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 DUTCHESS

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In the Matter of the Application of the METROPOLITAN TRANSPORTATION AUTHORITY,

relative to acquiring title in fee simple absolute to certain real property required for a commuter railroad project known as the

DECISION/ ORDER/JUDGMENT

WASSAIC EXTENSION PROJECT

consisting of portions of those parcels of real property known as Section 7166-00, Lot 060103 (Parcel A), Lot 074464 (Parcel B), and Lots 076212 and 112313 (Parcel C), and Section 7066-00, Lot 954116 (Parcel D) on the acquisition maps and on the current Tax Map of the Town of Amenia, Dutchess County, in the State of New York

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WASHED AGGREGATE RESOURCES, INC.

Index No: 2674/98

Claimant,

-against -

THE METROPOLITAN TRANSPORTATION AUTHORITY,

Condemnor.

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LaCAVA, J.

The trial of this Eminent Domain Procedure Law (EDPL) Article 5 proceeding, challenging the valuation by the

Metropolitan Transportation Authority (MTA or Condemnor) of the real property taken by the MTA in Eminent Domain from Washed Aggregate Resources, Inc. (Washed Aggregate, or Claimants) took place before this Court on April 14, 15, 16, 17, and 18, May 27, May 28, and 29, June 30, July 1, and 2, August 11, 12, 13, 14, and 15, October 6, 7, and 8, November 24, 25, and 26, 2008, and January 12, February 2, 23, 24 and 25, and March 18, 2009. The following post-trial papers numbered 1 to 9 were considered in connection with the trial of this matter:

PAPERS	NUMBERED
NOTICE OF MOTION/AFFIRMATION/EXHIBITS	1
MTA PRE-TRIAL MEMO AND MEMO IN SUPPORT OF MOTION	2
AFFIRMATION IN OPPOSITION	3
MTA REPLY MEMORANDUM AND IN SUPPORT OF MOTION	4
CLAIMANT POST-TRIAL MEMORANDUM	5
MTA POST-TRIAL MEMORANDUM/EXHIBIT	6
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW	7
MTA REPLY POST TRIAL MEMORANDUM/EXHIBIT	8
CLAIMANT POST-TRIAL MEMORANDUM OF LAW	9

The instant property (the subject claim) consists of two non-adjacent parcels owned by claimants Washed Aggregate, a sand and gravel mining company. The property appears generally on the tax map of the Town of Amenia within Section 7166-00, as Lots 060103 (consisting of 45 acres, and commonly referred to as “Parcel A” or the “Southern Parcel”) and 074464 (consisting of 68 acres, and commonly referred to as “Parcel B” or the “Northern Parcel”), and lie generally between Route 22 (on the west) and Route 81 (on the east.) The individual parcels which are the subject of the direct taking claim are a portion of Parcel A immediately adjacent to Route 22 (consisting of 3.685 acres), and a similarly situated portion of Parcel B immediately adjacent to Route 22 (consisting of 9.044 acres). The remainder of Parcels A and B are the subject of the consequential damages claim. Both portions of the two parcels are generally unimproved mining land.

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

FINDINGS OF FACT

During the 1970's, a sand and gravel mine commenced

operation on the subject parcels as Washed Aggregate Resources, Inc., a company owned, *inter alia*, by Carl Rennia. The company conducted the mining enterprise at varying degrees of output until 1997, when Dominick Peburn commenced negotiations to purchase the company which, at the time, was producing minimal product. At that time, both the northern and southern parcels had legal access to Route 81 (located to the east). In addition, an access road also existed from the southern parcel to Route 22 (located to the west). Based upon the testimony of Donald Fisher (the claimants' appraiser) and depictions on maps (in evidence) remnants of roadway access (apparently long abandoned) to Route 22 and/or Route 81 existed in the vicinity of the boarder of the northern parcel. This northern access roadway (or the remnants thereof) actually traversed another parcel (herein referred to as the "Luther Parcel") which lay generally in the area between the northern and southern parcels bounded on the west and east by Routes 22 and 81. It is the Court's understanding that the claimant had accepted the pre-vesting offer with regard to this parcel and its valuation is not a part of the instant proceeding. Existing on the parcels at that time, in addition to a non-operational concrete plant, were various types of mining equipment such as excavators, pan scrapers, crushers, washing apparatus, etc.

Following a period of negotiations, in May 1998, Peburn and three other investors purchased all of the assets of Washed Aggregate, including the subject parcels and all other real estate; its equipment; and its existing goodwill, for $675,000.00. Soon thereafter, MTA moved to acquire title by eminent domain, *inter alia*, to the two portions of the subject parcel (the Northern and Southern parcels) noted above. As part of the application, MTA submitted an order of condemnation (the "Order"), which was subsequently signed by the Court on July 27, 1998 (hereinafter the "Acquisition Date"). Attached to the application was an annex ("A") which contained metes and bounds descriptions of the 4 parcels which were to be the subject of the taking; three of the descriptions (**not** including that relating to the Northern Parcel) also included express reservations (the "Reservation") to the condemnees of

> "...any necessary and existing rights of pedestrian and vehicular access...from their adjacent lands to New York State Highway Route 22/343...subject to any reasonable limitations required by MTA and Metro North to prevent such access from interfering with commuter railroad operations and related activities.".

In the application in support of the taking, MTA stated that

the purpose of the acquisition was to extend Metro-North's Harlem commuter railroad line north to serve passengers in Upstate New York, Northern Connecticut, and Berkshire County, Massachusetts, and, in addition, to relieve parking congestion at the Dover Plains station located a short distance to the south. Dover Plains had been the northern most passenger terminus of the Harlem line since the early-1970's, when the former operator, the Penn Central Railroad, had ceased rail passenger operations north of that point. The taking was designed to facilitate the construction of a new commuter railroad station, an adjacent parking lot, a rail access road, a railroad car storage yard, and the creation of a grade crossing incident to the new station and parking lot. Following the signing of the acquisition order by this Court, an acquisition map was filed by the MTA. While the "Reservation" was not specified in the map, the parties, at trial, conceded to the map having been filed properly, with the "Reservation" deemed filed therein by its presence in the application.

MTA had made a pre-vesting offer to Washed Aggregate of compensation in the amount of $37,611.00, representing the value of the direct taking parcels as set forth in the highest approved appraisal prepared for MTA by Theodore Powers of Powers & Marshall Associates Inc. Washed Aggregate rejected MTA's offer, and filed a Verified Claim dated December 10, 1998 (the "Claim"). As of the acquisition date, the Town of Amenia had assessed the total value of the subject parcel at $598,100.00. Washed Aggregate commenced the instant action, asserting both a claim for the direct taking of the aforementioned Parcels A and B constituting approximately 12.7 acres immediately adjacent to Route 22, and for an additional claim for consequential damages resulting from the loss of the ability to conduct mining operations on the remaining portions of the Northern and Southern parcels as a result of the taking.

