**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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THE VILLAGE OF BREWSTER, A MUNICIPAL CORPORATION OF THE STATE OF NEW YORK,

**DECISION/ ORDER/JUDGMENT**

Condemnor/Petitioner

Index No: 817/04

-against -

MERRIEWEATHER ESTATES,

Condemnee/Respondent.

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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 Brewster of the real property taken by them in Eminent Domain from Merrieweather Estates, Inc. (Merrieweather or Clamiants)took place before this Court on September 2 and 3, 2009. The following post-trial papers numbered 1 to 6 were considered in connection with the trial of this matter:

| PAPERS | NUMBERED |
|---|---|
| MERRIEWEATHER ESTATES PRE-TRIAL MEMORANDUM/EXHIBIT | 1 |
| VILLAGE PRE-TRIAL MEMORANDUM | 2 |
| MERRIEWEATHER ESTATES POST-TRIAL MEMORANDUM/EXHIBIT | 3 |
| VILLAGE POST-TRIAL MEMORANDUM | 4 |
| MERRIEWEATHER ESTATES POST-TRIAL REPLY MEMORANDUM/EXHIBIT | 5 |
| VILLAGE POST-TRIAL MEMORANDUM/EXHIBIT | 6 |

The subject property in this EDPL Article 5 claim is located at 21 Putnam Terrace (formerly known as 17 Putnam Terrace), Village of Brewster, County of Putnam, State of New York, and is identified as Section 56.81, Block 1, Lot 14 (the premises, or the subject property) on the Tax Map for the Village. The subject property was taken in eminent domain by way of utility easement, in order to install sewer pipes in and

under the ground, by Order of this Court (Rosato, J.) dated August 27, 2004. Prior to title vesting, the subject property was owned in fee by Merrieweather. Prior to this action, Claimant was extended no offer in award for the taking of the premises. Claimants now bring an action to recover damages incurred as a result of the easement condemnation.

It should be noted that the parties and the Court conducted a site visit to the subject property subsequent to trial. Claimant's property consists of approximately 5,710 square feet of residentially zoned vacant land on the westerly side of Putnam Terrace in the Village of Brewster (Village) and the Town of Southeast (Town). Subsequent to the taking, a proposed permanent utility easement of approximately 1,985 square feet (some 35% of the subject) exists, running generally from the north to the south, effectively bisecting the parcel. The subject property is irregularly shaped, appearing rectangular on its north, west, and south sides. A portion, however, on the eastern (Putnam Terrace) side follows the general south-to-northwest curve of the road, which at this point is unpaved, with no curbs, sidewalks, or street lighting. It is also bordered on the north and south by complete parcels (also burdened by the same easement which is the subject of this action), and on the west by the southerly 3/4ths of 14 Putnam Terrace, and the northerly 1/3rd of 13 Putnam Terrace.

It should also be noted that Putnam Terrace has the general shape of a capital "P", running from south to north past 11 through 15 Putnam Terrace (to the west of the subject), and then turning more than 90 degrees to the right and east, and continuing southerly and easterly in a gradual loop to run directly past 22 Putnam Terrace, adjacent to, and east of, the subject at 21 Putnam Terrace. While public utilities were available to the subject, access via Putnam Terrace is limited. While the street is paved to the general area of 13 Putnam Terrace (to the west of the subject), from that point it continues, in an unimproved, and in fact overgrown, condition, further north and then east to the subject. The road condition approaching the subject is generally described as requiring the use of all terrain or rugged vehicles for safe travel. At the time of the taking, August 27, 2004, the subject property was vacant, and had been vacant for many years.

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

## FINDINGS OF FACT

The first witness for the claimant was William Ford, the Assessor for the Town of Southeast since March 1999. His professional qualifications and designations include the rank of Advanced Assessor from the New York State Office of Real Property

Services (ORPS); Professional Assessor, from the New York State Assessor's Association; and Assessment Administration Specialist from the International Association of Assessing Officers. New York State also requires that municipal assessors meet certain educational standards, as well as having had experience in real estate valuation or similar areas of experience, which standards Ford met prior to his employment with the Town.

The Village of Brewster, located within the Town of Southeast, has relied on the Town's assessment roll for its own assessment of real property taxes since sometime in the 1970s. Ford prepares the roll each year, by determining the fair market value of each taxable property within the Town and Village. Ford employs, in his office, a full-time licensed real estate appraiser, who conducts most of the actual inspections of the parcels, and additionally assists in the calculation of the fair market values of the parcels.

