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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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In the Matter of the Petition of the CITY OF YONKERS INDUSTRIAL DEVELOPMENT AGENCY, to acquire certain real property in the City of Yonkers, County of Westchester, State of New York, Together with all Compensable Interests Therein, Including Such Interests as May be Held by Any Unknown Condemnees

DECISION/ ORDER/JUDGMENT

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CONSOLIDATED EDISON of NEW YORK, Inc.,

Claimant,

Index No: 22771/06

-against -

CITY OF YONKERS INDUSTRIAL DEVELOPMENT AGENCY,

Condemnor.

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LaCAVA, J.

The trial of this Eminent Domain Procedure Law (EDPL) Article 5 proceeding, challenging the valuation by the City of Yonkers Industrial Development Agency (Yonkers, IDA, or Condemnor) of the real property taken by them in Eminent Domain from Consolidated Edison of New York, Inc. (Con Ed or Clamiants)took place before this Court on November 30 and December 1, 3, and 4, 2009. The following post-trial papers numbered 1 to 4 were considered in connection with the trial of this matter:

PAPERS	NUMBERED
CON EDISON POST-TRIAL MEMORANDUM	1
YONKERS IDA POST-TRIAL MEMORANDUM/EXHIBIT	2
CON EDISON POST-TRIAL REPLY MEMORANDUM	3

YONKERS IDA POST-TRIAL REPLY MEMORANDUM 4
AAA ELECTRICIANS POST-TRIAL REPLY MEMORANDUM/EXHIBIT 5
VILLAGE POST-TRIAL MEMORANDUM/EXHIBIT 6

The subject property consists of 7 ± acres of land utilized previously (and, to some degree, as set forth in greater detail below, currently) for operation of high-voltage electrical transmission and distribution lines and an electric substation, in the City of Yonkers, Westchester County, New York, more particularly described on the Tax Map of the City as follows: Section, Block, and Lot Numbers 4-4000-1, 4-4000-100, 4-4000-125, 4-4000-150, 4-4001-150 and 4-4001-160. The property was taken in Eminent Domain by a Decision and Order of this Court (LaCava, J.) dated February 5, 2005, subject to the terms and conditions of a letter agreement between the parties, dated May 17, 2006 and which, as set forth in greater detail below, consisted of a fee taking of 5.45 acres, a permanent easement of 1.17 acres, and a temporary easement taking of .83 acres. Claimant Con Ed timely filed a claim on or about March 15, 2007.

It should be noted that the parties and the Court have conducted a site visit to the subject property. The three parcels are portions of a larger parcel of approximately 85 acres immediately adjacent to and to the east of the New York State Thruway, at Exit 6A thereof, and adjacent to and to the west of the Sprain Brook Parkway. Utilized by Con Ed for the transmission and distribution of electricity, and as a utility substation in support thereof, the substation grounds are generally bounded on the north by the Ridge Hill development, on the south by Tuckahoe Road, on the west by Ridge Hill Boulevard, and on the east by Grassy Sprain Road. The taken parcels consist of a fee taking of 5.45 acres in the southern and western portion of the substation parcel, between Tuckahoe Road on the south and Grassy Sprain Road on the southeast; a temporary surface easement of .83 acres, facilitating construction, in the same area of the substation parcel; and a permanent (slope) easement over 1.17 acres in the northwest portion of the property, which runs generally north and south. The parcel has in the past, and continues to be, largely zoned "I" for Industrial uses, although a portion adjacent to the permanent easement taking is zoned "S-50" and permits residential uses. Topographically, the subject is varied; in the northwest, near the Ridge Hill Project, it is level, but as one travels south it slopes steeply downward in elevation from 300 to 100 feet above sea level.

FINDINGS OF FACT

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

Claimant first called John McCoy, an engineer employed by claimant as its project manager at the Ridge Hill development site and its liaison with Forest City Ratner, the developer of the project. McCoy described the purpose of the taking as designed to permit construction of two roads - Ridge Hill Boulevard and New Road. Ridge Hill Boulevard, which was built specifically as an access route for the Ridge Hill project, begins at Tuckahoe Road just to the west of the former entrance to the substation, and runs generally north and west, along Con Ed's property line, to the top of a hill, where it intersects an existing roadway, Otis Road. New Road extends from the Tuckahoe Road exit of the Sprain Brook parkway, on the east edge of the site, in a westerly direction, crosses over the former Con Ed access road to the substation, and connects with Ridge Hill Boulevard. The property taken consisted of portions of several parcels owned by Con Ed at the site, and did not affect the operation of its substation at the site. The substation receives electrical power generated elsewhere, and directs it to various locations in Yonkers or in New York City.