THE TRIAL

Claimant presented the testimony of Dominick Peburn, the President and the only principal of Washed Aggregate to testify at the trial. Dominick Peburn testified that he had some thirty years experience in the sand and gravel mining industry, including the purchase of several mining properties in western Connecticut, and one in Columbia County, New York. He stated that he had worked these mines, and then sold them or made some other use of the mined-out land. On one occasion in 1996, while returning to Connecticut from the Columbia County property, he observed, adjacent to Route 22, a rock-crushing machine on land that he later learned was the subject property. Peburn

researched the mining permit and determined that it allowed the mining, as well as crushing and washing operations on nine of the permitted fifty-eight acres including to down below the water table, all of which was highly desirable. He examined the mine land-use plan and the mine operation itself, which, according to Peburn, was going forward at a low level of intensity. Between 1996 and 1998, he engaged in negotiations with the operator, Al Rennia. In 1998, Dominick Peburn along with other investors purchased Washed Aggregate for $675,000.00, with Rennia taking back a mortgage of $500,000.00. Dominick Peburn understood that the purchase included the approximately 112 acre site, some mining equipment, several structures, and such other intangibles as good will that the company possessed. At about the time of the purchase, he testified that he sought to have the MTA construct a thirty foot wide paved haul road within the existing 50-foot wide right of way in order to insure access to Route 22 from the Southern Parcel. This request, however, was not incorporated by MTA, either into the "Reservation", nor, as set forth below, into the final road configuration for the project.

Subsequent to the purchase, in 1999 and 2000, Dominick Peburn testified that he operated Washed Aggregate, although not at full capacity; this differed from his deposition testimony on the subject, which indicated that following the sale Washed Aggregate "did no work." In 2000, during the construction of the railroad station's parking lot, Peburn testified that he dealt with MTA's construction contractor, Delaney Construction, and sold them a substantial amount of sand and gravel which was of New York State Department of Transportation (NYSDOT) acceptable quality. During this time, the parcel was operated as a mine, with crushing and washing taking place on the property. The aforementioned haul road (with its unpaved fifty foot wide right of way, much of which was used by trucks entering the Southern Parcel)was utilized to transport(mostly on Delaney trucks)the aggregate(sand and gravel)to the station site.

The western end of the haul road, close to Route 22, was subsequently paved, and used by MTA to form the parking lot entry way. The unpaved roadway, continuing east and into the Southern Parcel from the southeast corner of the parking lot, however, was narrowed by MTA to approximately fourteen feet according to Peburn. Guard rails were constructed, and the path of the roadway was curved and elevated by approximately nine feet from its previously gentle grade. The road ends(to the east)in a bridge which Peburn estimated was eighteen feet wide, wide enough for two trucks to pass at the same time. However, since some of the vehicles owned or utilized by, or engaging in commerce with Washed Aggregate measured in excess of eight feet wide, the road

configuration and the bridge size precluded simultaneous use of the new roadway by more than one such vehicle. Additional unfavorable factors included negative recommendations by the Town Attorney and Code Enforcement Officer (see below). Also, at about this time, there was a minor derailment of a train coming into the station. Based upon these factors, Peburn testified that, in consultation with his partners, he and Washed Aggregate decided to cease all operations at about the time that the station opened.

Ryan Peburn, Dominick's son, also testified as to his role in Washed Aggregate. During his time employed by the claimant, he was aware of federal Mine Safety and Health Administration recommendations that haul road design be based on the maximum width of trucks in use at the mining facility, which he asserted was at least eight feet. He identified photographs of sand which he stated was mined by Washed Aggregate from the Southern Parcel for sale to Delaney in connection with the station construction job. He also identified mining and crushing equipment on the Southern parcel, some owned by Delaney, and some by the claimant. Delaney used this equipment to process Washed Aggregate-mined material, which in all respects met his specifications. In particular, Ryan Peburn noted the presence on site of a Delaney owned Caterpillar scraper pan, which was over 11 feet in width and had been transported by a low-bed trailer from Route 22, down the then-existing haul road (*i.e.* prior to the re-grading, and placement of guard rails), and onto the property. He further identified a photograph depicting on the premises an articulated haul truck which was nearly 10 feet wide. Finally, he noted that on the original haul road there was sufficient sight lines at the bridge to allow one vehicle to observe another vehicle approaching and pull to one side to allow it to pass. In his opinion, there was not similarly sufficient sight lines on the new MTA-constructed curved access road.

David Portman, of Frederick P. Clark & Associates, Inc., testified as a planning and traffic consultant for Washed Aggregate. Although not a licensed professional engineer, Portman offered his firm's report as a planning document related to traffic safety. It was his opinion that the access road constructed by MTA from Route 22 to the subject parcel was dangerous, since it involved the co-use of the roadway by cars and trucks. In 2001, while employed by claimant as their traffic and planning consultant, he had written to the Amenia Zoning Administrator, advising him that MTA had "...redesigned, relocated and constructed a new, combined access drive to serve both the large trucks emanating from the Washed Aggregate mining operation and the passenger cars from MTA's new commuter parking

lot...", and that, therefore, in order to continue the claimant "...must obtain an amended special use permit from the Zoning Board of Appeals…."

Mr. Portman's opinion regarding the need for an amended permit is based on his conclusion regarding claimant's "legally preexisting use" under the Town Code, which conclusion was reached after Town Officials (including the Town Attorney) stated categorically that they had treated and would treat the mining operation as a legally preexisting use[1]. Mr. Portman believed that Washed Aggregate commenced its mining operation in 1979, which was prior to the promulgation of the Town Code in 1980. During his testimony on cross-examination, however, MTA introduced a copy of the Code which suggested that elements of the Code did actually predate Washed Aggregate's mining operation by some years, although there is no dispute that mining operations by Washed Aggregate's predecessors did themselves predate the Town Code and even state mining regulations for that matter. In fact, the 1979 application to the NYS DEC included a section signed by the Town Supervisor, in which he affirmed that no Town regulations governed the proposed mining activity.

Mr. Portman testified that because of the changes in the then-existing conditions of the mining operation including renovations relating to access to Route 22, the introduction of truck and commuter automobile traffic to the same narrow entrance drive, the creation of what is essentially a single access route which is unsuitable for commercial traffic relating to mining operations, the severe upward re-grading of the road, and the presence of a railroad gate which could cause a traffic back-up onto Route 22 or a back-up caused by possible truck congestion at the entrance area of the restricted roadway to the Southern Parcel, the legally pre-existing status possessed by Washed Aggregate would be negated and any application for an amended use permit due to the change would surely be denied. This was verified, according to Portman, in his conversations and correspondence with the above-mentioned Town Officials. He also concluded that, while the Town might consider DOT approval in their deliberations, they would generally, in his experience, not defer to DOT's opinion but rather make their own determination as to the safety of the intersection. And, Portman concluded that, even if the Town did permit exit and entry from Route 81 to the Washed Aggregate property, the roadway conditions of Route 81 precluded its safe use for industrial traffic. He also noted that

[1] While condemnor now asserts that this testimony by Portman was hearsay and thus inadmissible, MTA failed to object to the admission of this testimony at trial.

the Mined Land Use Plan contemplated the mining of the Southern Parcel out to within 25 feet of the eastern property line and creation of a berm and pond there, which in any event would preclude any access to Route 81.

Portman also indicated that he was familiar with the road, present on the 1956 US Geological Survey (USGS) Map, and the Reclamation Plan Map, running along the common property line which in the past had provided joint access from both the Luther and Northern Parcels, including the disused concrete plant (the remains of which were in existence on the Northern Parcel), over the railroad tracks, and onto Route 22. The taking, he stated, ended this road access, and would necessitate truck travel out onto Route 81 and south to the Southern Parcel, which the Town would not have allowed. Alternatively, he was also familiar with a pass under the MTA Right of Way and Route 22, alternatively described as the "cattle pass" or "culvert", which, in his opinion, might have provided access from the Northern Parcel to Route 22. While he conceded that the Northern Parcel did have an entrance from/exit to Route 81, and that truck traffic was permitted on Route 81, he asserted based upon conversations with Town officials that the Town had made clear that it would not permit access to either parcel from Route 81, or transfer traffic between the parcels via that route.

