

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

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**FILED AND  
ENTERED ON  
DATE  
December 20, 2004  
WESTCHESTER  
COUNTY CLERK**

In The Matter of the Application of

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

Index No.  
18221/03

**DECISION**

-----X

DICKERSON, J.

**ADVANCE PAYMENTS AND INTEREST RATES IN CONDEMNATION PROCEEDINGS**

The Condemnees, Domenick D. Bologna and Bart A. Didden, former owners of Section 2, Block 60, Lots 9, 10, 12, 13, 14 and 15 in the Village of Port Chester, New York [ " the Claimants " ] have moved for an " Order directing the [ Village of Port Chester ] to authorize and pay an advance payment to the Claimants with interest thereon " pursuant to Eminent Domain Procedure Law [ " E.D.P.L. " ] §§ 303, 304.

### **Offers Made And Advance Payments Accepted**

Pursuant to E.D.P.L. § 304(A) the Village of Port Chester [ " the Village " ], after acquiring three pieces of property owned by the Claimants<sup>1</sup>, made " offers [ on April 30, 2004 ] to tender payment with regard to acquisition of the fee title of " (1) Section 2, Block 60, Lots 9, 10, 12, 13 [ amount offered \$250,000<sup>2</sup> ], (2) Section 2, Block 60, Lot 14 [ amount offered \$340,000<sup>3</sup> ] and (3) Section 2, Block 60, Lot 15 [ amount offered \$385,000<sup>4</sup> ]. The offers totaling \$975,000 were accepted<sup>5</sup> by Claimants pursuant to E.D.P.L. § 304(A)(3) as advance payments without " prejudice [ to ] the right of a condemnee to claim additional compensation ". Notwithstanding the Claimants' " acceptance " the Village has not paid the Claimants any portion of the offered advance payments. Hence, the subject motion which Claimants contend should be granted " since title vested in the Village of Port Chester there is no excuse for not making the advance payment as the property provides the Village's security for the advance payment " <sup>6</sup>.

### **Village Wants A Stay And Sanctions**

While " recogniz(ing) its obligation to make the advance payments " <sup>7</sup> the Village has cross moved for an order " Staying ( its ) obligation to make the advance payments pending the outcome of the Federal litigation brought by Claimants [ Didden v. The Village of Port

Chester, 04 Civ. 0370 (CM)<sup>8</sup> ] and the appeal ( thereon ) " and " Awarding costs, including disbursements and attorney's fees, and sanctions under 22 NYCRR 130-1.1...against the Claimants and their counsel for their frivolous motion herein ".

### **What's The Hurry?**

In opposing the Claimants' request to be paid now rather than later, the Village asserts that there is " no basis for the Court to order the advance payments to be made at this time "<sup>9</sup>, that the Claimants have failed to show that the Village has not complied with E.D.P.L. §§ 301, 303 or failed to negotiate, that " the time period between vesting of title and the motion herein without the advance payments having been paid, five months, is neither unreasonable nor unusual "<sup>10</sup> and others have waited much longer to get paid<sup>11</sup>.

### **Wait Until Appeals Exhausted**

In support of its motion seeking a stay the Village notes that the Claimant's " appeal in Federal Court seeking to reinstate the Federal Complaint and find the condemnation and vesting of title to be unlawful...could affect the condemnation itself and whether the Claimants would be entitled to advance payments "<sup>12</sup>.

### **Claimants Have Failed To Transfer Title**

In addition, the Village asserts that the Claimants have not yet complied with E.D.P.L. § 304 and provided the Village " with all papers reasonably necessary to effect a valid transfer of title "<sup>13</sup>.

### **Sanctions Should Be Imposed**

And in support of its motion for sanctions, disbursements and fees the Village asserts that the Claimants' attorney, " Mr. Rikon in another proceeding which is part of this same redevelopment project "<sup>14</sup> made a similar motion which was denied and affirmed [ Matter of Village of Port Chester [ R.D.C. Realty ] ], 294 A.D. 2d 510 ( 2d Dept. 2002 ) ] and, hence, " there is no basis for the motion herein ".