Ford testified that he previously had assessed the subject parcel by consulting land tables established by ORPS, tables categorizing parcels which are prime (buildable) lots separately from those which are not buildable. Prior to 2005, the Putnam County Board of Health had denied applications for approval of sanitary facilities on certain lots, including seven lots located in the Town, which were deemed too small to support such facilities; without such approvals, the lots were thus unbuildable. In or about the year 2005, the State of New York determined that lots could not be deemed unbuildable solely due to the lots being considered too small to support sanitary facilities. Based on that determination, the aforementioned seven lots, including one immediately adjacent to the instant parcel, were, upon application, granted Board of Health Approval for such facilities on their then-current dimensions.

Regarding the assessment of the subject, Ford testified that the pre-2005 valuation of $45,000.00[1] reflected his belief that the Putnam County Board of Health would deem the lot as undersized for sanitary facilities, and thus not buildable. After 2005, based on the Board of Health's beginning to grant approval to undersized lots based upon the change by New York State in making such parcels buildable residential lots, he corrected the assessment of the subject parcel by increasing it from $45,000 to $117,500. He agreed that, had the correct assumption on the buildability of the lot been used in 2004 (and previous) assessments, the subject

[1] While the Assessor testified that his recollection was that the assessment on the date of taking was $45,000. The parties both agree that it was $117,500.

property would have been assessed, in those earlier years, more consistently with the corrected 2005 assessment of $118,000. Ford elaborated regarding Tax Map Lot 11, located adjacent to, and to the north and west of the subject property. These two contiguous lots (subdivided from one lot in the original 1911 Map) were recently subdivided and improved, after also receiving Board of Health Approval due to the changes noted above by the State. Notably, and notwithstanding that each of the subdivided parcels in Lot 11 is now improved with a residence, these lots do not conform to 1991 Village of Brewster Zoning Code as to minimum lot size, nor do the lots have frontage on a paved portion of Putnam Terrace (although a paved driveway now connects these residences to the paved portion of that street). Other lots adjacent to the subject have also been subdivided since the 2005 State correction, and one has been improved by a residence.

Ford noted that, although the aforementioned paved portion of Putnam Terrace does stop shortly after its intersection with Ward Street, Putnam Terrace itself does not stop, but continues in an unpaved condition to the right (west and south, around the rest of the "P" shape described above). He also agreed that the word "PAPER" does not appear on the tax map for the portion of Putnam Terrace that is unpaved, and that Putnam Terrace, whether paved or not, is owned by the Village. Ward Street, to the contrary, as depicted on the tax map, is delineated on its extreme western portion with the word "PAPER". In addition, the paved portion of Ward Street, at its western perimeter, ends in a stairway which exists in the map roadbed. These stairs lead up to a tax lot improved by a house. Ford agreed that, even the portion of Ward Street described on the map as "PAPER", is still accessible to the public, and that the Village maintains a right to improve the unpaved portion which is superior to any use made by adjoining landowners. He also conceded that the unpaved portion of Putnam Terrace is also a public street, to which the public has an undeniable and undisputable right of access.

On cross-examination Ford also repeated that when Lot 11 was subdivided into two lots, neither of the lots satisfied the 7,500 square foot minimum lot area requirement of the 1991 Code. The larger parcel was approximately 6,200 square feet, and has been improved with a residence, while the smaller lot was approximately 4,500 square feet. Ford was aware that the size of the subject parcel is about 5,700 square feet. Despite their both being below (with one substantially below) the lot size minimum, and the fact that neither fronts on the paved portion of Putnam Terrace, Ford acknowledged that approvals for development of the two lots were granted. Ford also testified that the tax maps do not reflect the location, or even the existence, of the utility easement, so that

his assessments, since the taking, do not take the easement into consideration. Thus, claimant continues to be assessed for the whole parcel, including the easement.

Claimant next called its appraiser, Paul Ritzcovan. Ritzcovan is licensed by New York State as a Certified General Appraiser, and has 45 years of experience in real property valuation. He is qualified with the Columbia Society of Real Estate Appraisers as a Senior Member With Professional Designation as Certified Appraiser, and is an Accredited Appraisal Consultant, which qualifies him to do condemnation valuation for the New York State Department of Transportation. Ritzcovan has also taken between 25 and 30 continuing education courses in the past 12 or 13 years. As part of his preparation for the appraisal, he inspected the property and the tax records relating to the subject. He also reviewed the Village Zoning Code. It may be noted that although he mistakenly referred to it as the Town Code, it was clear, from the presence of the Village Code in his appraisal, that the Village Code is what he was referring to. At the time of the inspection, he noted that the lot had a moderate uphill slope from the street westbound towards the back of the lot, and continuing westward onto the adjoining lot, and out to the westerly portion of Putnam Terrace. He also saw that a house was under construction at that time on the adjoining lot, which had the same continuous, moderate, and rolling slope.

