

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

-----X
THE RAY RIVER CO. and HAVERSTRAW
RIVERFRONT INC.

Petitioner,

-against -

THE VILLAGE OF HAVERSTRAW,

Respondents.

-----X
LaCAVA, J.

DECISION/ORDER

Index Nos:
2074/07

Motion Date:
7/9/07

The following papers numbered 1 to 5 were considered in connection with this motion by petitioners/prospective claimants for a writ of prohibition, barring condemnor from proceeding with its proposed acquisition of certain property:

<u>PAPERS</u>	<u>NUMBERED</u>
ORDER TO SHOW CAUSE/AFFIRMATION/EXHIBITS	1
VERIFIED ANSWER/AFFIRMATION/EXHIBITS	2
NOTICE OF PETITION/PETITION/EXHIBITS	3
AFFIRMATION IN REPLY/EXHIBITS	4
AFFIDAVIT IN FURTHER OPPOSITION	5

Petitioners (Ray River) seek an Order enjoining the Village of Haverstraw (Village) from entering and/or trespassing upon the subject property until the pending Article 78 Petition is decided; recovering the full rental value for the dates of March 13, 14, and 15, 2007 when the Village entered upon the Subject Property, including any additional damages incurred by the subject property; ordering the Village to pay sanctions in an amount to be determined by the Court; and such other relief the Court deems proper and just.

In July 1999, the Village of Haverstraw informally proposed to begin a redevelopment project of its downtown waterfront area. Subsequent to declaring the Project Area as "substandard or

unsanitary" (in compliance with General Municipal Law (GML) §502 and 504), the Village authorized and directed preparation of an urban renewal plan based on the proposal. After some initial problems with possible adverse environmental impact were resolved, the "Waterfront Urban Renewal Plan" (the URP) was drafted by the Village's consultants with the assistance of the proposed Developer and reviewed by the Technical Advisory Committee of the Village. The draft was then presented to the Village Board (in accordance with GML Article 15).

On June 12, 2001 the Village Board referred the URP to the Planning Board of the Village of Haverstraw for its report and recommendation pursuant to GML § 505. On December 17, 2001 the Planning Board concurrently held a public hearing on the proposed URP pursuant to the same statute and pursuant to Eminent Domain Procedure Law (EDPL) § 201, and a review of the public use to be served by the Project and the impact on Village residents of the proposed condemnation of certain parcels of land in the Project Area. The meeting was continued to January 7, 2002, and a public comment period remained open until January 31, 2002.

On July 14, 2003, pursuant to GML §507, the Village Board authorized publication of the Notice of Availability for Public Examination of the proposed Land Acquisition and Development Agreement (LADA) between the Village and the developer. Included therein was specific reference to the project proceeding in phases. Subsequently, on July 28, 2003, the Village Board, in anticipation of moving forward with the project, held and closed concurrent second public hearings on: 1) all proposed actions, 2) EDPL §201 hearings, 3) proposed designation of the developer as the qualified eligible sponsor of the project and 4) the LADA and proposed disposition to the developer of parcels in the Project Area for redevelopment to ensure compliance with all relevant statutes concerning the URP. At this hearing, Ray River's principal, Bruce Kanner, noted the likelihood that the taking of the subject property might not occur for as much as seven years.

Following these final public hearings, the Village Board, on August 11, 2003, adopted Resolutions for the Determination and Findings, which were published on August 16, and 17, 2003, pursuant to EDPL §204. The Determination and Findings, in compliance with the statute, specified the public use to be served by the project, the approximate location for the public project (which area included the Subject Parcel) and reasons for its selection, and the general effect the proposed project would have on the environment and the residents of the locality. Adopted simultaneously with the Determinations and Findings at this time were the final URP, which

provided that the redevelopment of the Land Use Areas might proceed in phases, as well as the Lead Agency Findings Statement, which stated that development was expected to take place in three phases, with the portion designated as Land Use Area A proceeding first, followed by Areas B through and including F. In addition the Developer's Redevelopment Plan, attached to the Statement, described the project consistently as multi-phased.