### **The Matter Of 6% Interest**

In their Motion the Claimants sought an " advance payment... with interest thereon ". Subsequently the Claimants now seek " interest at 6% on the initial payment from the vesting date until the day of payment "<sup>15</sup>. The Village asserts variously that the request of 6% interest is untimely<sup>16</sup>, the E.D.P.L. does not set an interest rate<sup>17</sup>, an interest rate of lower than 6% is not prohibited<sup>18</sup> and the rate of interest is to be determined at a compensation trial<sup>19</sup> not now.

## The Timing Of The Condemnation Challenge

And lastly, the Claimants assert that the Village " should have waited until all litigation challenging the taking was completed "<sup>20</sup>. The Village notes, however, that " there was no litigation challenging the taking when the condemnation was commenced...on November 6, 2003...( the Didden case ) challenging the condemnation was not commenced until January 16, 2004, over two months ( later )..." . The Village discusses at some length the untimeliness of the Claimant's condemnation challenge [ "...the Federal Court ( denied ) an injunction and ( dismissed ) the Amended Complaint ( because ) condemnees herein failed to timely file a challenge under Section 207 of the EDPL and thus are precluded from challenging the public use "<sup>21</sup> ] and the seemingly mutually exclusive positions taken by Claimants [ " In Federal Court the condemnees challenge the transfer of title, yet to receive an advance payment in State Court the condemnees must provide documents necessary to transfer title. *The condemnees cannot have it both ways* [ emphasis added ] "<sup>22</sup> ]. As we shall see, however, the Claimants can have it both ways in the sense that they are entitled to receive advance payments with interest now without giving up any of their rights to seek greater compensation and challenge the condemnation proceeding in Federal Court.

## Oral Argument & Briefs

During oral argument on November 9, 2004 the Claimants and their counsel, Mr. Rikon, asserted that they would complete and submit to the Village " all papers reasonably necessary to effect a valid transfer of title " of the subject parcels. Subsequently, and at the Court's request, the parties submitted extensive Memoranda of Law addressing several issues including (1) What would be an appropriate interest rate should advance payments be ordered? (2) Does the issuance of a stay pending the outcome of the Didden appeal serve as an *interrorum* device chilling the enthusiasm of condemnees to pursue their rights to seek greater compensation or challenge the condemnation proceeding?, (3) Are the Claimants willing or able to sign " the necessary title papers in light of the pending Federal Appeal "<sup>23</sup> and (4) Instead of issuing a stay what are the available alternatives which address the Village's need for security in having the advance payments returned should the Didden case be successful and the Claimants' need for compensation now rather than later. For example, the parties were asked to consider alternatives such as payment of the advance payments into Court pursuant to E.D.P.L. § 304(D) or into escrow accounts maintained by Claimants' counsel.

## DISCUSSION

### The Governing Statute

The issues raised herein are governed, in part, by E.D.P.L. §§ 301, 302, 303, 304 as to how and when a condemnor, such as the Village, must pay condemnees, such as the Claimants, an amount of money offered in full or as an advance in satisfaction of claims arising from a condemnation proceeding.

### E.D.P.L. § 301

E.D.P.L. § 301 directs the condemnor both before and after acquisition " by eminent domain of real property for proposed public project " to " make every reasonable and expeditious effort to justly compensate " condemnees " by negotiation and agreement " [ see e.g., Matter of National Fuel Gas Supply Corporation v. Town of Concord, 299 A.D. 2d 898, 899, 752 N.Y.S. 2d 187 ( 4<sup>th</sup> Dept. 2002 ) ( " There is no requirement that petitioners plead or prove, as a prerequisite to the acquisition of property by eminent domain, that it negotiated in good faith with the [ property ] owners ' ( Oswego Hydro Partners v. Phoenix Hydro Corp., 163 A.D. 2d 829, 559 N.Y.S. 2d 841 ( 4<sup>th</sup> Dept. 1990 ) citing Matter of Consolidated Edison Co. Of N.Y., 143 A.D. 2d 1012, 1014-1016, 533 N.Y.S. 2d 591 ( 2d Dept. 1988 )<sup>24</sup>].