Based on this preliminary analysis, he concluded the "Highest and Best Use" for the parcel to be its utilization as a single-family residential property. In examining comparable properties to establish a value, Ritzcovan took into consideration that access to the property was via an old, apparently disused dirt road, which was also an approved street that appeared, as set forth above, on both the Town and Village Tax Maps, and the filed subdivision map. He also considered the fact that, while the 1991 Village Zoning Code required a 7,500 square foot minimum lot area for parcels which like the subject were assigned the R-75 zoning classification, the subject lot, having been mapped on or about July 26, 1911, predated the 1991 Code. Further, the only non-conformity of the subject was with respect to the minimum lot area.

Ritzcovan was aware that the tax assessor had testified that the undersized lot (designated Lot 16 on the 1911 Map) adjacent to the subject had recently been subdivided into a separate lot and improved -- despite the fact that it is even smaller than the subject (and thus more non-conforming in lot size) -- and despite the fact that it too, like the subject, has no frontage on any paved portion of Putnam Terrace. Ritzcovan was also aware that

the parcel immediately to the south of and adjacent to the subject parcel does have clear and passable frontage on Putnam Terrace. Consequently, in his opinion, lot frontage on an unimproved but mapped street does not impede the buildability of the lot.

Ritzcovan described the easement, consisting of 1,985 square feet, as rectangular in shape. It contained about one-third of the total lot area, and passed north to south, nearly through the middle of the parcel. While, in his opinion, the lot had been a buildable residential lot prior to the taking, following the taking, the lot was rendered unbuildable. Fair market value prior to the taking was determined by analysis of the sales of five similar parcels with the same highest and best use (single family residential), while the post-taking value was calculated based on the inability of an owner to build a residential premises on the property, resulting in a highest and best use, post-taking, as an assemblage parcel (*i.e.*, its only value was to increase the size of an adjoining parcel). He analyzed five comparable properties, all single-family residential building lots, and all of which were later improved with single-family homes. In so doing, he noted that he disagreed with the Village's appraiser's use of a per square foot calculation, rather than the more common per buildable lot calculation. The comparable properties ranged in unadjusted value from $105,000.00 to $141,600.00, and, as adjusted, from $68,710.00 to $105,404.00. From this, he concluded the market value of the subject parcel to be $95,000.00 as of the date of taking, August 27, 2004. Ritzcovan then analyzed three assemblage sales, ranging in value, pre-adjustment, between $5,000.00 and $10,000.00, and, post-adjustment, between $4,500.00 and $9,000.00, to arrive at a post-taking appraised value of $5,000.00 for the parcel. He therefore concluded that damages, constituting the difference between the two values, were $90,000.00.

Ritzcovan was cross-examined about his use of the "Town of Southeast" zoning code (rather than the Village of Brewster Code which he actually used). The Village zoning code required a minimum lot area of 7,500 for the subject lot, making the subject a legal, non-conforming lot. It was his opinion that the subject parcel not only fronted on a street, but also met all minimum size, depth, and width requirements of the 1991 Zoning Code. This was true because the 1991 Code contains a grandfather clause which permits the use and improvement of pre-existing, dimensionally non-conforming lots. As such, only site plan approval from the local Building Department would be required for development. He repeated that, upon his inspection of the premises, one adjoining undersized lot (subdivided from Tax Map Lot 11) had already been improved with a duplex home, and was being graded. Although he conceded that Putnam Terrace, directly in front of the subject

parcel, was a dirt road overgrown with vegetation, and also had a chain across it in front of an adjoining property, the tax map demonstrated that the street is owned by the municipality and thus public.