At the August 11, 2003 meeting, and prior to approval by the Board of the LADA, a discussion ensued regarding the amendment of the LADA, at 1.2 (b), to provide that the developer, Ginsburg Development LLC (GDC) must seek acquisition of the development parcels within three years. Then-counsel for the Village, reflecting prior concern regarding the takings, noted that "the time period in which the condemnations would begin was in fact greatly reduced after negotiations....The developer came to an agreement that the maximum time period would be three (3) years...." Kanner, during the subsequent public participation period of the meeting, then inquired regarding the calculation "of the three (3) year time period, which was reflected in the LADA to acquire his property...." Village counsel responded

It is three years from the non-appealability of the documents passed that night on Site A. He believes the thinking behind it is that the time limit should start when the developer knows that he has at least secured the Site "A" portion of the project. It would be at that point that the three year requirement would begin.

In October 2004, GDC wrote to Ray River to advise that the Village was having appraisals of the subject property done, and further that environmental testing was taking place at the site. GDC also offered to commence negotiations with petitioners "to take title well in advance of the scheduled development." The following month, GDC conveyed an offer to Ray River of \$1,500,000.00; this offer was not responded-to by petitioners for some four months, when, in March 2005, petitioners rejected the offer as not offered in good faith. Soon thereafter GDC inquired in correspondence as to what Ray River considered a good-faith offer; on March 28, 2005, petitioners proposed to solicit offers from third parties, and submit the best such offer to GDC, which offer GDC would be bound to meet or, failing that, GDC must exclude the subject property from the development. Approximately one week later GDC rejected this counter-offer, and advised that it would request that the Village proceed with condemnation of the subject property, which GDC did, in a letter to Village Counsel, on June 22, 2005.

The Village meanwhile had commenced condemnation proceedings on some of the properties--those designated to be the subject of the first phase of development--included within the URP, those proceedings commencing within one year after the publication of the Determination and Findings. On August 11, 2006, counsel for the Village sent a letter to Ray River stating their intentions to acquire the Subject Property, and made a good-faith offer of \$ 1,190,000.00 for the acquisition. Counsel advised petitioners that they had 90 days to accept or reject this offer. On March 7, 2007, the Village, in light of petitioners' failure to accept the tendered offer, informed the Ray River by mail that they were seeking to enter onto the Subject Property to perform environmental testing in preparation for the property's condemnation. In response, two days later, Ray River filed an Article 78 proceeding in the nature of a Writ of Prohibition seeking to preclude the Village from taking, or seeking to take, title pursuant to eminent domain. Ray River also wrote a letter to the Village informing them that they were not permitted on the subject property, and that they would be considered trespassers if they entered; the petitioners also padlocked the entrance to the Subject Property.

However, notwithstanding these warnings, the Village entered upon the Subject Property to perform testing on March 13, 14, and 15, 2007. Petitioners then, on March 20, 2007, sought an Order to Show Cause preliminarily and permanently enjoining future entry by the Village upon the subject premises, arguing that, pursuant to EDPL §401, the Village had three years following the publication of the Determination and Findings (i.e. until August 16, 2006) to commence a condemnation action relating to the subject property and, having failed to do so, they were barred from entering the premises preparatory to such taking. The Court stayed all proceedings until oral argument on the matter was heard on March 23, 2007, at which time the Village argued that, while proceedings to condemn the subject property had not occurred within the required three year time period, not only had the Village taken steps to further the taking (e.g. the letter advising petitioners that condemnation was forthcoming and communication an offer of just compensation for the taking), but that the urban renewal project which included the subject property was "multi-phased"; that takings in the primary phase of the development had occurred within three years from the publication of the Determination and Findings; and that, therefore, while outside of the three year taking period for single-phase developments, the proposed taking was within the ten years permitted for multi-phased takings, and thus timely.