**E.D.P.L. §§ 302, 303**

E.D.P.L. § 302 directs the condemnor to obtain an appraisal of the subject property with the condemnee's cooperation and § 303 directs the condemnor to use the appraisal and " make a written offer for one hundred per centum of the valuation so established ( by the appraisal ). Wherever practicable, the condemnor shall make the offer prior to acquiring the property...".

**E.D.P.L. § 304(A)**

E.D.P.L. § 304(A) directs the condemnor to make a written offer stating that " (1) the offer constitutes the amount of the condemnor's highest approved appraisal of the just compensation of the property, and that payment will be made together with appropriate interest; (2) a condemnee may accept the offer as payment in full; (3) a condemnee may reject the offer as payment in full and instead elect to accept such offer as an advance payment, and that such election shall in no way prejudice the right of a condemnee to claim additional compensation...and (4) upon the acceptance of the written...offer, the condemnor shall enter into an agreement or stipulation with the condemnee providing for payment pursuant to such agreement, either as payment in full or as an advance payment. The right of the condemnee to



the advance payment shall not be conditioned on the waiver of any other right " .

### **The Purpose Of Advance Payments With Appropriate Interest**

These procedures establish a method " to insure that condemnors quickly and justly compensate individual owners whose property has been acquired under the power of eminent domain. This procedure requires, for example, that the owner be justly compensated for his property at an amount determined by an appraiser; that all offers must be in writing and that the owner can reject an offer and accept it as an advance payment pending a full settlement "<sup>25</sup>.

Advance payments are remedial in nature [ see e.g., Matter of the City of New York, 71 Misc. 2d 1019, 1022-1024, 337 N.Y.S. 2d 753 ( N.Y. Sup. 1972 ) ( in discussing the provisions of Chapter 1161 of the Laws of 1971 [ which increased advance payments to 100% of the appraisal ] the Court noted that such procedures are remedial in nature. " The history of the proceedings in condemnation has established that the advance payments made were generally only sufficient to pay off the mortgage liens on the property taken, leaving the owner with little or no funds for investment in replacement property or the alteration of his remaining property, prior to the receipt of the final award. Delays in the payment of the final award were usually lengthy, compelling the condemnee to assume an unnecessary financial burden. Chapter 1161 was

enacted for the purpose ...to alleviate this burden from innocent owners whose property is acquired for public purpose by the exercise of the power of eminent domain...It is remedial because it regulates the quantum of the advance payment. It does not fix the final award which can only be determined by the court after a trial of the issues. The issue of ' fair and just compensation ' is not in any way affected by a condemnor's payment of 100% of its appraised value of the condemned property. The amount of the advance payment is predicated solely on the condemnor's appraisal uninfluenced by the claimant's appraisal. This legislation seeks...to remove a financial burden which condemnees have heretofore borne, pending a court adjudication of the ' fair and just compensation ' to which they are entitled. The Legislature in its wisdom enlarged the advance payment to be made available to those whose property is taken by the exercise of the sovereign's power of eminent domain...No substantive right of the condemnor or condemnee is involved by the increase in the advance payments " ); City of New Rochelle v. Sigel, 65 Misc. 2d 962, 963, 319 N.Y.S. 2d 208 ( West. Sup. 1970 )( " It is fundamental that prompt compensation be paid to the owner " ); City of New York ( Stapleton Branch Library Addition )<sup>26</sup>, Richmond County, Index No. 8822/02, Decision of J. Gerges ( " Thus ' the mandate of EDPL 303 is that the condemnor establish and offer ' an amount which it believes to represent just compensation '...Further ' the property owner should be placed in a position where at the time title is divested he

receives some moneys to enable him to do what is necessary to compensate him for his loss "..."].