Claimant then presented testimony from John Edmund Duncan, a cousin of Dorothy Jones, claimant's current president. He stated that he was familiar with the area containing the subject since the 1960's; that for nearly twenty years he has resided immediately to the west of the Putnam Terrace area; and that he has walked in the area of the subject periodically during that time. He described Putnam Terrace, as one proceeds north from Putnam Avenue, as an all-blacktop street until near where it intersects with Ward Street, at which point it becomes a cleared street but with a packed stone and/or gravel surface. This same packed stone/gravel surface continues as Putnam Terrace travels east and south, passing Lot 22 (on the 1911 Map), before, near the subject, it deteriorates further into an overgrown dirt road. The property line of the subject to the east (*i.e.* next to Putnam Terrace), and that same line for the adjoining properties to the north and south as well, contains a line of evenly spaced trees, running generally north to south, which, in his opinion, appear to be of the same variety and to be of the same approximate age and height.

Claimant's final witness was Dorothy Jones, an officer and shareholder of claimant. Merrieweather Estates, she testified, is a Sub-Chapter S Corporation which was formed in 1955 by her father, Robert Reiffen, for the express purpose of developing and selling real estate. Claimant, according to Jones, has owned the subject parcel since October 6, 1961, although the numbering of the parcels in the area, including the subject, were changed at some point (from 17 to 21) due to a subdivision by an adjoining land owner which created two additional lots. Some of the lots affected by the subdivision remained unimproved, while at least one, former 13 and 14, was improved by a small cabin used for storage but never inhabited. She noted, on a trip to the property some three years prior to her testimony, that Putnam Terrace was rough, and had high ragweed, but she also found it passable and not overgrown. In her experience, Putnam Terrace has always been a traversable street, and it can still be traversed by a vehicle that can handle a rougher terrain. Indeed, upon a recent visit, she noticed tire tracks in the street. Further, when she visited the property immediately prior to her testimony, she also saw the bordering trees on the east side of the subject. Claimant's intent, according to Jones, had always been to develop the property, and not to abandon it. The taxes were always paid, and never fell into arrears. She noted that the assessment had been

$117,500.00, although it had also recently been reassessed and reduced to $111,600.00. She also stated that the tax bills contain the statement that "The assessor estimates the Full Market Value of this property as of [the current tax year] was: 117,500."

Jones described the property as lightly wooded, gently sloping, and with no wetlands close by. She noted that the southern border of the subject is only about 50 to 60 feet away from one cleared portion of Putnam Terrace (where a neighbor put a chain across the right-of-way). As a result of the taking herein, a section measuring approximately 1,985 square foot was removed from the center of the parcel. Previously, claimant always considered the lot buildable and it was assessed as such. In fact, the first time claimants were advised that the subject was not buildable, was when a claim for the taking was made. However, she conceded that no application for a site plan or for a variance had been made previously. No variance was sought, since the lot is pre-existing, dimensionally non-conforming and development is permitted under the 1991 Code; and no application was made, because the individual circumstances of the owners (most residing out of the area) led to there being no plans to develop the property in the near future, although the principals did intend to develop the lot at some future time.

Condemnor then called its appraiser, Robert Balog. Balog testified to his training and experience, including courses he has taken on Industrial Valuation and Income Producing Valuation from the American Institute of Real Estate Appraisers. Although not having any State appraisal licenses, he has been an appraiser since 1977 and has appraised all types of properties for banks, corporations and municipalities. For the past 15 years, he has primarily appraised properties in either eminent domain or tax certiorari matters. During that time, he has also been appointed as a consulting assessor for various municipalities, and in fact has been retained by the City of Yonkers, the Village of Hastings-on-Hudson, and the Town of Greenburgh for general tax certiorari litigation appraisal work.

Notably, Balog's appraisal describes the subject parcel as "landlocked," based on the fact that, on the sole day (which he described as a "snow-covered day") that he inspected the parcel, it did not appear to him that there was "any evidence of access" to the subject. He did, however, also make inquiries to the Village regarding the level of improvement of Putnam Terrace. Balog also stated that, in his highest and best use analysis, he examined the four necessary criteria for such valuations, and found that the first, legal permissibility, was determining. He examined legal permissibility in light of the applicable Code, in

particular the R-75 zoning category of the 1991 Code, which required a minimum lot area of 7,500 square feet. He concluded that, since the subject parcel had only 5,710 square feet, or less than the minimum lot area required by the R-75 zone of the 1991 Code, it was not a legally permissible building lot. Since the parcel simply does not meet the 7,500 square foot minimum lot size required by the R-75 zone of the 1991 Code, he concluded that the highest and best use of the property is not as a building lot, but solely as an assemblage parcel.