Pursuant to EDPL §401 and these offered facts, the Court

denied the requested interim relief, but left open Ray River's request for a permanent injunction. Petitioners now argue that, while in some circumstances it may be true that a municipality has ten years, rather than three, under EDPL § 401 to move forward with a multi-phased taking, and that prior takings in the waterfront project undoubtedly did occur within three years of the publication of the Determinations and Findings, the Village never identified the takings herein (as distinguished from the project itself) as multi-phased, and thus cannot now claim that they were intended to be multi-phased. Further, and irrespective of the additional time granted by EDPL §401, Ray River claims that, by amending the LADA at 1.2 (b), the Village voluntarily and irrevocably committed to all takings within a three-year period. The Village responds that there was never any question, in the minds of any of the participants to the waterfront project, including petitioners, that the project was to take part in phases.

The process for an Urban Renewal project for which eminent domain takings are necessary is governed by interlocking provisions of the General Municipal and the Eminent Domain Laws. Pursuant to EDPL § 404, a condemnor may enter onto property that is to be condemned prior to its acquisition for the purpose of making surveys, test pits and borings, or other investigations, and also for temporary occupancy during construction. The condemnor is statutorily liable to the landowner for any damage caused to the Subject Property. Thus, entry onto the subject property by the Village, if incident to a condemnation, was proper.

Further, EDPL §401 places in effect a statute of limitations on the condemnor of property, which period begins to run from the last day the Determination and Findings are published. While EDPL §401(A) provides that such takings must commence within three years, EDPL §401 (C) extends the time-frame to ten years, provided that the takings were expected to be performed in stages, and that the proceedings regarding the first stage were commenced within three years. Thus, if the Waterfront Urban Renewal Project herein, and the takings incident thereto, were expected to be performed in stages, then the proceedings to condemn any property not included within the first stage thereof would have been timely, so long as they were commenced by August 17, 2013.

In addition, GML §505, which sets forth the requirements for an Urban Renewal Plan, requires that the Village Board, upon receipt of the planning board's recommendation, resolve that: 1) the area is substandard or unsanitary; 2) any financial aid to be provided is necessary; 3) the plan affords maximum opportunity to private enterprise consistent with the sound needs of the municipality as a whole; 4) the plan conforms to a comprehensive

community plan for the development of the municipality as a whole; 5) there is a feasible method for the relocation of families and individuals displaced from the urban renewal area into comparable living accommodations; and 6) in the case that the project is to be performed in stages, that there will not be any undue hardship towards the residents of the locality in performing the project in stages.

While it is clear, as petitioner argues, that neither the URP, nor the Lead Agency Findings Statement under SEQRA (SEQRA Statement), nor the Determination and Findings herein, contained reference to multiple stages in the takings proposed therein, the Village has noted that the aforementioned documents are replete with references to the project proceeding in phases. For example, the URP notes that the development may be phased; the SEQRA Statement denominated three development phases; and the Findings describe the three separate phases of the project. To be sure, one may infer, from the multi-phasing of the development, that the takings might occur in several phases as well. Nevertheless, as Ray River properly asserts, there is nothing in the nature of the project to compel such a conclusion, and, as set forth previously, none of the development documents sets forth any plan or intention to conduct the takings in phases.

However, contrary to petitioners' argument, the failure of the Determinations and Findings in particular to reflect an intent by the Village to pursue the takings in stages is not evidence of a defect therein. EDPL §204 provides

- (B) The condemnor, in its determination and findings, shall specify, but shall not be limited to the following:
 - (1) the public use, benefit or purpose to be served by the proposed public project;
 - (2) the approximate location for the proposed public project and the reasons for the selection of that location;
 - (3) the general effect of the proposed project on the environment and residents of the locality;
 - (4) such other factors as it considers relevant.

While the relevance of an intent by the Village to condemn the properties in the URP over several years is certainly arguable, the statute appears to give wide discretion to the Village as to whether or not to include such other factors as multi-staging in the Determination and Findings. Consequently, the absence of such

factors from the Determination and Findings does not support petitioners' motion to strike the latter.