Advance payments including interest at an appropriate rate are meant to help condemnees go into the market place and replace property of which they have been deprived [ see e.g., Rose v. State of New York, 24 N.Y. 2d 80, 89, 246 N.E. 2d 725, 298 N.Y.S. 2d 968 ( 1969 ) ( " The constitutional requirement of compensation mandates that *the property owner be indemnified so that he may be put in the same relative position, insofar as this is possible, as if the taking had not occurred* [ emphasis added ]...Just compensation is properly measured by determining what the owner has lost " ); M.T.A. v. American Pen Corp., 94 N.Y. 2d 154, 158, 701 N.Y.S. 2d 301, 723 N.E. 2d 50 ( 1999 ) ( " " To ensure that a condemnee obtains just compensation, the State is constitutionally required to pay prejudgment interest to compensate for delay in making payment and deprivation of use of the property " ); Matter of Cullen Bryant Park and Preserve, 87 Misc. 2d 1004, 386 N.Y.S. 2d 918 ( Nassau Sup. 1976 ) ( " The requirements of chapter 1166 are mandatory and seek to alleviate the hardship imposed on owners in financing the purchase, rental or replacement of the property taken by eminent domain " ); Matter of Town of North Hempstead, 70 Misc. 2d 350, 351, 333 N.Y.S. 2d 503 ( Nassau Sup. 1972 ) ( " We are here faced with a situation in which the property owner has been deprived of his property through no fault of his own and against his will. He must now go into the market place to replace that which he has lost...Chapter 1161 is an

attempt to alleviate some of the injustice by providing the condemnee with the maximum funds possible during the early stages of a condemnation proceeding. " )].

### **Rights Not To Be Relinquished**

It is clear that condemnees may accept an advance payment without being forced to give up any rights they may have to seek greater compensation or, for that matter, challenge the condemnation proceeding itself as the claimants have done in the Didden case [ see e.g., Brody v. Village of Port Chester, 345 F. 3d 103, 116-117 ( 2d Cir. 2003 ) ( " The Village contends that ' by entering into the Advance Payment Agreement and accepting the \$1,800,000 payment, Brody has thus agreed that the Village has title to his property and to cooperate with the Village in clearing any objections to the Village's title. Accordingly, Brody no longer has any cognizable interest in opposing the condemnation of this property...The advance payment is a statutory creation that allows property owners to receive money while condemnation proceedings are in progress, and the statute expressly provides that acceptance of the advance payment cannot be conditioned on the relinquishment of rights...Thus contrary to the Village's assertion, the statutory scheme does not necessarily contemplate that advance payment will be made only after all challenges to title have been resolved and title has passed to the condemnor " ); see also: Matter of Cullen Bryant Park and Preserve,

87 Misc. 2d 1004, 386 N.Y.S. 2d 918 ( Nassau Sup. 1976 )( paragraph in advance payment agreement conditioning payment upon entry of judgment against condemnee not enforced ); Cronk v. State of New York, 100 Misc. 2d 680, 684, 420 N.Y.S. 2d 113 ( Ct. Claims 1979 )( " The claimant...was required to accept the proposed agreement, in its entirety, on penalty of forfeiture of interest...it can hardly be said that there was an assent to the formation of the agreement itself " )<sup>27</sup> ].

### **There Must Be A Valid Transfer Of Title**

The Village asserts that the Claimants (1) can " not provide the necessary papers to accept the advance payment...due to the pending Federal appeal "<sup>28</sup> and (2) have not complied with E.D.P.L. § 304(c) because they have failed to provide " ` all papers reasonably necessary to effect a valid transfer of title ` "<sup>29</sup> and, hence, " the advance payment does not have to be paid until the necessary papers can be provided "<sup>30</sup>. As noted above Claimants and their counsel have agreed to sign " all papers reasonably necessary to effect a valid transfer of title ".

### The Advance Payments Should Be Made Now

The Village relies upon language in Matter of Village of Port Chester [ R.D.C. Realty, Inc ], 294 A.D. 2d 510, 511, 742 N.Y.S. 2d 849 ( 2d Dept. 2002 ) [ " R.D.C. Realty " ] which states that " The ( E.D.P.L. ) provides no specific time requirement for advance payments " ) but fails to inform the Court that it had agreed to and was, in fact, actively involved in closings so that advance payments could be made<sup>31</sup>. The Appellate Division in R.D.C. Realty, supra, held that " since the condemnor acknowledged its obligation to make advance payments and *has begun to do so* [ emphasis added ], the motion to direct the condemnor to make advance payments was properly denied ". The Appellate Division relied upon the Village's good faith efforts to make advance payments and found it unnecessary to order such payments.