Balog further testified that the difference between his appraised value, and that opined by Ritzcovan, was the latter's opinion that the highest and best use of the subject property was as a building lot. Balog insisted that he reviewed the Village Code quite carefully, but found no "grandfather clause" benefitting the subject parcel. While he did visit the property the one time, and thereby concluded that Putnam Terrace was unimproved, and thus possibly not a public street, his determination of highest and best use was based not on accessability but, largely, on the failure of the parcel to meet the minimal lot size specified in the Code.

Balog, having arrived at a highest and best use for the property, then used the sales comparison approach to determine a per square foot unit value after adjustments. Balog used three assemblage comparables, ranging in value from $141,600 to $300,000, or from $1.88 to $4.64 per square foot, which he adjusted to between $1.59 and $2.75 per square foot. From this, he concluded a "before taking" market value for the parcel of $2.00 per square foot, or $11,400.00, and that the taking left it valued at 85% of that amount, yielding damages amounting to $1,710.00.

On cross-examination, Balog conceded that in the last twenty years he has not taken any continuing education courses in appraisal or assessment; that he has never taught a continuing education courses to appraisers or assessors; and that, in fact, he does not hold a New York State appraiser's license. He also admitted that his visit to the subject, and in particular his view of Putnam Street, was partly obscured by the snow cover on the ground. He also testified that the words "paper road" do not appear on the Village Tax Map for the Street, despite his recollection that it did. Nor did he conduct any investigation as to the status of Putnam Street, including securing a copy of the Tax Map to determine the ownership of the Street.

Balog also conceded that, despite his expressed opinion that the highest and best use of the subject parcel was for an

assemblage, none of his comparable parcels were substandard lots specifically sold as assemblage lots to adjoining landowners, and, indeed, the comparable parcels were all ultimately improved with houses. While he was aware that the subject's 5,710 square foot area does not conform to the R-75 zone 7,500 square foot minimum lot area, as required under the 1991 Code, he also knew that the lot was mapped some eighty years prior to the effective date of the 1991 Code. He went on that the basis for his opinion that the subject parcel was not a pre-existing, non-conforming parcel, was his own reading of the Code, as well as a representation by Peter Hansen, the Village Clerk, who made that statement to him after Mr. Balog disclosed that he was retained by the Village to appraise the parcel in connection with the instant claim. Finally, he conceded that, if Hansen were not correct, and if the 1991 R-75 zone did not restrict development of the subject, then his appraisal is incorrect, and his opinion would be that the highest and best use of the parcel would be for a residential building lot, yielding a considerably higher appraisal value than for use as an assemblage.

Balog stated that, although he had read the entire Code, he based his reading that the Code prohibited development of the parcel on the "chart grid" (on the next to last page of the Code) which sets forth the requirements for each zone, and that, if there were any grandfather clauses, he did not see any that were conclusive. He stated further that he did review the "grandfather" provision of the section at issue(18 D 90), but in his opinion it did not apply to vacant land. However, when asked to review the grandfather clause again, Balog agreed that the grandfather clause specifically applied to the "use of a lot" which does not conform to the code's area, shape or frontage requirements, and that the 7,500 square foot minimum lot area is, in fact, an area requirement. Balog then asserted that the grandfather clause was actually inapplicable to vacant lots, although he abandoned that assertion when the section was re-read to him. He then stated that the clause requires conformity with "all other requirements" of the code, and, despite the fact that he had previously noted only the area deficiency as a bar to development, he would not concede that the lot conformed to any of the other requirements of the zone. However, when questioned, he was unable to identify any such specific deficiency, other than lot size. Finally, Balog was also unable to explain how an adjacent 4,500 square foot lot (Lot 16) had recently been approved by the Village as a separate buildable lot, despite its being smaller (and thus more non-conforming) than the subject.

## 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]).

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 pre-taking 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 development of the parcel as a single-family residential property. Their appraiser, Ritzcovan, found that access to the property, although via an old and apparently disused dirt road, was over an approved street which appeared on not only the Town and Village Tax Maps, but also the filed subdivision map. He also found that, although the 1991 Village Zoning Code required a 7,500 square foot minimum lot area for parcels zoned R-75 (like the subject), the subject lot long predated the 1991 Code, having been mapped on or about July 26, 1911. Indeed, the only non-conformity of the subject was with respect to the minimum lot area. He further knew that the adjacent lot had been subdivided into a separate lot and improved, despite the fact that it was even smaller than the subject, and that it too, like the subject, had no frontage on the paved portion of Putnam Terrace. Ritzcovan., based on these facts, concluded that single-family residential development was the highest and best use of the property. Consequently, claimants met their initial burden of demonstrating that the highest and best use of the property prior to the taking was for residential development.