Michael A. Galante also testified for Washed Aggregate as a traffic consultant. Galante first saw the subject property in 2005. Claimant introduced aerial photographs of the haul road/parking lot exit/Route 22 intersection, upon which templates of the turn-radius of large trucks were superimposed. The templates, according to Galante, depicted what was allegedly off-tracking (*i.e.* driving partly off of the roadway surface, or into opposing lanes of traffic) of such trucks as they entered or exited the subject property. It was his opinion that such a condition would not have normally been approved by DOT. Galante also testified that, while guard rails might have been installed by DOT north of the intersection, if an adjoining landowner needed to continue access to Route 22 in an area where such access was blocked by the guard rails, the landowner need merely apply for modification of the guard rail configuration. And Galante was of the opinion that it was possible, despite the attempt to coordinate the railroad crossing and intersection signal lights, that traffic (including large truck traffic) could back up at the crossing and onto Route 22, when a truck was present to enter and/or exit.

Washed Aggregate also presented the testimony of George L.

Marshall, one of claimant's two consulting geologists. Marshall testified that he became affiliated with the former owner of the subject parcels, Luther's Sand and Gravel, in either 1969 or 1970. In 1973, he assisted Luther's in their preparation of the DOT's newly-required Source Report for sand and gravel mines. In 1975, he also assisted Luther's in complying with the recently-enacted Mined Land Use Reclamation Law. In 1978, he became familiar with Bill Anderson and Al Rennia, who later formed Washed Aggregate at the subject location. Rennia ran the company until the 1991 when, because of heart problems, he was forced to seek a buyer for the company. During the time when Rennia ran Washed Aggregate, the Mine Land Use Plan permitted mining below the water table; in fact, Marshall had prepared the original application seeking that entitlement.

Dr. Richard A. Hisert, also a geologist, testified for the Claimant. While Hisert is not a licensed or certified real estate appraiser, nor had he ever testified about valuation in court proceedings, he offered a value conclusion as to the mineral reserves and the income which could be generated by mining those reserves contained on the real property at issue herein. Hisert did not personally conduct soil borings on the subject parcels to determine the extent of the reserves and their quality. He relied instead on his personal knowledge of the subject properties garnered primarily during the time he served as a long-time consultant to Allen Sand and Gravel which owned a neighboring property, on a study conducted by George Marshall (which itself partly relied on letters from a Bernie Neuman), on a study by Clough Harbor and Associates of adjacent property holdings, and on New York State Topographic Maps.

Based on all of these sources, Hisert concluded that the permitted sand and gravel reserves contained in the southern parcel amounted to approximately 1,000,000 (one million) cubic yards, or 1,500,000 (one million, five hundred thousand) tons of said material, assuming that Washed Aggregate could mine up to the 25 foot setback limit under which it had operated based on its pre-existing use status. If, on the other hand, the current zoning requirement of 300 foot setbacks were to be enforced due to changes in the original use, Hisert expressed his opinion that there would be approximately 280,000 (two hundred eighty thousand) cubic yards of mineable reserves, a reduction of approximately 700,000 (seven hundred thousand) cubic yards, or approximately 1,000,000 (one million) tons of reserves. Further, Hisert came to the conclusion that the permitted sand and gravel reserves contained in the northern parcel amounted to approximately 1,800,000 (one million, eight hundred thousand) cubic yards, or 2,400,000 (two million, four hundred thousand)

tons of said material, again assuming that Washed Aggregate could avail itself of the 25 foot setback requirement due to its pre-existing status. If, however, the current 300 foot setback requirement were enforced on the northern parcel, according to Hisert, the available reserves would be reduced to approximately 500,000 (five hundred thousand) cubic yards of mineable reserves, or approximately 705,000 (seven hundred five thousand) tons of said material, a reduction of approximately 1,300,000 (one million, three hundred thousand) cubic yards, or approximately 1,700,000 (one million, seven hundred thousand) tons of said reserves. Regarding just the direct taking, the amount of reserves, according to Hisert, would be just over 206,000 (two hundred six thousand) tons. Finally, he estimated the total potential reserves (including non-permitted areas) to be approximately 3,200,000 (three million, two hundred thousand) cubic yards in the northern parcel, and 1,900,000 (one million, nine hundred thousand) cubic yards in the southern parcel, or a combined total for both northern and southern parcels, of approximately 7,000,000 (seven million) tons. He also expressed opinions that it was likely that claimant would be granted permission by DEC to expand its mining operations beyond the permitted areas and into those potential reserves, and also be granted authority (denied in the 1999 renewal) to mine the wetlands. Hisert conceded, however, that reception of a wetlands permit was not guaranteed, and agreed that approximately 90% (1,300,000 tons) of the reserves in the southern parcel, and approximately 40% (960,000 tons) of the reserves in the northern parcel, are below the water table, with some of the reserves in the southern parcel lying as much as 90 feet below the watertable.

Hisert conducted a discounted cash flow (DCF)analysis to value the Washed Aggregate properties, using a 20-year period. In his opinion, DCF was the appropriate analysis to conduct for the subject, since a close analysis of both the market (for the mined product) and the reserves would be necessary to proper valuation of the property. The alternative, a sales analysis, according to Hisert, was often flawed since either the motivation or knowledge of the buyer or seller of a comparable property might not properly be known from just the sales price, or a sales analysis might miss other agreements relating to the sale such as crushing, transportation, or other interests. In any event, according to Hisert, and while he did not consult with any real estate brokers for such information, he was unable to locate sales of any similar mining operations for use as comparable properties, even though MTA’s appraiser apparently located five such sales. Hisert based his analysis on assumptions regarding business activity, production levels, and income that were never

actually generated by the subject (Washed Aggregate). In particular, Hisert assumed for the purpose of his analysis that Claimant could sell approximately 200,000 tons of sand and gravel per year, or approximately 3,800,000 (three million, eight hundred thousand) tons of material for the 20-year period, and that some 54 truck trips per day in and out of the property (or about one every four minutes) would be needed to sustain the mining operation. This resulted in an estimate of value for the 20-year period, on a discounted cash flow basis, of $ 11,400,000.00.

The basis for Hisert's opinion on future income was "letters of intent" or notes by prospective customers (there is no evidence that they had ever been customers in the past) of Washed Aggregate, indicating how many tons of material (but not the price thereof) they might purchase from the claimant – from which he computed prospective annual sales. These letters, except for one from before the sale to Dominick Peburn, were all written after Washed Aggregate ceased mining operations. Several of the letters were merely price quotation requests, and none articulated a firm commitment to purchase. Notably, Hisert also calculated average prices of sand and gravel of $10.00 or more per ton, during 1998, 1999, and 2000, while New York State average prices during that period, listed in Appendix A of his own report, were closer to $5.00 per ton. Hisert additionally assumed that Washed Aggregate would increase its share of the sand and gravel market in the area, although there is no evidence that they had done so in the past, and Hisert admitted that the future failure of claimant to increase their market share, or the failure of DEC to renew their permit, would make his estimates entirely inaccurate. Hisert also estimated income from ready mix concrete operations by Washed Aggregate, although there was no operable concrete plant on the acquisition date and such a plant would have to be built before such operations could commence. Hisert conceded no information about prospective customers of such an operation, and that he did not value the ready mix concrete itself, but rather the non-existent ready mix business.