The witness stated that he visits the site often, most recently approximately one week before trial. At that time, he observed that the road construction was not yet complete, although blasting had been completed, retaining walls (for the adjacent slopes) had already been installed, and some of the initial layers of the roadway surface had been put down. Still needing to be completed were a final asphalt coating, lighting, and traffic signal installation. He also described the temporary construction easement as generally running on the western side of Ridge Hill Boulevard, with portions separately on the north side of the project, and also in the south, on the western side of a unit substation near Tuckahoe Road. These easements, the witness believed, were still being used by the developer in construction of the project. The witness was also questioned about a Limited Use Agreement entered-into between claimant and condemnor approximately nine months prior to the taking. The agreement restricts some uses and other activity on Ridge Hill Boulevard, in favor of claimant, and grants claimant rights to use the road and control activity (such as the installation of wires or cables) above or below the surface of the roadway.

Claimant next called appraiser Eric Haims as its expert on valuation. Haims first examined the highest and best use, as of the date of title vesting, for the subject property. In Haims' opinion, there were several controlling factors in his analysis. First, the fee taking involved a long, narrow corridor of land. This made the parcel not conducive to economic development. Further, the large assemblage parcel immediately adjacent to, and

to the east of the subject, although constituting an assemblage that created a large area of property, was underutilized, and had somewhat limited access. Haims, although having opined in his appraisal that the highest and best use for the taking portion of the subject property was for both road access and utility purposes, now testified that its highest and best use was for road access only.

Having determined the highest and best use of the property, Haims next considered the proper valuation methodology to be utilized. Haims opined that the property was unique, since the balance of the subject (*i.e.* the portion not taken) was already improved with an electrical substation, and since the parcel was in actuality part of a large electrical corridor extending from Dutchess County into New York City. Haims also recognized that valuation of the suggested electrical corridor presented a difficult, time consuming appraisal problem, which, he believed would ultimately have had no effect upon claimant's damages, because the taking had no impact upon the electrical substation use. Despite the fact that the taking was partial, given no adverse impact on the substation use, consequential or severance damages were unwarranted, and thus, according to Haims, a "before and after" appraisal was not necessary.

Haims therefore determined only Con Edison's direct damages, after the taking, utilizing the market approach and six comparable sales. The six sales were close in distance to the subject - four were in Yonkers; one was less than eight miles away in Hartsdale, a hamlet in the neighboring Town of Greenburgh; and the remaining parcel was approximately 22 miles away, in the City of Peekskill. Haims opined that, often, sales from distant locations are actually not "comparable" at all, and thus insufficient to determine value. Also, according to Haims, during a rapidly changing market it is important to use comparable sales that are close in time to the date of title vesting. He thus chose for his analysis sales which were all within two years of the date of taking. Haims then made a market adjustment of 12% per year, or 1% per month, for these sales, which reflected his opinion that the local real estate market was appreciating at a very rapid pace during this period, with a residential market characterized by frequent bidding wars, quick sales, rapidly escalating prices, and a strong demand for vacant land and new development projects throughout Westchester County.

Haims also made adjustments based on the relative location, size, topography, configuration and access characteristics of the comparable sales. Since the subject fee taking was over five acres in size, for example, negative adjustments reflected that larger

sized properties (such as the subject) generally sell for lower unit values than smaller sized ones (such as the comparables). Further, the long, narrow shape of this taking necessitated a configuration adjustment of 10% with respect to each of the comparable sales, which were all more regularly-shaped (and, hence, according to Haims, more desirable) parcels.

Of the six comparable sales, Haims placed the greatest weight for his ultimate value conclusion on his Sales #3 and #4, both of which were located in Yonkers, and both of which were close in time (14 and 21 months, respectively) from the date of title vesting. After these adjustments, Haims determined a value for Sale #3 of $14.11 per square foot, and for Sale #4 of $15.99 per square foot. From his analysis, and again placing some reliance on these two sales as more properly representative of the true market value of the subject, Haims' final conclusion on value for the fee taking was $15 per square foot. Application of this value to the size of the taking, 237,228 square feet, yields, according to Haims, a fair market value of the fee taking of $3,560,000.