In addition, while there may be no express language in E.D.P.L. §§ 301-304 stating when the advance payments should be made it is clear from the Legislative History [ " to insure that condemnors quickly and justly compensate individual owners whose property has been acquired under the power of eminent domain "<sup>32</sup> ] and case law [ see e.g., Rose v. State of New York, supra, at 24 N.Y. 2d 89; Matter of the City of New York, supra, at 71 Misc. 2d 1022-1024; City of New Rochelle v. Sigel, supra, at 65 Misc. 2d 963; Matter of County of Nassau, 87 Misc. 2d 1004, 1005, 386 N.Y.S. 2d 918 ( Nassau Sup. 1976 ); Matter of Cullen Bryant Park and Preserve, supra, at 87 Misc. 2d 1004; Matter of Town of North

Hempstead, supra, at 70 Misc. 2d 351 ] that such payments should be made sooner rather than later.

### **An Appropriate Interest Rate**

E.D.P.L. § 304(A) requires that advance payments be made " with appropriate interest " [ see e.g., Matter of Town of North Hempstead, supra, at 70 Misc. 2d 351 ( remainder of advance payments ordered to be paid together with 6% interest ); Matter of Town of Hempstead, 78 Misc. 2d 1090, 359 N.Y.S. 2d 164 ( Nassau Sup. 1974 )( 6% interest on advance payments ); Matter of the City of New York, supra ( accrued interest at the legal rate on remainder of advance payment )].

General Municipal Law § 3-a(2) [ " G.M.L. " ] provides that " The rate of interest to be paid upon any judgment or accrued claim...arising out of condemnation proceedings...shall not exceed six per centum per annum ". The Claimants want 6% interest on their advance payments while the Village would prefer to pay 3%<sup>33</sup>.

### **Presumption Of A Reasonable Rate**

The 6% interest rate in G.M.L. § 3-a(2) is presumptively reasonable. The Court, however, may in its discretion award interest at a lower rate upon the presentation of evidence sufficient to overcome

the presumption [ see e.g., Rodriguez v. New York City Housing Authority, 91 N.Y. 2d 76, 78, 666 N.Y.S. 2d 1009, 689 N.E. 2d 903 ( 1997 ) ( personal injury case; " Defendant submitted a counterproposal that the rate of interest should be fixed at 5.35% as a reasonable rate based on the average 52-week Treasury Bill rate...We only note that the Legislature has set 9% as the rate of interest to be generally imposed so that amount is presumptively fair and reasonable, notwithstanding any contemporaneous grant of judicial discretion to impose a lesser amount...The fact that another interest computation may also be ' reasonable ' does not mandate the selection of that rate in an exercise of discretion " ); M.T.A. v. American Pen Corp., 94 N.Y. 2d 154, 701 N.Y.S. 2d 301, 723 N.E. 2d 50 ( 1999 ) ( condemnation case; hearing to be held on reasonableness of 9% maximum statutory interest rate ); Abiele Contracting, Inc. v. New York City School Construction Authority, 6 A.D. 2d 366, 367, 774 N.Y.S. 2d 380 ( 2d Dept. 2004 ) ( wrongful termination case; " the statutory interest rate is presumed fair and reasonable...The defendant failed to submit sufficient evidence to rebut the presumption that the statutory rate of 9% was fair and reasonable " ); Auer v. State of New York, 283 A.D. 2d 122, 727 N.Y.S. 2d 507 ( 3d Dept. 2001 ) ( personal injury case; failure to overcome the presumption of reasonableness of statutory interest rate ) ].



### Real Property Tax Refund Interest Rates

The Village asserts that a 3% interest rate is more appropriate relying upon, among other interest rate sources<sup>34</sup>, a 3% interest rate for " real property tax refunds " for 2004 discussed in a December 12, 2003 letter from the Office of Real Property Services<sup>35</sup>. Pursuant to RPTL § 726 (2), the interest rate for tax certiorari refunds follows the first quarter overpayment rate as set forth in Tax Law § 607(j)(1),(2). RPTL § 762(2) states that "(2) Interest shall be paid on the amount of any refund made pursuant to this section, computed from the date of payment of the tax or other levy or portions thereof refunded; ....such rate of interest shall be the overpayment rate set by the commissioner of taxation and finance pursuant to subsection (j) of section six hundred ninety-seven of the tax law and such interest rate shall not be greater than nine percent per annum...Provided, the interest rate of the first calendar quarter set forth in the first month of the calendar year shall be the annual interest rate, and shall be the rate of interest prescribed by this subdivision.....". Prior to October 1, 2003, Tax Law § 697(j) stated that the interest rate for overpayments shall not be less than six per cent per annum. Effective October 1, 2003, this six percent minimum is no longer applicable. The current Section 697(j), as amended, states that "(1) The commissioner shall set the overpayment and underpayment rates of interest to be paid.....Such rates shall be the rates prescribed in paragraphs two and four of this subdivision.....(2) Rates of interest. (A)