Regarding expenses of the mining operation, Hisert calculated the average cost of production in the industry, by inquiring of similar operations what their costs were. However, he then reduced these costs by 40% to account for Dominick Peburn's experience in the industry, although he also conceded that most operators of small mines like Washed Aggregate similarly would rely on experienced management, making such a large adjustment just for "experienced management" inappropriate. Hisert also was unable to point to inclusion in his cost estimates ($2.75 per ton) of the amounts needed to purchase

below-the-waterline mining equipment (such as dredges or drag lines), which costs could amount to $ 1,000,000.00 or more. Hisert's DCF analysis on the issue of discount rate, however, suffered from his apparent lack of knowledge of common investment and lending rates and practices, calling into question his calculated discount rate. He also was unsure if he had ever calculated a capitalization rate, and did not remember how to do so. Notably, Hisert also calculated his discount rate by using 20 and 30 year treasury notes, and was questioned on cross-examination as to whether such safe investments bear a reasonable relation to more risky investments such as a mining operation like Washed Aggregate. And Hisert was closely cross-examined on his claimed use of a 15% discount rate in year one, where he actually used a 13% rate for that year. Hisert calculated, based on all factors, a value of $11,401,824.00 for the mineral reserves present on the parcels, and a value of $113,732.00 for the ready-mix concrete plant, for a total value conclusion of $11,515,556.00.

Hisert was also asked about a roadway leading from the northern parcel to Route 22, which, he conceded, was not being used by claimant at the time of the taking. He was also aware, from the acquisition map, of the existence of a cattle pass from the northern parcel, and under the railroad right of way and Route 22 to adjacent land on the west side of Route 22. He described it as a fairly large concrete structure about 10 feet wide, which, it was his belief, could be used by a quarry operator to remove minerals from the northern parcel to the west side of Route 22 for entry onto that Route. It was his understanding that Washed Aggregate had deeded rights to utilize the cattle pass. While he was unsure whether a vehicle could pass through the culvert, it was his opinion that a conveyor system, commonly used by mines, could be employed to carry the reserves from the northern parcel, through the cattle pass, and to trucks on the west side of Route 22 for transport elsewhere.

Donald Fisher, Washed Aggregate's appraiser, testified regarding highest and best use of the subject property. He concluded that, before the taking, the highest and best use of the property was the use to which it had been put immediately prior to and following the taking, namely a quarry. Fisher examined road access from Route 22 to the site, noting that, while the flood plain map of the area does not show the road leading from Route 81 to Route 22 adjacent to the south-west boundary of the northern parcel, other maps, and an aerial photograph obtained from the State of New York do, in fact, show such a northern haul road, the remnants of which he physically

observed on the northern parcel when he inspected it. Fisher also observed remnants of the 50-foot haul road right-of-way on the southern parcel. According to Fisher, the results of the taking included the deprivation of access to Route 22 from both parcels including the deprivation of a right-of-way suitable for truck traffic related to mining operations in the south, and the deprivation of an intersection with Route 22 and the southern haul road that provides for safe truck traffic related to mining operations.

Fisher initially considered using comparable sales of mining properties to value the subject, and actually approached other appraisers to obtain comparable sales data for a market appraisal of the subject. Indeed, he conceded on cross-examination that he had appraised many quarry properties in the past twenty-five years, and in so doing had utilized the sales comparison method in approximately one half of those occasions (valuing the real estate inclusive of the mineral reserves), with the remainder being income capitalization analyses, but in only one of those did he employ a DCF analysis. Such a market analysis would use properties of comparable size that also contained similar mineral reserves, and he had previously conducted many such analyses, using comparable quarry properties from all areas of New York State. Despite the fact that Fisher did not know the tonnage of the reserves on the subject parcels[2], or the tonnage of any of the potential comparable quarry sites, he nevertheless chose to disregard several potential comparable quarry sites, concluding that those suggested comparable sales simply did not have the same level of reserves as the subject parcels. He also testified that he was unaware that the "Amenia Sand and Gravel Mine Market Study", prepared by him in 1997 and appearing in his report as Appendix E, actually included four properties that did sell within several years before or after the taking.

Upon instruction from counsel, Fisher limited his market analysis to only the bare land value of the property before and after the taking, rather than the value inclusive of the mineral assets therein. He therefore sought out sales of similar, industrial or rural commercial land. Fisher also admitted that he did not consider the $675,000 sale of Washed Aggregate occurring just two months prior to the acquisition as indicative of value, because it included not only the northern and southern parcels, but also improvements, equipment, and the good will of the company, which would, he said, make the sale "not arms

[2] Notably, Fisher inquired about, but did not retain any details concerning the tonnage on the potential comparable quarry sites.

length."

Notably, Fisher used one sale (Comparable # 3) that was not merely vacant land, but in fact a quarry, which may have had a considerable mineral reserve on site. Fisher also failed to recognize that this same sale contained, in addition, an adjoining parcel, making his calculation of price per acre inaccurate. Further, Fisher was cross-examined on his before analysis comparable properties generally, regarding whether they were geographically superior to the subject and therefore not really comparable at all. Finally, after adjusting his before sales, Mr. Fisher determined per acre values of $5,000.00 for the southern parcel and $4,700.00 for the northern parcel, in each case values which were nearly one third above the adjusted mean, the adjusted midpoint, and the adjusted median of his comparable properties, without any clear explanation of why he had done so. Fisher concluded his before analysis by arriving at land values of $220,000.00 for the forty-four acre southern parcel and $302,000.00 for the 64.40 acre northern parcel and improvements of $30,000.00 and $18,000.00 respectively for each parcel. Total values for each parcel were calculated to be $250,000.00 and $320,000.00 respectively for a total before taking value of both parcels of $570,000.00. Fisher further testified that he examined and accepted Hisert's value conclusion, pursuant to his DCF analysis, of $11,515,556.00 . He then added it to his own vacant land analysis, as set forth above, to reach a total conclusion of value for the two parcels and their combined mineral reserves, before taking, of $12,085,556.00.

In his after taking analysis, Mr. Fisher recognized the effects of the direct taking: in the southern parcel, 3.685 acres including some 1,100 feet of the haul road east from Route 22 to and including the bridge leading to the remainder of that parcel; and in the northern parcel, 9.044 acres running along the western portion of the parcel and directly adjacent to the former railroad corridor, including some 750 feet of the former haul road described above as adjacent to the Luther parcel and the northern parcel, and a former concrete batch plant. At the values per acre set forth above in the before taking analysis ($5,000.00 and $4,700.00, respectively), values would be yielded for the direct taking of $18,500.00 and $41,500.00, respectively, for a combined direct taking value of $61,000.00. To this, Fisher added $29,000.00 for the site improvements, $710,219.00 for the mineral reserves (from the northern parcel), and $113,732.00 for the value of the concrete plant (on the northern parcel), for a total value of $913,951.00 attributable to the direct taking.