Haims then employed a similar analysis to calculate the value of the permanent easement. Using the previously calculated base value of $15 per square foot, Haims determined the loss in value that occurred by the taking of a permanent easement - namely, that claimant retained their rights in fee to the parcel after the taking, but lost other valuable rights. He calculated this loss in value to the claimant to be 50%. Notably, condemnor's appraiser also determined that the taking of the permanent easement resulted in a 50% loss in value. Haims then reduced the base value of $15 per square foot by the 50% loss of value from the permanent easement taking, which left $7.50 per square foot in value. He then multiplied that amount by the area of the easement (50,835 square feet), to arrive at a value conclusion for the taking of the permanent easement of $382,000.

Finally, to calculate the value of the temporary easement, Haims first determined a rate of return, in order to ascertain the rental value of the land. He testified that he "conservatively" estimated this rate of return to be 7%. Haims went on to calculate the value of the land for the temporary easement by using the same base value of $15.00 per square foot, and multiplying it by the 36,043 square feet of this taking, to reach a total value for the parcel taken by temporary easement of $540,645. Applying the 7% rate of return to this total value of the taking parcel of $540,645, yielded a rental value of $37,845 per year, or $3,153.76 per month, for the temporary easement.

As stated above, the Condemnor's temporary easement has not

yet been terminated. Accordingly, the damages for the temporary easement continue to accrue. Haims thus computed total compensation for the three takings in the amount of $3,942,000, apportioned as $3,560,000 for the fee taking and $382,000 for the permanent easement, as well as compensation for the temporary easement continuing in the amount of $37,845 per annum from the title vesting date of February 5, 2007 until such time as the easement is formally terminated.

After claimant rested, condemnor called their appraiser, William Beckmann. Beckmann first sought to determine the highest and best use of the property before the taking. Initially, he considered that the taking was one small (under 10%) portion of an 86.119 acre parcel used by Con Edison for its substation. Normally, he conceded, where a part of a contiguous parcel which is under single ownership is taken, consideration is given as to what the highest and best use of the entire or larger parcel is. However, Beckmann also took into consideration whether the larger parcel, and the taking parcel, shared a common highest and best use. Of the three taking parcels, one was located on the eastern side of the substation property, and was zoned S-50, which permits residential uses on lots of 5,000 square feet or less. In that area, characterized by slopes running down from the electric lines and substation, uses consistent with the zoning classification are evident.

Beckmann concluded that this residential parcel has a highest and best use different from parcels closer to the other taking areas, although he did also consider some of the property, namely those areas burdened by overhead wires, supported the substation parcel and thus shared its same highest and best use. The remainder of the taking parcels, however, he viewed as directly supporting the existing industrial use, namely the electrical substation. Thus, he determined the highest and best use of the property as vacant was for the same industrial use as was already being exercised on the site. However, Beckmann went on to conclude that the taking parcels were not required in order to support the existing improvements (the industrial use, which is the substation) and that therefore the parcels are excess land. Further, they are all, according to Beckmann, at the periphery of the larger parcel, and form a natural buffer which would not normally be developed by Co Ed. Thus, the utility of the larger parcel is not affected by the taking, so the areas of the peripheral parcels should be appraised as if they were vacant, and thus by their utility purpose, rather than as portions of the "larger parcel".

Like Haims, Beckmann concluded that the proper methodology to be employed for valuation was a market analysis. He testified that

he sought comparable industrial or commercial sales in Westchester County, with land areas of in excess of 10 acres, occurring since 2000, and was able to find only two sales which met those criteria. He then proceeded to employ sales of smaller properties, which he then adjusted for the size differences, and he also utilized two Rockland County sales which were sold for electrical substations, for a total of seven comparable properties.

The locations, sales prices, and prices per acre, of these comparables are as follows:

	Location	Sale Price	Price/ac
1	New Rochelle	$3,650,000	$1,181,230
2	White Plains	$1,450,000	$ 557,692
3	Yonkers	$2,237,500	$ 648,551
4	Yorktown	$3,900,000	$ 350,719
5	Briarcliff Manor	$6,250,000	$ 374,251
6	Wesley Hills	$1,250,000	$ 131,303
7	New City	$1,225,000	$ 137,332

Regarding the locations of the comparables, only one, #3 was, like the subject, in Yonkers, while #1 was in New Rochelle and #2 in Greenburgh/White Plains. The remaining Westchester properties were further away, one in Yorktown (#4) one in and Briarcliff Manor (#5), while two, #6, in Wesley Hills, and #7, in New City, were in Rockland County; the non-Yonkers properties were between 5.5 and 23 miles away from the subject. Claimant criticized these distant properties as unrepresentative, even as adjusted, of the commercial and industrial real property market in Yonkers in 2007.