In contrast, condemnor failed to present credible expert

proof that development of the subject as single-family residential was unlikely. Their appraiser, Balog, based his opinion that the subject's highest and best use was as an assemblage, was based largely on his reading of the Zoning Code which, he argued, provided no exclusion for parcels mapped before the Code was enacted. However, when cross-examined as to whether his opinion would change in light of the code section permitting pre-existing non-conforming uses for lots, he simply asserted that such lots must meet all other applicable requirements, without being able to assert a single such requirement that the subject property did not also meet. And he was wholly unable to explain how an adjacent, smaller buildable lot was approved for development in the face of the same Code restriction. The Court also notes that, while he was careful not to rely solely on his use analysis on the perceived lack of access to the parcel, his opinion in that regard was based on a single visit to the premises when snow covered the ground and, presumably, made analysis of the roadway conditions difficult at best. The Court thus rejects Balog's methodology on this issue. *(See, Gyrodyne Company of America v. State of New York,* 89 A.D. 3d 988, 2011 WL 5865845 (2d Dept. 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 over a mapped street, its generally level topography, and its size, grand-fathered, as it was, from the R-75 size restrictions, the proposal to build a single family residential unit was physically possible at the subject location. Further, residential development was deemed likely, given the expert testimony that the plan was similar to those developed elsewhere in the area, even those on undersized lots, and there was a significant likelihood that sale of the proposed dwelling unit would be economically profitable for the claimant, and thus 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 single-family residential parcel, as of the date of the title vesting (*C.f. Gyrodyne, supra*). The parties agree, however, and the Court will adopt, that the highest and best use post-taking is as an assemblage parcel.

5. Valuation

a. Condemnor's Appraiser's Methodology

As set forth above, condemnor's appraiser, Bob Balog,

incorrectly concluded an assemblage as the highest and best use of the property. Claimant contends that Balog's comparable properties, as assemblage uses, cannot be adjusted to residential uses, and in fact Balog conceded that none of his comparables were actually sold as assemblage lots. Further, the comparable properties used by Balog were enormous in comparison with the subject. The smallest, at over 30,000 square feet, is six times the size of the claimant's property, while the largest, at almost 160,000 square feet, is more than 30 times as large as the subject. For these significant disparities, Balog made adjustments of only +15 % for the smallest property, and +50 % for the largest property. Balog also made considerable (-15 %) adjustments for frontage and utility (including access), when, as set forth above, he simply would not concede the availability of any access to the subject, based on his observations made when snow covered the street, and when, in fact, access was and is available over a mapped municipal street.

In addition, Balog attributed -20 % for development potential as an adjustment for each of his three comparables, denoting that all three comparable properties were more likely to be developed than the subject. However, as set forth above, Balog conceded on cross-examination that claimant's parcel predated the creation of the R-75 zoning; that no impediment to development other than lack of size was present; and that an adjacent parcel with the same undersized condition as the subject has been developed as a single-family residential parcel. Finally, Balog's location adjustments, -10 %, -20 %, and -20 %, portray the subject to be a significantly less valuable parcel, when the testimony demonstrates that the subject has an "average" location, since it actually lies in not nearly so disadvantageous a location when compared with Balog's comparable properties. Having determined that Balog's methodology was in error to the extent that it concluded that the highest and best use of the subject was as an assemblage parcel, and since his comparables, which were not actually used as assemblage parcels and varied so significantly from the subject, even with adjustments, in the Court's determination, Balog's appraisal is not persuasive and insufficient. The Court thus elects to base its analysis solely on claimant's appraiser's methodology, particularly crediting his comparable properties, except with respect to Balog's comparable #1, which was also used by Ritzcovan as his comparable #4.

b. <u>The Ceiling and the Floor</u>

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 assessment set by the Town Assessor[2] (as testified-to by the assessor), and the corresponding market values, are as follows:

| Claimant's Value | Pre-Vesting Offer | Assessment | Condemnor's value |
|---|---|---|---|
| $ 95,000 | **$ - 0 -** | $ 117,500 | $ 11,400 |

c. The Measure of Damages in a Partial Taking

The record here is that the condemnor took, by eminent domain, 1,985 of the total 5,710 square footage of the subject parcel, or approximately one-third of the surface area, for a permanent utility easement. While permanent easement rights were taken only over those 1,985 square feet, Ritzcovan testified that due to the placement of the burdening easement, nearly in the direct center of the parcel, this taking resulted in the elimination of any future residential development potential of the whole parcel. This effected not only a partial taking of the 1,985 square foot portion of the subject, but, due to the burden, in terms of the future inability to develop the parcel, imposed by the easement, the taking additionally caused consequential damages to the remainder of the parcel. As such, the measure of damages for the taking herein is the difference between the pre-taking value of the subject, and its post-taking value. (*McDonald v. State of New York*, 42 N.Y.2d 900 [1977]; *Brookhaven v. Gold*, 89 A.D.2d 963 [2nd Dept. 1982]).