Regarding indirect damages, Fisher expressed the opinion, based partly on the above-mentioned traffic studies, that access to Route 22 for truck traffic to and from the southern parcel, any reservation notwithstanding, was no longer possible. His personal experience with the trucks involved in claimant's business led him to conclude that two-way truck traffic, and even, at times, one-way truck traffic involving tractor-trailer trucks, would be precluded by the narrowness of the current haul road - flanked as it is by guard rails only 12 to 14 feet apart. Further, based on the mining permit, which allowed excavation to a point between 37 and 47 feet below the level of Route 81, access to the latter Route would, as mining progressed on the eastern side of the southern portion, become impossible. And, it was also his opinion that, based on the taking at the western portion of the northern parcel, access out to Route 22 from that parcel was eliminated. The two previous methods of egress, either via the northern haul road, or via the previously-existing north-south road to the southern parcel (*i.e.* across what became the remaining Luther parcel) and then out to Route 22, were eliminated by the taking. Based on these changes, which effectively eliminated access to or from either parcel for any mined materials, Fisher opined that the highest and best use pre-taking, i.e. as a quarry, was no longer viable, leaving residential (with zoning variances), agricultural, and/or recreational as the highest and best uses of the parcels after the taking.

Fisher's after taking analysis utilized six vacant land sales as comparable properties. These were chosen out of a larger group of eleven parcels initially deemed generally comparable, based on the after highest and best use, and were located not only in the area of the subject properties but in the Town of Amenia itself. After adjusting his after-taking sales, Fisher determined a value of $3,000.00 per acre for the southern parcel that was just below the range of the adjusted mean and adjusted median, and just above the adjusted midpoint of his comparable properties for the two parcels. For the 40.315 acres remaining after the taking, this yielded a value of $121,000.00 for the southern parcel. Mr. Fisher then used the same comparable properties to determine the value of the northern parcel. Using his adjusted sales, Fisher computed a per acre value for the northern parcel of $2,900.00 per acre, which was close to the range of the adjusted mean and adjusted median, but approximately 10% above the adjusted midpoint of the comparable properties. For the 55.356 acres remaining after the taking, this yielded a value of $160,000.00 rounded (r) for the northern parcel, and a total after-taking value of $281,000.00 for the two parcels. Since the before-taking value, as set forth above, was

$570,000.00, the indirect damages, solely on the property, totaled $289,000.00 according to Fisher.

As set forth above, Hisert calculated the value of the mineral reserves present on the parcels to be $11,401,824.00 and the value of the ready-mix concrete plant to be $113,732.00 for a total value conclusion of $11,515,556.00 for the mineral reserves. Fisher accepted Hisert's conclusion of value in this regard, and calculated a total before taking value of $12,085,556.00 by adding his land value of $570,000.00 to Hisert's mineral value of $11,515,556.00. Based on the aforementioned curtailment of access by the acquisition, according to Fisher, the mineral reserves and concrete plant cannot be utilized at all. He therefore calculated them to have no value after the taking, leaving a total loss conclusion equal to the before-taking value of $11,515,556.00. The sum of the $289,000.00 in property damages and the $11,515,556.00 loss of the mineral reserves and concrete plant represent a total loss value of $11,804,556.00, which is composed of direct damages, as set forth above, of $913,951.00, and indirect damages of $10,890,605.00.

MTA presented Dr. David Scribner, an appraiser and college professor, to testify about alleged violations of USPAP by Donald Fisher. According to Scribner, as a basic issue, Fisher failed to perform due diligence in gathering factual information for his appraisal and value analysis. USPAP Rule 1-1(b) requires appraisers to be sure that their gathering of factual information is conducted in a manner that is sufficiently diligent. However, Scribner pointed out numerous instances in which Fisher simply received information directly from Dominick Peburn or from claimant's attorneys, without doing any further due diligence on that information. In fact, much of Fisher's information regarding the subject parcels at the time of the acquisition came from Peburn or counsel, including the nature of MTA's reservation of access, the size of trucks used by claimant, the existence of a right-of-way between the northern and southern parcels on the acquisition date, the fact that Rennia was under duress leading to the stock sale, and other issues. Fisher was also unclear as to the actual width of the southern haul road, either before the taking or after the re-design, and the location of the northern haul road. Scribner also testified that Fisher failed to ascribe (by way of deduction from the consequential damages) benefits to the construction, including alteration of the driveway

access, paving, turn lanes, traffic signals, and the widening of Route 22.

However, chief among Fisher's USPAP violations, according to Scribner, was the former's improper market valuation of the subject parcels accomplished by simply adding the component parts, Hisert's mineral reserves valuation and his own land-only valuation, together. Scribner noted that this was the most egregious, but not the only, instance where Fisher accepted, and incorporated into his own report without analysis, considerable data from Hisert without himself confirming its accuracy. While he did, on numerous occasions, caution that all descriptions of the subject mineral reserves and related property features in the H2H appraisal were the sole responsibility of Hisert, and were not part of Fisher's assignment, Fisher admittedly incorporated Hisert's report by reference, and, most importantly, added Dr. Hisert's valuation to his own vacant land value conclusions to conclude a total market value. According to USPAP, the whole may be less (or more) than the sum of its individual parts. This is particularly true here, according to Scribner, since in his opinion Hisert actually valued (in his DCF analysis) the sand and gravel business, not just the reserves, and therefore valued the land as well; as such, the inclusion by Fisher of Hisert's valuation, with his own land valuation, effected a double-counting of the value of the land.

Notably, on redirect examination, Fisher asserted that he conducted his land-only valuation, and added it to Hisert's mineral reserve valuation, to complete the final step of the DCF analysis which he said was omitted by Hisert; however, as set forth above, Fisher never mentioned this reasoning anywhere in his appraisal, and Scribner stated that there is no evidence of this assertion, nor that either Hisert or Fisher ever considered the present value of the reversion of the property; rather, at best Fisher calculated the present value of the parcels. Fisher also stated in the appraisal that he conducted the land-only analysis, and added the two values together, "at the client's request." Scribner also recognized that Hisert improperly conducted his income capitalization analysis, since he failed to utilize historical performance of the business to estimate operating expenses.

Scribner also stated that, in his opinion, Fisher committed numerous violations of USPAP's proscription against failing to label extraordinary assumptions, those "directly related to a specific assignment, which, if found to be false, could alter the appraiser's opinions or conclusions." During cross-examination, Fisher admitted, for example, that he failed to describe as extraordinary the alleged lack of access on the Northern Parcel to Route 22, claimant's ability to access Route 22 via Luther's parcel, and claimant's assertion that Rennia was under duress, which distress artificially lowered the stock sale price. Finally, Scribner opined that Fisher violated USPAP by failing to even consider the recent stock sale of Washed Aggregate in his valuation of the premises. USPAP requires an analysis of all sales of the subject property which occurred within three (3) years of the effective date of the appraisal. While what occurred in the case at bar was not a sale of the land *per se* but a stock sale, nevertheless the stock sale was a sale of a business which included the real property at issue herein, albeit with other property as well. According to Scribner, at the very least the price paid for the stock should set the upper value limit (as inclusive of the land and the other property) on the value of the underlying real estate, from which the appraiser should subtract the value of any personal or intangible property transferred as well, to yield a proper market value for the real property. Claimant's appraisers failed to do this while, as Scribner pointed out, condemnor's appraisers did.