Beckmann's adjustments for time also reflected a fairly wide range of values, since Sale #1 occurred four years, Sale #2 three years, and Sale #3 four years, prior to the vesting date. In addition, Sale #4, the oldest, was just over six and one-half years prior to title vesting. While three of his comparables (#5, #6,

and #7) were less than nine months prior to the vesting date, Beckmann's comparables are indeed, as a whole, a considerable number of years before the vesting date, calling into question whether they properly reflect market values as of February 2007, and the ability of an appraiser to accurately adjust for such a significant time difference. This is particularly true since, as indicated above, Beckmann's appraisal adjusted each comparable 5% per year to reflect market appreciation during that time, and yet Mr. Beckman admitted that, with respect to residential property, prices had appreciated 55.6% from 1990-2001 and then 25% per year for the next two years, and although he provided no such data directly with respect to industrial or commercial sales. The Court also notes that Beckmann's market adjustment may also be called into question by his own Sale #5, which sold in March 2006 for $4,200,000, and then, in May of the same year, for $6,250,000, an appreciation (and calling for, it may be argued, a market adjustment) of 48% per year. As claimant argues, even a market adjustment by Beckmann of 12% per year would have substantially increased the valuations of his comparable properties.

Beckmann also chose to adjust several of the properties for the seller's and/or buyer's motivation. Sale #1, for example, was adjusted -10% for motivation due to the fact that the purchaser needed that specific property for use with an abutting parcel. Sale #3 was also adjusted -10% for motivation, since the buyer needed that particular parcel to relocate his auto dealership. And Sale #4 had a motivation adjustment of +10% because the seller was motivated to sell the property quickly. Claimant asserts, however, with some justification, that motivation adjustments of such amounts are significant, rendering these comparables questionable market transactions for comparison; indeed, Beckman's definition of "transaction" seems to exclude sales such as these since they would appear not to have been "typically" motivated.

Having adjusted time and motivation, Beckmann proceeded to make adjustments for location, size, encumbrances, zoning, topography, and visibility and access. Beckmann initially determined the subject, and Comparable #2, to have average locations. He then he adjusted -5% for Comparables #1, #3, and #5, since he deemed them above average. Comparable #4 was then adjusted 20%, and Comparables #6 and #7 were then adjusted 30%, since he deemed the latter three to have below average locations.

On cross-examination, Beckmann conceded that Sale #1 was located in a flood zone, and that he had been so advised previously (having such information in his file). Despite this, he did not determine how much of the property was within the zone, and even failed, in his analysis, to make any adjustment for that negative

factor. Similarly, he was aware that Sale #4 was located in a 100 year flood plain, but adjusted only 2.5% for that situation; he also took no steps to determine how much of this property was wetlands.

Claimant also questioned Beckmann regarding his Sale #5, which he had noted had a "substantially depreciated" building on site. In his calculations, Beckmann had assumed that the building would be demolished to make way for development, and he attributed very little value to it. He conceded, however, on cross-examination that he had never entered the building, nor had he ever observed its interior condition, and that in fact the building was not demolished, but instead was rehabilitated for office use. And, regarding Sales #6 and #7, Beckmann was aware that both of these properties were sold to Orange and Rockland Utilities (for the purpose of creating an electrical substation). Since that utility company has the power of eminent domain, it was evident that the purchase was, at the very least, under the possible threat of condemnation, yet Beckmann conceded that he had never spoken to the seller to determine if undue influence had been exercised by Orange and Rockland Utilities during the pre-sale negotiations. Finally, as claimant has also noted, Sale #6 was also near both a horse farm and a sewage pump station, clearly diminishing its value, while Sale #7 was adjacent to property already owned by the buyer, and thus likely more valuable to the buyer for assemblage purposes.