d. Sales Comparison Method Generally - Pre-Taking

As set forth previously, the Court has found it necessary to reject condemnor's appraisers' valuation methodology due, *inter alia*, to its reliance on an incorrect highest and best use analysis, namely that the property was suitable only as an

[2] As set forth above, the Assessor testified that his recollection was that the assessment on the date of taking was $45,000, but the parties both assert that it was $117,500.

assemblage. Furthermore, as set forth in greater detail above, the Court finds that the parcels used by Balog are wholly inadequate, as assemblage parcels, to be employed by the Court in its analysis of a single family residential parcel. Claimant's appraiser correctly concluded that the highest and best use of the subject was for single-family residential development, and thus all of his comparables are devoted to that use, and the Court also finds that, based on Ritzcovan's testimony and the Court's own analysis, claimant's comparables were sufficiently adjusted to the subject property by Ritzcovan in his analysis. Thus, the Court can and will employ those comparables, as properly adjusted, to arrive at a proper value for the subject.

In arriving at a value for the subject parcel, Ritzcovan employed five comparable properties in Putnam County, two in the neighboring Town of Carmel (hereinafter Plum Road and Greenway), and the remaining three (henceforth North Brewster, Fairview, and Holmes) in the same Town (Southeast) as the subject, although none of the latter three were located in the Village of Brewster, wherein the subject property lies. All were, like the subject, unimproved residential parcels, ranging in size from just over 9,600 square feet, to nearly 55,800 square feet. Three of the comparables, Plum, North Brewster, and Greenway, were under 20,000 square feet, or less than four times the size of the subject. Those same three parcels were also similar to the subject in terms of location (the former being slightly better), topography (the subject was slightly less desirable than the three), and availability of utilities.

The total sales prices of the comparables ranged from $105,000 for the North Brewster parcel to $141,600 for the Fairview parcel. The earliest sale, Plum, occurred 14 months pre-taking. The other four sales were post-taking, with the nearest sale in time, Fairview, occurring some 3 months after the title vesting date. Of the remaining two most nearly sized and configured comparables, the sale of the North Brewster property occurred 32 months after the taking, and the Greenway sale 49 months post-taking. Ritzcovan's adjustments for time (the period between the sales of the comparables and the date of taking), calculated by him to be 3% per year, yielded an adjusted range of from just over $91,000 for North Brewster to approximately $140,500 for Fairview, with North Brewster at $91,613, Plum at $111,940, and Greenway at $105,300. Based on the range of testimony adduced at trial (Balog calculated time adjustments at 5% per year), the Court accepts Ritzcovan's use of 3% per year as the proper increase for time.

Ritzcovan then made other adjustments to his comparable properties, as follows:

| | North Brewster | Plum | Greenway | Fairview | Holmes |
|---|---|---|---|---|---|
| Size | - 10% | - 5% | - 5% | - 15% | - 25% |
| Location | - 5% | 0% | 0% | 0% | 0% |
| Physical Characteristics | - 5% | - 5% | - 5% | - 5% | - 5% |
| Access | - 5% | - 5% | - 5% | - 5% | - 5% |
| Utilities | 0% | 0% | - 5% | 0% | 0% |
| Net Adj. | - 25% | - 15% | - 20% | - 25% | - 35% |

Based on the testimony set forth at trial, the Court also concurs with the adjustments employed by Ritzcovan as they relate to the comparative sizes of the subject and the comparables, and as to their respective locations and physical characteristics. Regarding access, the Court rejects Balog's significant adjustment for the deficiencies he perceived in access to the subject, and concurs in Ritzcovan's -5% adjustment as sufficient to account for the nature of the roadway access, as Putnam Street continues north of Ward Street, and then east and south east, towards the front of the subject. The Court also concurs with the adjustments made by Ritzcovan as regards utilities.