MTA also presented the testimony of Theodore Powers regarding the value of the land acquired by MTA. Powers, an appraiser for nearly 60 years, inspected the subject parcels three to four times, including immediately prior to the acquisition. He was, in fact, the only expert to have inspected the property at or about the time of the acquisition. Powers testified, contrary to the indications on the map and the testimonial evidence by the Peburns and Fisher, that there were no existing roads on the northern parcel, other than a driveway onto Route 81, which was unaffected by the taking. However, he admitted on cross-examination that he never actually entered the northern parcel to examine it; rather, he made his observations from either the south (the Luther parcel), from the west (Route 22) or from the east (Route 81.) While the southern parcel did have access

to Route 22 by way of a dirt road, this road was not of a width such as was testified to by Washed Aggregate's witnesses (*i.e.* 30 to 50 feet wide) but was actually from nine feet wide to no more than 15 feet at its widest point.

In Powers' opinion, the highest and best use of the property both before and after the acquisition was its historical use as a quarry, or for agricultural purposes, or for passive recreational use, although he made no effort to examine the mining permit, and asserted that the presence of gravel reserves in either parcel was "irrelevant" to his analysis.. Powers utilized the sales comparison method, adjusting (in some cases significantly) for the small size of his comparable properties relative to the subject. Thus, for example, in one instance, the comparable was 40 times smaller than the southern parcel, and nearly sixty times smaller than the northern parcel. He also included among his comparable sales, the corporate sale of Washed Aggregate immediately prior to the taking. Notably, he found that sale to be a primary indicator of the subject parcels' market value adjusting it 20% to account for the inclusion of other assets in the sale although, he conceded, he had no prior experience with the transfer of stock in mining operations. From his several comparable sale properties, Powers concluded a value of $4,800 per acre, which yielded a total value of $61,099 for the 12.729 acres of property acquired by MTA in the direct taking. On cross-examination, however, Powers conceded that the comparable parcels (except the stock sale) were all residential properties valued during a market when residential values were declining , that none had the same highest and best use as the subject, and that several indicators of increasing value in the mining field existed as well and were not considered.

MTA also presented another appraiser, George Silver, who has had extensive experience in valuing quarry properties, in order to address claimant's consequential damages claim. Silver, like Powers and Fisher, found the highest and best use of the property, both before and after the taking, was as a quarry. Silver also utilized the sales comparison method, collecting and reviewing some 75 quarry sales. As set forth below, MTA's experts concluded the existence of significantly lower mineral reserves for the subject parcels. Nevertheless, for the purposes of appraising the parcels, Silver assumed mineral reserve amounts comparable to those alleged by claimants (i.e. one million tons of viable in-place reserves.) Silver concluded per acre values of $7,700 for quarry acreage and $800 for low utility acreage on the southern parcel, and $4,600 for upland acreage and $800 for

low utility acreage on the southern parcel. From that data, he determined that consequential damages totaled $35,500.

MTA next called Mark Zduncyzk, a geologist, in order to determine the quality and quantity of the mineral reserves from an analysis of soil borings conducted on the southern parcel only. He made that determination based on information from Silver that the northern parcel was not part of the condemnation case. Zdunczyk, with 36 years of experience as a geologist, was the only expert who had personally conducted borings. Mr. Zdunczyk described the sand and gravel that he found on the site as “low grade construction products, low grade fill and structural fill, maybe a little bit of blacktop sand”. Such items, he said, are not in high demand in the region because of the abundant supply of such materials available locally.

He also determined that much of the materials were situated below the water table. In his experience, it is expensive and difficult to mine below the water table, and often permits for such mining are difficult or impossible to obtain, although he conceded that at least twice (in 1998 and 2004) Washed Aggregate had sought and obtained such permits. Zdunczyk, on cross-examination, also corrected his prior testimony that he had not seen cross-sections of the two parcels, and thus did not know where below-the-water-table mining was permitted. He had, in fact, seen such cross-sections previously, and was aware that such mining was permitted in both parcels. He admitted during cross-examination, however, that some of his borings were on the direct taking parcels, and some on the Luther parcel, and agreed that some of the borings, particularly in the northern parcel, showed good sand and gravel reserves. He also admitted that he chose the locations of the borings, and thus he was unable to directly calculate the reserves in those permitted areas in which he did no borings. In his opinion, the southern parcel reserves, in particular, are so scattered that mining them requires laborious and time consuming “hunt and peck” efforts, while the reserves on the northern parcel are of too low a quality to justify the investment required to mine them.

Zdunczyk testified to three different scenarios which he considered likely, in light of DEC setbacks regarding wetlands

and wetland buffers, and the 300-foot Town of Amenia setbacks. It was his opinion that Washed Aggregate was subject to both DEC and Town of Amenia's setbacks, so he believed that Scenario #3 was the most appropriate. He did, however, admit during cross-examination that there was no evidence that the Town had ever enforced the setback restriction against claimant, and was unaware of permission from the Luther parcel owner that claimant could mine to within 25 feet of that property line. Under Scenario #3, there exist approximately 160,350 tons of in-place reserves on the southern parcel, and 239,400 tons of in-place reserves on the northern parcel, for a total of 399,750 tons of in-place reserves, far below the amount of reserves projected by claimants.

Zdunczyk conceded on cross-examination that he relied on the Bernie Neuman letter contained in the H2H report for some of these figures, but declined to include the amount listed therein for northeast farm area potential reserves (1,215,669 tons.) He also admitted that he declined to find reserves in the southwest portion of the northern reserves due to the presence of wetlands therein and the 100 foot setbacks required by DEC, even though he was aware that claimant had received a permit which allowed mining withing 100 feet of wetland areas. Inclusion of figures for those areas would, he agreed, yield reserves for parcels similar to the Marshall/Neuman calculations with much of the reduction to his evaluation coming from the enforcement of Town and DEC setback requirements, and the failure to evaluate the two northern parcel areas as set forth above.

MTA called William FitzPatrick, a licensed professional engineer and licensed traffic operations engineer, as an expert on traffic safety. He was previously employed by New York State DOT for more than 35 years, including serving for a period of time as Director of Traffic Engineering and Safety for Region 8 (which includes Amenia.) In his opinion, the access from the southern parcel to Route 22, prior to the acquisition access, was both inadequate and unsafe for commercial traffic associated with a mining venture since the access driveway was only 12 to 13 feet wide, and it was constructed of dirt and/or gravel. In addition, it had no markings or delineations, and there were no turn lanes and no traffic signal at Route 22 itself. On the other hand, the post-taking intersection and driveway was designed by Clough, Harbour fully in accordance with the

New York State Design Manual, the American Association of State Highway and Transportation Officials ("AASHTO") guidelines, and the New York State Policy and Standards for the Design of Entrances to State Highways. It was also constructed under DOT-approved Highway Work Permits, which reflect state of the art traffic engineering standards.

Clough Harbour's design modification for the intersection of the driveway (leading to the southern parcel) and Route 22 included the widening of Route 22, the paving of the driveway, the creation of turning lanes on Route 22, the creation of two lanes on the driveway for vehicles entering northbound and southbound onto Route 22, and the installation of traffic and railroad signals. The railroad signals are triggered by approaching train traffic, causing the railroad crossing gates to be activated and the traffic signal to turn red and railroad warning lights to function. In his opinion, these design changes greatly improved traffic safety not only on Route 22, but also for rail station traffic and Washed Aggregate traffic as well. In particular, the renovated driveway from the station parking lot into the southern parcel was designed to accommodate all varieties of vehicles. The type of shared access between cars and trucks as would occur at the entrance to the parking lot from Route 22 is, according to FitzPatrick, very common, and occurs throughout the MTA/Metro-North system. Specific examples of mixed car and truck shared access occur at the Poughkeepsie, Irvington and Cortlandt commuter railroad stations.