As regards zoning, Beckmann adjusted Comparables #3 and #4, -12%, due to the subject's inferior zoning classification, and #5, 10%, because the latter parcel was located in a more restrictive zone with more limited uses. Based on the topography of the subject, which he described as "varied", Beckmann adjusted all of the comparables (which he deemed possessed "average", and thus superior, topography) -7.5%. And he adjusted all of the comparables the same amount, -5%, for visibility and access. Beckmann thus employed total adjustments in his valuation (which the Court notes were at times substantial) ranging from a minimum of - 22.5% for Sales #6 and #7, to a maximum of -79.5% for Sale #3, as follows:

Location	Total Adjustment	Adjusted Price/ac
New Rochelle	-67.5%	$419,090
White Plains	-62.5%	$248,347

Yonkers	-79.5%	$140,708
Yorktown	-42.0%	$286,479
Briarcliff Manor	-47.5%	$203,850
Wesley Hills	-22.5%	$105,575
New City	-22.5%	$110,423

Having applied these adjustments, Beckmann arrived at a range of adjusted sales of between $105,575 and $419,000 per acre, and, with an emphasis on no specific property, a value of $275,000 per acre. Therefore, for the entire 81.619 acre parcel, Beckmann derived a before taking value of $22,500,000. However, Beckmann then conducted a topographical analysis of the property which showed the degree of slope for various portions thereof. Since he found that the taking areas were also areas containing slopes generally in excess of 30%, he concluded that approximately 20 acres consisted of steep slopes and difficult topography, which he valued (without explanation) at $100,000 per acre or $2,000,000. Since approximately 61.619 acres consisted of developable land, he valued (again, without explanation) this portion at $325,000 per acre, or a total of $20,026,175. The total before taking land value, according to Beckmann, was thus $22,026,175, which he rounded to $22,500,000. Beckmann also valued the property separately as both steeply sloped and developable; the steeply sloped portion, in his opinion, should be valued at $100,000 per acre and "developable land" at $325,000 per acre. Approximately 20 acres of steep topography land should thus be valued at $2,000,000, while the approximately 61.619 acres of developable land should be valued at $20,026,175, which, rounded, yields the same value of $22,500,000 before the taking.

Beckmann next analyzed the rights taken by condemnor. He described the fee taking as approximately 5.446 acres for an access road; the temporary easement as approximately .83 acres (acquired for up to 24 months, while construction was ongoing); and the permanent slope easement as 1.17 acres for the purpose of slope stabilization of the proposed Ridge Hill Boulevard. According to Beckmann, since the development potential of the remainder would not be affected by the fee or easement takings, the highest and best use of the property would remain the same, namely industrial use (an electric substation). He also noted that the memorandum of understanding guaranteed many rights to Con Ed even after the

taking, which minimized the damages to Con Ed from the taking, in his opinion.

Beckmann used the same comparables in his 'after" analysis, namely:

	Location	Sale Price	Price/ac
1	New Rochelle	$3,650,000	$1,181,230
2	White Plains	$1,450,000	$ 557,692
3	Yonkers	$2,237,500	$ 648,551
4	Yorktown	$3,900,000	$ 350,719
5	Briarcliff Manor	$6,250,000	$ 374,251
6	Wesley Hills	$1,250,000	$ 131,303
7	New City	$1,225,000	$ 137,332

For property #1, Beckmann's post-taking adjustments were the same except -5%(from -7.5%) for topography, and he added an adjustment of 2.5% for appurtenant rights. As to property #2, his after adjustments were again the same except for topography -5% (from -7.5%) and the added adjustment of 2.5% for appurtenant rights. For property #3, Beckmann's after adjustments were again the same except -5% (from -7.5%) for topography and the added 2.5% adjustment for appurtenant rights. As to property #4, his after adjustments again were the same except for topography - 5% (from -7.5%) and the added adjustment for appurtenant rights of 2.5%. For property #5, Beckmann adjusted the same except for topography - 5% (from -7.5%) and the added adjustment for appurtenant rights of 2.5%. As to property #6, his after adjustments were again the same, except -5% (from -7.5%) for topography and the added adjustment for appurtenant rights of 2.5%. Finally, as to property #7, Beckmann adjusted the same except for topography - 5% (from -7.5%) and the added adjustment for appurtenant rights of 2.5%. This gave total adjustments after-taking of:

Location	Total Adjustment	Adjusted Price/ac
New Rochelle	-62.5%	$483,566
White Plains	-57.5%	$281,460
Yonkers	-74.5%	$175,028
Yorktown	-37.0%	$311,176
Briarcliff Manor	-42.5%	$223,264
Wesley Hills	-17.5%	$112,387
New City	-17.5%	$117,547