Thus, the Court concludes that the adjustments are proper for the five comparables used by Ritzcovan, and in his value conclusion of $95,000.

e. Assessment as Proof of Value

As noted above, the Assessor of the Town of Southeast, whose assessment is accepted and employed by the Village of Brewster for tax assessment purposes, testified that his recollection was that the assessment of the instant property on the date of taking was $45,000. However, the parties have both asserted in their papers that the assessment of the property was actually $117,500. Certainly, the assessor conceded that, after the opinion by New York State reclassifying the property as buildable (discussed in greater detail above) the value of the subject approached

$117,500. In any event, the Court merely elects to use those asserted values, and, in fact, the mean, which is $81,250, as a check on the Court's own calculated value of $95,000.

f. Sales Comparison Method Generally - Post-Taking

As set forth above, Balog expressed his opinion that, prior to the taking, the subject was an unbuildable lot according to the Village Zoning Code, a conclusion which this Court has, as also set forth in greater detail above, rejected. Balog also expressed the opinion that, post-taking, the subject was no less an unbuildable lot, again according to the Village Zoning Code. Based on his premise of the unbuildability of the lot pre- and post-taking, Balog concluded that the damage suffered was "negligible", which he expressed in his chosen figure of 15% of the pre-taking value of the subject.

Ritzcovan, again as set forth in greater detail above, found the subject a buildable lot pre-taking, and valued it accordingly. The Court concurred with Ritzcovan's assessment as to the pre-taking buildability of the lot, and the pre-taking value to be ascribed to the subject. While Ritzcovan agreed with Balog that, post-taking, the subject was unbuildable, Ritzcovan asserted also that the loss of the right to build on the subject premises is solely due to the imposition of the easement upon it by the taking herein, and, based on the expert testimony proffered by Ritzcovan, the Court concurs in that judgment, and therefore is bound also to reject, as inappropriate, Balog's mathematical calculation that the damage post-taking to claimant was 15% of the pre-taking value.

Ritzcovan went on to opine that the effect of the taking, and the restriction on development, as to the whole, but particularly as to the easement portion of parcel, located, as it is, in the center of the subject, has been to alter the highest and best use of the property from single family residential development to use only as an assemblage. The Court thus also concludes, as did Ritzcovan, that the loss of the right to develop the subject parcel, from the imposition of the easement, as a single family residence, has caused significant damages to claimant, and elects to calculate that damage not mathematically, as offered by Balog, but by an analysis of comparable properties whose use is as an assemblage.

Ritzcovan offered three comparables whose value was calculated as assemblage properties; the Court notes that indeed all three parcels were sold and used afterwards as assemblage

parcels. These comparables sold for $5,000, $7,100, and $10,000[3] respectively. The three parcels were all sales which occurred no more than six months from the taking (two just before, and one just after). All were slightly larger than the subject, ranging from 10,000 square feet to 15,000 square feet. The locations were all similar to the subject, and they had similar physical characteristics, access, and utilities availability. Since there was no cross-examination of Ritzcovan as to the adjustments to be applied, the Court accepts his net adjustments of -10%, -7.5%, and -10%; his adjusted values of $4,500, $6,938, and $9,000; and his stated conclusion of post-taking value for the subject of $5,000.

As set forth previously, the measure of damages in a partial taking is the difference between the value of the subject pre-taking and its value post-taking. Here, Ritzcovan concluded a value of $95,000 pre-taking, and $5,000 post taking, resulting in damages from the taking for a permanent easement of $90,000. He assessed these damages as consisting of $33,030 in direct damages (calculated at his stated value of $16.64 per square foot pre-taking) and the remainder ($56,970) in severance damages. The Court concurs in Ritzcovan's judgment as to the pre- and post-taking valuation, and thus also to the amount of damages.

Claimant Merrieweather Estates, Inc., is therefore awarded the calculated cost of the loss from the taking, namely the amount of $90,000.00, with interest thereon from the date of the taking, August 27, 2004, less any amounts previously paid, if any,[4] together with costs and allowances as provided by law.

## Conclusion

Upon the foregoing papers, and the trial held before this Court on September 2 and 3, 2009, it is hereby

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

**ORDERED**, that condemnor Village of Brewster shall pay as compensation to claimant the amount of $90,000.00, with interest

[3] While his appraisal lists the sales prices at $5,000, $7,500, and $10,000, Ritzcovan testified to $5,000, $7,100, and $10,000.

[4] The Court has been informed by the parties that no such amounts were previously paid.

thereon from the date of the taking, August 27, 2004, less any amounts previously paid,, if any, 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
May 14, 2012

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

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