Overpayment rate. The overpayment rate of interest set under this subsection shall be the sum of (i) the federal short-term rate as provided under paragraph three of this subsection, plus (ii) two percentage points ". According to the New York State Department of Taxation and Finance, this Section 687(j) interest rate for overpayments was 3% for the first calendar quarter set forth in the first month of the 2004 calendar year. That is the rate of interest prescribed by RPTL § 726(2) for tax certiorari refunds for 2004.

#### **Property Tax Refund Interest Rates Not Applicable To Condemnation Awards**

The Village has failed to overcome the presumption of reasonableness of the 6% interest rate mandated by G.M.L. § 3-a(2). Condemnation advance payments with appropriate interest serve a very different purpose than real property tax refunds arising out of tax certiorari proceedings. In condemnation proceedings the condemnee is being deprived of property which must be replaced as soon as possible " so that he may be put in the same relative position...as if the taking had not occurred " [ Rose v. State of New York, supra, at 24 N.Y. 2d 89 ]. The condemnee must be compensated " for delay in making payment and deprivation of use of the property " [ M.T.A. v. American Pen Corp., supra, at 94 N.Y. 2d 158 ]. And the condemnee must be given sufficient monies [ through advance payments and appropriate interest ] so that " He ( may ) now go into the market place

( and ) replace that which he has lost " [ Matter of Town of North Hempstead, supra, at 70 Misc. 2d 351 ] and to " enable him to do what is necessary to compensate him for his loss " [ City of New York ( Stapleton Branch Library Addition ), supra.

It is problematical, at best, that Claimants herein would be able to borrow money at a 3% interest rate or even at the statutory 6% interest rate in order to " replace that which ( they have ) lost ". The purpose of real property tax refunds, however, is to compensate tax payers for paying more taxes than they should have, typically, several years ago. While such a windfall is welcome there is none of the urgency and, perhaps, even desperation, which condemnees face when their property is taken in a condemnation proceeding. This is why advance payments have been mandated, why advance payments should be paid sooner rather than later and why statutory interest of 6% should be imposed.

### **The Power To Withhold Advance Payments**

The Village's power to withhold advance payments should not be seen as being used as an *interror* device to discourage condemnees from asserting their due process rights in challenging condemnation proceedings as the Claimants have done in the Didden case. It may be that after the Second Circuit Court of Appeals in Brody, supra, at 345 F. 3d 117, held " that Brody did not relinquish his rights to pursue [ a challenge to the condemnation proceeding ] by accepting the advance payment " that the

Village decided not to make the offered and accepted advance payments to the Claimants herein until after all appeals were exhausted in the Didden case. There is no basis for such a rationale since it plainly seeks to deprive condemnees of their right to accept and expeditiously receive offered advance payments and at the same time pursue all of their due process rights to seek greater compensation and challenge the condemnation proceedings.

#### **Advance Payments With 6% Interest To Be Deposited In Escrow Accounts**

After careful consideration of the alternatives recommended [ i.e., advance payments paid into Court pursuant to E.D.P.L. § 304(A) ( see e.g., Matter of County of Nassau, 87 Misc. 2d 1004, 1005, 386 N.Y.S. 2d 918 ( Nassau Sup. 1976 ) ( advance payments " seek to alleviate the hardship imposed on owners in financing the purchase, rental or replacement of the property taken by eminent domain...Payment of the money into court obviously defeats this beneficial purpose and is only authorized when the owner refuses the advance payment or where the owner's title is disputed or is not clear and unencumbered " ) or deposited into escrow accounts ] the Court directs the Village to make the advance payments together with 6% interest into three escrow accounts [ one for each parcel ] to be maintained by Claimants' counsel. The Village's obligation to continue to pay " appropriate interest " on the advance payments will cease upon issuance of the payments and deposit into the escrow accounts

[ see e.g., Serf Realty Co. v. State of New York, 228 A.D. 2d 428, 643 N.Y.S. 2d 663 ( 2d Dept. 1996 ) ]. The payments in the escrow accounts will remain there until the Federal Court appeals in the Didden case have been resolved.