Nevertheless, Fitzpatrick conceded on cross-examination that the volume of vehicles testified to by claimant's expert (trucks entering or exiting every four minutes) would, in fact, have a significant impact on the operation of the traffic signal at the intersection. This was because the traffic projections made by Clough, Harbour were based on analysis of traffic data for Dover Station (as relates to passenger traffic at the station) and historic traffic data for Washed Aggregate (for the mine, based on historically minimal traffic in the time preceding the taking). Notably, Fitzpatrick was aware of a discrepancy between the quarry traffic counts immediately prior to the taking - one truck per day at most – and counts done prior to that(as many as ten trucks per day). He was also aware of DOT correspondence with the Town which warned of additional

improvements being necessary if either the parking lot were expanded (as projected) or the quarry were operated at a higher level of intensity.

Fitzpatrick was also asked about a preliminary engineering report done for Metro-North prior to the taking. Notably, therein, aerial photographs from 1980 and 1990, and a USGS Amenia Quadrangle Map used to identify the three proposed properties to be acquired, all showed the haul road linking Route 81 and Route 22 at or near the southern border of the northern parcel. He agreed that, as it is a Dutchess County route, the Town of Amenia may not regulate the access to or use of Route 81, but may regulate through zoning regulations the use of a premises adjacent to the route. He also referenced §52 of the Highway Law and State transportation regulations regarding work in a highway right-of-way. It was his belief that the statute precludes use of the cattle pass by claimant absent the issuance of a D.O.T. permit, since it is a culvert under a State highway (created, it would appear, through a raise in the elevation of Route 22 between 1905 and 1940). And, using photo-logs (taken in 1998 and 2004) of Route 22, and 1998 and 2004 photographs (in evidence) taken in the area of the southern end of the northern parcel, he concluded that not only were there no guardrails in this area of Route 22 at that time, but also that the grade from the rail trail and railroad right-of-ways moving west towards Route 22 (as it existed after the taking) was raised some significant degree following the construction of the station. In 1998 the northern parcel was, as Fitzpatrick described it, more of a "plateau", and thus it sloped gradually as one proceeded west from the taking area towards Route 22, which explains the presence now of a retaining a wall to the west of the tracks and rail trail. Finally, he asserted that the current MTA-constructed haul road, to accommodate traffic wider than the current 13 foot average width, would require not only removal of the present guard rails, but also the deposit of substantial gravel fill to level the current adjacent slopes.

In rebuttal, claimant called Halina Duda, a mined land reclamation specialist for the State Department of Environmental Conversation for the region including the subject parcels. She stated that she was familiar with the southern haul road as it existed prior to the taking, and that it was not as steep in grade as it is currently, nor did it previously have guard rails. It was previously wide

enough for two trucks to pass each other on the roadway at the same time, and had sufficient area to the side of the roadway to allow a truck to pull over and park if desired. She also stated that traffic at mines tends to busiest in the early morning hours, and that such traffic might amount to amount to as many as 50 to 100 trucks per day. She further testified that claimant was permitted to mine below the water table, and, although they would need a permit for mining in wetlands, such permits were easier to acquire at the time of the taking.

Claimant also re-called Ryan Peburn, who testified to the existence of a drag line being present on the subject property when the taking occurred. He also disputed Zdunczyk's opinion on the value of Portland cement concrete sand. In Ryan Peburn's experience, because there was little market for such sand, Washed Aggregate had not and would not actively market its sand as such, preferring instead to market it as road sand for municipalities, or asphalt sand for asphalt manufactures. This was because there was a market for sand for those uses, and the sand produced also met those specifications. He also stated that Zdunczyk was incorrect when he asserted that one could not get a drill rig into the northern reserves without entering wetland areas - one basis for his conclusion that the reserves in that area were not accessible and thus had no value. There was, in fact, a road and bridge which would afford access to those reserves. Ryan Peburn also identified photographs which depict the level of the haul road above the surrounding terrain (contrary to Fitzpatrick's testimony), noting that the road as re-built is substantially above the terrain on its north and south sides. And, finally, using aerial photographs from 1980 and 1990, he identified not only the disused concrete plant on the northern parcel, but also the road at/or near the southern border of the northern parcel, between Route 81 in the east and Route 22 in the west, noting that it entered Route 22 approximately 50 to 75 feet north of Whalen's Garage which may be seen on the previously-described 1998 and 2004 tracking photo-logs (taken while driving northbound on Route 22). Also, the area, where Peburn describes the northern haul road as entering, is visible in these same photos as a clearing on the right shoulder of Route 22 according to his testimony.

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. Motion Regarding Condemnor's Appraisal Testimony

Prior to the commencement of the trial, condemnor moved by way of motion *in limine* to preclude claimant from proceeding at trial with their appraisal and testimony in relation thereto, for, *inter alia*, failure to consider a recent sale of the subject; failure to employ the sales comparison method in valuing the subject; and improper use of a discounted cash flow methodology to value the subject. Claimant opposed the motion, asserting that their appraiser had appropriately made decisions regarding his methodology. The Court reserved decision. Upon further consideration, the motion is denied as the objections raised pertain to the weight to be accorded to the appraisal, the methodologies employed therein, and conclusions to be derived therefrom rather than its admissibility into evidence. However, with respect to the specific objections raised, the Court's analysis and findings are as follows:

a. Claimant's Appraiser's Methodology Faulty

Regarding the latter two issues, condemnor asserts that claimant's appraiser improperly valued the mineral reserves it claims to have lost by performance of a discounted cash flow analysis incident to use of income capitalization method. Condemnor argues, quite properly, that in condemnation matters valuation must be based solely on the real property interest acquired by the taking. According to MTA, however, Fisher and Hisert (the latter a geologist, not an appraiser) valued a hypothetical quarry operation, and then added the value of vacant land to that business value

conclusion. They did this by calculation of a value for the minerals alone, and then simply adding this mineral value to the land value to reach a valuation for the subject.

As set forth in greater detail above, Hisert used a 20 year period in his DCF analysis, including assumptions regarding business activity, production levels, and income never previously generated by Washed Aggregate on the subject. This included the assumption that claimant could sell some 200,000 tons of sand and gravel per year, or some 3,800,000 tons of material over the 20-year period, based not on actual sales but on the "letters of intent" from prospective customers, and that local average prices for sand and gravel would be $10.00 or more per ton, despite that being double the average rate in the State. It also assumed that Washed Aggregate would increase its share of the sand and gravel market in the area, although there is no evidence that they had done so in the past, and run an active ready mix concrete operation, although there was no operable concrete plant on the acquisition date. Hisert further assumed claimant's costs would mirror industry averages, but then questionably reduced these costs by 40% to account for Dominick Peburn's supposed experience in the industry. In addition, Hisert's DCF analysis was hampered by his apparent lack of knowledge of common investment and lending rates and practices; he was also unsure if he had ever calculated a capitalization rate. From this analysis, he concluded a value of $11,401,824.00 for the mineral reserves present on the parcels, and a value of $113,732.00 for the ready-mix concrete plant, for a total value conclusion of $11,515,556.00.