Beckmann found that the range in adjusted sales price per square acre ran from a low of $112,387 to a high of $483,566. Placing equal emphasis on all of the comparables, he found $290,000 as the proper value for the subject post-taking. At 76.173 acres, that yielded a market value of $22,090,170. However, Beckmann also noted that the taking was specifically in an area of steep slopes, reducing the steeply sloped area from approximately 20 acres to approximately 14.554 acres. At the previously mentioned value of $100,000 per acre for steep land, and $325,000 per acre for developable land, that yields a total of $1,455,400 and $20,026,175, again rounded to $22,000,000. Having previously found the before value to be $22,500,000, subtraction of the after value would then, according to Beckmann, yield total damages of $500,000.

Beckmann then calculated that the loss of utility from the permanent (50,840 square feet) easement, valued at the same $100,000 per acre (or $2.30 per square foot) due to the topography of the land, at 50% of the value of the land, or $58,466 (rounded to $56,500). He then calculated that the loss of utility from the temporary (36,043) easement, valued again at $100,000 per acre (or $2.30 per square foot) due to the topography, to be 24% of the value of the property for a period of 2 years, or $19,896 (rounded to $19,900). This yielded, according to Beckmann, total damages, for the fee taking and permanent and temporary easements, of $578,400.

Beckmann was also cross-examined about an appraisal prepared

for prior counsel for condemnor. Four of the comparables he used in that appraisal, which he did not use again in his trial appraisal, were Yonkers properties, and for three, #1, #3, and #5 (upon which he placed emphasis in his analysis), he concluded values of $75,617 per acre; $174,010 per acre; and $156,000 per acre. The Court also notes that, in his methodology for the prior appraisal, Beckmann did not include a slope analysis.

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. 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 generally did not agree as to the highest and best use of the property. As condemnor properly points out, the burden of proof is on the claimant to demonstrate that the highest and best use asserted is a reasonable probability as of the date of the title vesting. (*ITT Realty Corp. V. State*, 120 A.D.2d 706 [2nd Dept. 1986].) This is particularly true where claimant asserts, even partially, a highest and best use different from the use to which the property was being put before the taking. Here, claimant presented an appraisal report by Haims that found that the highest and best use of the property was both the current use, for utility purposes, and for a completely different us, road access from Tuckahoe Road on the south to the Ridge Hill development adjacent to the north. At trial, however, Haims then altered his

opinion, and concluded that the highest and best use of the property was only road access. Condemnor's appraiser, Beckmann, on the other hand, both opined in his report, and testified at trial, that the highest and best use of the property was that to which it had been and was being put, namely utility use.

Putting aside for a moment the issue of the rejection by an appraiser, at trial, of not only one of the two highest and best uses which he determined in his own appraisal report, but also his rejection of the current use (utility) of the property, as condemnor properly points out, Haims's conclusions violated the principle of condemnation appraisal which holds that, in order to determine damages, the value of the property must be appraised before and after the taking. The Appraisal of Real Estate, 12th ed., states at p. 647: "A property is generally valued before and after a partial taking to determine just compensation." Haims, has in fact, in the past been qualified as an expert in the Court and testified to such a valuation. Instead, here, he merely conducted a market analysis, and determined the market value of the fee taking and easements, as if the taking was a taking of the whole parcel. There was extensive testimony at trial that, prior to the taking, the parcel as a whole was used to support an electric substation, and that the partial taking had no effect on the continued use of the electrical substation located on the property. Consequently, there was no justification for Haims' failure to value the property before and after the taking to determine damages.

In his analysis, Haims also violated another essential principal of condemnation appraisal, namely that he failed to determine the "larger parcel". Haims could not determine the before and after value of the parcel, because he failed to properly determine the full extent of the parcel before the taking occurred. Haims testified that, in his opinion, it was too difficult and complicated to determine the larger parcel, although he did concede on cross-examination that the larger parcel was, in fact, the property being used by Con Ed for its utility substation. Beckmann, instead, recognized this, and valued the taking as if it was a portion of the utility substation property.