### **Motion For Sanctions Denied**

The Village's cross motion seeking fees, disbursements and sanctions under 22 NYCRR 130-1.1 against Claimants' counsel, Mr. Rikon, is denied. While it is true that the Appellate Division in R.D.C. Realty, supra, denied a motion, brought by Mr. Rikon's clients therein, seeking payment of advance payments, it was because the Village was cooperating with claimants to clear titles and transfer the subject properties thus obviating the need to order payment of the offered and accepted advance payments.

### **Conclusion**

Accordingly the motion and cross motion are decided in the following manner. The Village and the Claimants will do whatever is necessary to deliver " all papers reasonably necessary to effect a valid transfer of title " to the Village. Once this is accomplished the Village will make the offered and accepted advance payments together with interest at the statutory rate of 6% to the Claimants to be held in escrow by Claimant's

counsel until resolution of the pending Federal Court appeals in the Didden case.

Settle Order On Notice.

White Plains, N.Y.  
December 20, 2004

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HON. THOMAS A. DICKERSON  
Supreme Court Justice

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## ENDNOTES

1. Matter of Village of Port Chester, Index No. 18221/03, West. Sup. J Rosato, Decision dated March 11, 2004.

2. Exhibit B to Affirmation of Michael Rikon dated September 13, 2004 [ " Rikon Aff. I " ]; Letter of John E. Watkins, Jr. dated April 30, 2004 ( " The above offer constitutes the full amount of the Village of Port Chester's highest approved appraisal of just compensation...If payment is accepted, then payment of the foregoing amount will be made, together with any appropriate interest " ).

3. Exhibit C to Rikon Aff. I; Letter of John E. Watkins, Jr. dated April 30, 2004.

4. Exhibit D to Rikon Aff. I; Letter of John E. Watkins, Jr. dated April 30, 2004.

5. Rikon Aff. I at Ex E ( " Claimant demands the amount offered be paid as an advance payment in accordance with EDPL 304(1) ' the offer constitutes the amount of the condemnor's highest approved appraisal of the just compensation for the property, and that payment will be made together with appropriate interest ' " ).

6. Rikon Aff. I at para. 7. See also Reply Affirmation of Michael Rikon dated October 4, 2004 at para. 11 [ " Rikon Aff. II " ] ( " land stands as security for the money in the event that the vesting of title is reversed " ).

7. Affirmation of John E. Watkins, Jr. dated September 29, 2004 at para. 20 [ " Watkins Aff. I " ]. See also the Sur-Reply Affirmation of John E. Watkins, Jr. dated October 6, 2004 at para. 27 [ " Watkins Aff. II " ]( " Condemnor Village recognizes its obligation to make an advance payment but under the circumstances herein it is appropriate to stay that obligation pending the outcome of the Federal litigation " )].