More importantly, however, it is abundantly clear that these petitioners knew full well, from an early date, that the takings would likely proceed in several stages, and over an extended period of time. As set forth previously, during the EDPL §201 public hearing on July 28, 2003, petitioners' principal, Bruce Kanner, protested the developer's right to take the subject property "...with no time limit...[in] probably seven to ten years...." And, as set forth in greater detail below, delay in proceeding with the takings was clearly of concern to the municipality as well as petitioners, since they purportedly amended the LADA to avoid such a delay. Thus, petitioners cannot now argue that the Village should not be permitted to avail itself of the extended time limit (ten years) afforded to multi-phased takings pursuant to EDPL § 401, since they assert that there was no evidence that the property was "...to be acquired for a public project in stages..." (see EDPL §401 [c]). The several hearing minutes demonstrate, to the contrary, that such a taking in stages was contemplated well prior to the final vote on the project by the Village. Having clearly intended the takings to occur over an extended time, and having commenced prior takings in a timely fashion, pursuant to EDPL §401 the proposed taking herein was indeed timely.

Petitioner further argues, however, that the Village separately bound itself to proceed with takings, in particular that of the subject property, within three years, and not the ten years afforded multi-stage projects under EDPL §401. As mentioned previously, there had in fact been concern voiced, not only by petitioners but by several of the Village's Board members, that GDC would not seek to condemn some of the properties, including the subject property, for many years. This concern was naturally fed by the scope of the project, which, as set forth above, contained several phases which would include construction over as much as ten years. At the aforementioned August 11, 2003 Board Meeting, Liam McLaughlin Esq., then-counsel for the Village, was asked to explain any changes made to the LADA which was then before the Board for a vote. McLaughlin noted the above concerns, and stated "The developer came to an agreement that the maximum time period would be three (3) years...." Later in the meeting, petitioners' principal (Kanner) asked how "the three (3) year time period, which was reflected in the LADA to acquire his property" would be calculated. Village counsel responded that the three years period would, in effect, commence thirty days from that day (i.e. the time would run until September 10, 2006.)

The aforementioned amendment to the LADA appears in § 1.2 (b) thereof. It provides

At any time after the later of (i) the issuance of the Village Approvals (which may include site plan approval for one or more phases of the project) and (ii) the completion of the Environmental Procedures, and from time to time thereafter until the date which is three (3) years after the Village Approvals (but only including the approval of the Site Plan for Phase I of the Project at Land Use Area A) have become final and unappealable, the Developer may deliver a written notice to the Village of the Developer's election to acquire any one or more of the Disposition Parcels....
(LADA, § 1.2 (b), emphasis added.)

The amended LADA thus places the burden on GDC to deliver a written notice to the Village of the former's wish to acquire property by condemnation, which notice must be delivered to the Village within three years.

As set forth in greater detail above, following a six-month period in which the parties conducted unsuccessful negotiations to agree on a fair compensation price, on June 22, 2005, GDC indeed delivered a letter to Village Counsel, in which they requested that the Village commence condemnation proceedings for the subject property. This request was less than two years after the Board Meeting, and thus well-within the three years provided-for in the LADA.

To be sure, for whatever reason, the Village then waited some thirteen additional months before they even forwarded an offer to petitioners, and an additional seven months thereafter before they sought entry to the premise for the purpose of conducting a survey. Nevertheless, embodied within the amended LADA was the Village's intent to insure prompt takings under the URP, which intent was to be effected by requiring GDC to deliver any requests to condemn parcels within three (3) years. GDC fulfilled their obligation insofar as it relates to the subject property, hence neither EDPL §401, nor the LADA, present a bar to the proposed taking by the Village.

Based on the foregoing, it is hereby

ORDERED, that the petitioner's motion, for a writ of prohibition, barring condemnor from proceeding with its proposed acquisition of certain property; to recover the full rental value for the dates of March 13, 14, and 15, 2007 when the Village entered upon the Subject Property; and ordering the Village to pay

sanctions in an amount to be determined by the Court, is denied.

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

Dated: White Plains, New York
July , 2007

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

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