Haims also, in his analysis, clearly violated the "scope of the project" rule in valuing the subject. Haims concluded in his appraisal that road access was one of the highest and best uses of the property, while, at trial, testifying that it was the only highest and best use for the property. However, the primary focus of this road access, was and still is to access the adjacent Ridge Hill project, which is the very project for which the taking took place. There is simply no evidence, that prior to the time of the

Ridge Hill taking, there was any value to be derived from road access through the Con Ed parcel; it simply does not appear in the record. As the U.S. Supreme Court stated in *United States v. Miller*, 317 U.S. 369, 377 (1943):

> If a distinct tract is condemned, in whole or in part, other lands in the neighborhood may increase in market value due to the proximity of the public improvement erected on the land taken. Should the Government, at a later date, determine to take these other lands, it must pay their market value as enhanced by this factor of proximity. If, however, the public project from the beginning included the taking of certain tracts but only one of them is taken in the first instance, the owner of the other tracts should not be allowed an increased value for his lands which are ultimately to be taken any more than the owner of the tract first condemned is entitled to be allowed an increased market value because adjacent lands not immediately taken increased in value due to the projected improvement.

It is clear from the testimony that the Con Ed taking was considered by the Ridge Hill project developers as a parcel necessary to be taken for the benefit of the project. The Ridge Hill parcel, however, was taken first, and only afterwards was the Con Ed parcel taken. Pursuant to *Miller*, Con Ed may not benefit from the road access now available because of the Ridge Hill taking.

Haims then, in his evaluation of the highest and best use of the Con Ed property, clearly violated several key principals of appraisal and, when cross-examined about these violations, was unable to present a proper defense of his analysis in respect to these issues. Consequently, the Court rejects as unreliable his methodology.

Beckmann, on the other hand, clearly produced two separate appraisals for the subject property, one prior to trial and dated June 1, 2006, and his 2007 trial appraisal. As claimant properly notes, the prior appraisal showed an analysis by Beckmann which was different in many respects from that produced for the trial. For example, as claimant points out, Beckmann employed several more comparables in his prior appraisal than in his trial appraisal. And, while he employed no slope analysis in his first appraisal, his trial appraisal methodology includes a slope analysis, one

which, the Court notes, he provides no support or authority for. Furthermore, Beckmann concedes that the analysis was based on a survey by an outside company of barely more than 50% of the property, with computer assistance to complete the survey. Thus, while the Court accepts Beckmann's highest and best use, as it is consistent with the use of the property prior to the taking, and his methodology generally, the Court shall employ its own methodology, adjusting where necessary, with consideration for his prior appraisal, and in particular without his unreliable and unsupported slope analysis.

4. 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 condemnor's appraiser's trial testimony, his prior appraisal, and the corresponding market values, are as follows:

	Claimant's Value	Condemnor's Value
Fee Taking	$3,560,000 (Ceiling)	$545,600 (Floor)
Permanent Easement	$382,000 (Ceiling)	$58,500 (Floor)
Temporary Easement	$75,690 (Ceiling)	$19,895 (Floor)

(Note that a declaration against interest is taken against condemnor for the data favorable to claimant contained in Beckmann's prior appraisal, and that the Floor for the temporary easement reflects the value of the temporary easement over only the 24 month period following the taking, and not to the date of the trial - as limited by the claim.)

5. Valuation

a. The Fee Taking

As set forth above, Claimant's appraiser chose to partly reject, in his appraisal, and then totally reject, at trial, the prior and current use of the property, as and for an electrical substation, a methodology which the Court simply rejects as an unreliable indicator of market value. As for Beckmann's appraisal methodology, examination by the Court of the comparable properties used in his before analysis in his trial appraisal for the fee taking (approximately 5.446 acres), discloses that several, including #2, valued at $248,347 per acre; #3, valued at $140,708 per acre; #4, valued at $286,479 per acre; and #5, valued at $203,850 per acre, appear to more nearly approximate the conditions and status of the subject. The seven comparable properties, as adjusted, range in value from $105,575 to $419,090 per acre; have a median of $203,850 per acre, and an average of $216,353 per acre. From these seven comparables, Beckmann derived a value of $275,000 per acre; based on the similarity of the above-mentioned comparables, particularly #2 and #4, the Court agrees, and accepts that value. At 81.619 acres, this would yield a value before the fee taking of $22,445,225.00, rounded to $22,500,000.00. Beckmann then, as set forth above, performed a slope analysis on this market conclusion. The Court, however, takes as a declaration against interest, that in his prior appraisal Beckmann did not include a slope analysis of the property to value the developable and steep slope land. Further, the Court's opinion, as stated above, is that the slope analysis is not reliable, based, as it is, on an incomplete survey of the property. Thus the Court declines to adopt Beckmann's, or employ its own, slope analysis, and concludes the same pre-taking value of $22,500,000.00. Notably, this amount is within 10% of the before-taking value concluded by Beckmann.