8. See Didden v. Village of Port Chester, 304 F. Supp. 2d 548 ( S.D.N.Y. 2004 )( complaint dismissed ).

9. Watkins Aff. I at para. 4.

10. Watkins Aff. I at para. 17.

11. Watkins Aff. I at para. 17. The Village cites three cases wherein the claimants waited much longer than 5 months for payment of advance payments, e.g., Matter of City of New York, 2004 WL 258138 ( Kings Sup. 2004 )( 2 years and 10 months from vesting to payment of advance payment ); Matter of Town of North Hempstead, 70 Misc. 2d 350 ( Nassau Sup. 1972 )( 1 year and 10 months from vesting to partial payment of advance payment; over 2 years for payment of balance ); Matter of City of New York, 71 Misc. 2d 1019 ( N.Y. Sup. 1972 )( over 1 year from vesting to payment of advance payment ).
12. Watkins Aff. I at paras. 18-19.
13. Watkins Aff. I at paras. 22-24.
14. Watkins Aff. I at para. 28.
15. Rikon Aff. II at para. 9.
16. Watkins Aff. II at para. 4.
17. Watkins Aff. II. at para. 7.
18. Watkins Aff. II at para. 9.
19. Watkins Aff. II at para. 11.
20. Rikon Aff. II at para. 3.
21. Village Memorandum of Law dated November 23, 2004 at p. 3 [ " Village Brief I " ]. See also: Didden v. Village of Port Chester, supra, at 304 F. Supp. 2d 558-559.
22. Village Reply Memorandum of Law dated November 29, 2004 at p. 5 [ " Village Brief II " ].
23. Village Brief I at p. 5.
24. Matter of Consolidated Edison Co. of N.Y., 143 A.D. 2d 1012, 1014-1016, 533 N.Y.S. 2d 591 ( 2d Dept. 1988 )( " Inasmuch as the EDPL contains no requirement that the condemnor negotiate with and make an offer of compensation to the property owner prior to commencement of public hearings...the clear language of EDPL 301 and 303 does not set forth an absolute requirement that just compensation be paid the property owner prior to the commencement of the EDPL Article 4 acquisition proceeding. EDPL 303 simply



requires the condemnor ' wherever practicable ' to make an offer of compensation prior to actually acquiring title to the property...EDPL 302 specifically excuses the condemnor from making an offer of payment prior to acquisition ' " ).

25. Chapter 839, Laws of 1977 Legislative Bill Jacket at p. 9, Ten Day Bill Budget Report On Bills, para. 2.

26. Claimant's Memorandum of Law dated November 22, 2004 at Appendix A [ " Claimants Brief I " ].

27. See unreported cases at Claimants Brief I, p. 8, e.g., Wilson v. State of New York, Court of Claims, Index Nos. 50142, 50882, J. Madugno Decision dated January 9, 1992 ( condition attached to agreement for advance payment that claimant secure from tenant waiver of fixtures claim before payment held invalid ).

28. Watkins Aff. I at para. 22. See also Village Brief I at p. 5 ( " How can the condemnees herein provide the necessary papers to effect a valid transfer of title as required by the statute while at the same time challenging the transfer of title in federal court " ).

29. Watkins Aff. I at para. 23.

30. Watkins Aff. I at para. 24.

31. A review of the Record On Appeal [ " R.O.A. " ] in Matter of Village of Port Chester [ R.D.C. Realty, Inc ], 294 A.D. 2d 510, 742 N.Y.S. 2d 849 ( 2d Dept. 2002 )[ " R.D.C. Realty " ] reveals that both parties therein actively sought to clear titles and transfer the subject properties [ R.D.C. Realty R.O.A. at p. 20 ( Affirmation of Michael Rikon dated January 31, 2001 ) ( " Thereafter, the condemnor authorized advance payments for only the real estate claims. Closings were, in fact, scheduled in certain matters and our office moved expeditiously to clear all title objections and make arrangements with holders of mortgage instruments so that they could be paid from the proceeds and deliver satisfactions of mortgage " ); R.D.C. Realty at p. 28 ( Affirmation of John E. Watkins dated April 18, 2001 )( " (4) the Village has been trying to work with Mr. Rikon's office to clear title and then schedule appropriate closings ...(5) the Village acknowledges its responsibility to make advance payments at appropriate times to appropriate claimants " ); R.D.C. Realty at p. 50 ( Affirmation of John E. Watkins dated May 9, 2001 )( " Contrary to the claims of Mr. Rikon, your affirmant does not believe the Court needs to intervene because the Village has

acknowledged its obligation, has held one closing, and has scheduled the closings of the remaining four fee claimants " ).

32. Chapter 839, Laws of 1977 Legislative Bill Jacket at p. 9, Ten Day Bill Budget Report On Bills, para. 2.

33. Village Brief II at pp. 7-8 and Exs. C-E.

34. Id. Ex. B ( Federal Reserve 5 year Treasury Constant Maturity Rates for April 2004 of between 2.91% and 3.60% ); Ex. E ( Federal Reserve Prime Rate indicating 4% for 2004).

35. Id. Ex. C.