In its after-taking analysis, the Court again accepts Beckmann's methodology generally, except for the aforementioned slope analysis. His adjustments yield, among the closely similar comparables, #2 valued at $281,460 per acre; #3, valued at $175,028 per acre; #4, valued at $311,176 per acre; and #5, valued at $223,264 per acre. All seven comparables, range in value from $112,387 to $483,566 per acre; have a median of $223,264 per acre, and an average of $243,490 per acre. From these seven comparables, Beckmann derived a value of $290,000 per acre; the Court, however, determines, based especially on the similarity of comparables #2 and #4, that the proper value is $275,000 per acre post-taking. At 76.173 acres (the fee taking, as set forth above, was approximately 5.446 acres), this would yield a value after the fee taking of $20,947,575.00, rounded to $21,000,000.00. Notably, this amount is

within 5% of the after-taking value concluded by Beckmann. The damages for the fee taking, then, are the difference between the before taking value of $22,500,000.00 and the after taking value of $21,000,000.00, or $1,500,000.00.

b. The Permanent Easement

The permanent easement taken by condemnor was 1.17 acres. Beckmann valued this land after his slope analysis; having rejected the slope analysis, the Court employs the same $275,000 per acre value for the permanent easement parcel as for the fee taking parcel. This yields a market value for the permanent easement parcel of $321,750. The Court accepts, from its review of the agreement between the parties, Beckmann's calculation (and, indeed, Haims' calculation as well) that the lease value of the parcel remaining after the permanent easement is still 50%; consequently, the Court arrives at a market value of the permanent easement taking of $160,875, rounded to $160,000.

c. The Temporary (Construction) Easement

The temporary construction easement taken by condemnor was .83 acres. Again, Beckmann valued this land after his slope analysis; the Court having rejected that slope analysis, the same $275,000 per acre value as for the fee taking and permanent easement will be employed for the temporary easement parcel. This yields a market value for the temporary easement parcel of $228,250. The Court also accepts Beckmann's calculation that the lease value of the parcel taken by temporary easement is 1% per month or 12% per year, for a period of 2 years. The Court therefore arrives at a market value for the taking of the temporary easement, as of the date of trial, of $54,780, rounded to $55,000.

6. Final Conclusion on Value

Having calculated a before and after values for the fee taking of approximately 5.45 acres by condemnor, and damages therefor, as well as damages for the permanent easement taking of 1.17 acres and the temporary easement taking of .83 acres, the Court concludes final damages, as follows:

Fee Taking	$1,500,000.00
The Permanent Easement	$160,000.00
Temporary (Construction) Easement	$55,000.00

Total Damages	$1,715,000.00

which values are well within the range of testimony *(See, Rose v. State,* 24 N.Y2d 80 [1969]).

Claimant Con Edison of New York, Inc. is therefore awarded the calculated cost of the loss from the fee taking, namely the amount of $1,500,000.00; the calculated cost of the loss from the permanent easement taking, namely the amount of $160,000.00; and the calculated cost of the loss from the temporary easement taking, namely the amount of $55,000.00 for the 24 month period following the taking, for a total of $1,715,000.00 to the date of trial, with interest thereon from the date of the taking, February 5, 2007, less any amounts previously paid, together with costs and allowances as provided by law.

CONCLUSION

Upon the foregoing papers[1], and the trial held before this Court on November 30 and December 1, 3, and 4, 2009, it is hereby

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

ORDERED, that condemnor Yonkers Industrial Development Agency shall pay as compensation to claimant the amount of $1,715,000.00, with interest thereon from the date of the taking, February 5, 2007, less any amounts previously paid, together with costs and allowances as provided by law.

Settle Judgment.

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

Dated: White Plains, New York
November 28, 2012

[1] The Court acknowledges the assistance of Erica Gilerman, Elizabeth Granci, Crystal Green, Cesare Ricchezza, Jimmy Zgheib, Adam Kudovitsky and Melvin Monachan, summer interns and second year students at Pace University School of Law, in the preparation of this Decision and Order.

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