While mineral deposits' presence on appropriated land should obviously be a factor to be considered in reaching a proper valuation of the property, condemnor is correct that it may not form the basis for a recovery separate from the land itself. Nor is it proper to value a business which may operate on the land, or to multiply the alleged amount of mineral reserves by a given price unit. *In Matter of Huie v. Board of Water Supply, City of New York*, 1 A.D.2d 500 (3rd Dept. 1956), claimant's dairy farm was taken in eminent domain by New York City for water supply purposes. Upon the taking, the City extracted the minerals (sand and gravel) on a portion of the property, and arrived at a land value by calculation of the cubic yardage removed, multiplication of that amount by a set price per cubic yard, and addition of that total to the value of the land otherwise taken, which

valuation method was adopted by the court. The Third Department reversed, holding:

> The award was confirmed by Special Term and the city has appealed. In our opinion, the commissioners of appraisal adopted an erroneous theory of law by arriving at the value of the sand and gravel pit on a cubic yard basis. The proper measure of claimant's compensation is the difference between the fair market value of the land before the taking and the fair market value of any part of it remaining after the appropriation. (*Matter of Board of Water Supply of City of N. Y.*, 277 N. Y. 452.) As a factor bearing upon the question of fair market value, it is proper to consider the deposits of minerals which might tend to enhance value. (*New York City R. R. Co. v. Maloney*, 234 N. Y. 208.) But an award may not be made for materials separate from the real estate by multiplying a quantity of materials by a given price. (1 Orgel on Valuation Under Eminent Domain, § 16; *Orleans Co. Quarry Co.* v. *State of New York*, 172 App. Div. 863, decision amended 173 App. Div. 990.) The proper measure of damage is the market value of the land condemned including deposits rather than the sale price of the total number of units of deposits plus the value of the remainder of the land appropriated. (1 A.D2d, at 501-02).

Similarly, in *Maloney*, supra, at 217-18 (1922), the Court held:

> In this proceeding, however, the defendant was permitted to establish by several witnesses that borings made upon the lands disclosed deposits of clay and sand adapted for the manufacture of brick; that brick yards could be established on the northerly and southerly tracts, buildings erected, machinery installed, and as to the number of millions of brick that might be produced annually, that a suitable dock for shipment might be erected; that the land thus improved could be utilized for the manufacture of brick upon a royalty rental basis, in substance rented to a tenant who would pay ten per cent annually upon the cost of the improvement and a further royalty of from forty to sixty per cent thousand on brick manufactured, and as bearing upon the southerly parcel that the

> quantity of clay to run a four-machine plant producing twelve millions brick per season for thirty-six years or more was available.
>
> The measure of compensation in a proceeding like the present one is the fair market value of the land before the property was taken and the fair market value of the property remaining after the appropriation of a portion thereof. Notwithstanding that the owner of land is not limited in compensation to the use which he makes of his land, nevertheless it is the market value of the land which controls. As bearing upon the question of market value, the owner is privileged to offer evidence as to deposits of certain materials upon the land which might tend to enhance the market value beyond the purposes for which the same was used. In the present case, however, the values sought to be established were purely speculative and hypothetical. They were based upon the proposition that because deposits of clay and sand were to be found upon the land, the owner if she should establish brick yards thereon, erect buildings and equip them with necessary machinery for the manufacture of brick covering a period of thirty-five or forty years, and able to find a tenant who would pay her annually ten per cent on the sum invested and a royalty of forty to sixty per cent on a possible sale and manufacture of millions of brick, would thereby be enabled to make a large net return on the property. This evidence is in excess of the rule of the measure of damages properly applicable to a case like the present one, and as suggested was purely hypothetical and, therefore, improperly received. The question in such a case is not merely whether the property is peculiarly adapted for the special use claimed for it, even with deposits upon it such as have been enumerated, but whether or not purchasers can be found who would pay more for it because of the adaptability to the use to which the same might be applied.

(*Cf Levin v. State*, 13 N.Y.2d 87 [1963], where the Court recognized the speculative nature of capitalizing a future business enterprise, and its preference for the sales comparison method in such instances; *U.S. v. 5 Acres of Land*, 50 F.Supp. 69, 71 [1943], describing such a valuation

as "condemned by the weight and authority of judicial decisions").

Recently, in *Bell v. Village of Poland*, 281 A.D.2d 878 (4th Dept. 2001), the Court stated

> We cannot make our own findings upon this record because the appraisals submitted by the parties are defective. Petitioners' appraiser...erred in multiplying the amount of gravel appropriated or rendered unmineable by the unit price per cubic yard. It is improper to value the property by "multiplying the estimated quantity by a given price unit" (*Sparks v State of New York,* 39 AD2d 822); the proper measure of damages is the "value of the land as enhanced by the mineral deposit" (*Wheatfield Props. Co. v State of New York,* 55 AD2d 1040).

Condemnor properly argues that their appraiser appears to have followed the above authority, conducting a before and after analysis by way of the market or sales comparison method, and using quarry properties as comparable sales (with appropriate adjustments), while claimant's valuation of a hypothetical sand and gravel business is simply inappropriate. Even if it were proper to value the land based on the hypothetical business model constructed by Hisert and used by Fisher, however, it is equally true that the data employed in their analysis is completely speculative. Indeed, as condemnor has pointed out, claimant concedes doing little to no mining business prior to the taking, thus there is an absolute dearth of historical income and expense data upon which am appraiser could rely to construct a proper business valuation method, by income capitalization or otherwise. Additionally, Hisert failed to demonstrate the reliability of the data he did employ, by substantiating its use in the mining industry in the area or as a whole.

Hisert admittedly employed a DCF analysis, which he asserted was common in valuing properties containing mineral reserves, by assuming sales (based on the post-taking "letters of intent"), and adjusting those prices to arrive at a value for the property at the end of the 20-year period. He, however, failed to complete the analysis by discounting that figure to get the present worth of the reversion of the remaining land, which failure Fisher tried to correct in his own analysis. However, in this regard Fisher too erred, since he calculated only the present value

of the property rather than the present worth of the reversion value.

Condemnor argues in effect that this method -- the use of income and expenses for a business essentially not in operation, to support a discounted cash flow analysis -- is the type of capitalization of a non-existent stream of revenue whose use was rejected in *Arlen of Nanuet, Inc. v. State*, 26 N.Y.2d 346 (1970). *Arlen* involved the use of a lease for a building which had not yet been constructed, as the sole indicia of value for a vacant property. Discussing *Levin, supra,* the *Arlen* Court stated:

> We agreed with the State's position that such a method [a lease for a building not yet constructed, as also used herein] was impermissible but decided that the record did not support such a hypothesis. More specifically, although we held that executory leases and agreements -- relating to land vacant on the day of the taking -- may be given some weight as enhancing the value of the vacant parcels, we pointedly declared that it would be error to expand the weight of such evidence by treating those leases and contracts as if they represented an income flow already in being.

The *Arlen* Court (26 N.Y.2d, 352-3) went on, then, to note that the trial court in *Levin*

> did not fall into [that] error of valuing the property by capitalizing the net rental income as might have been proper if the building had been completed and rent had commenced....

In short, *Levin*, and *Arlen* following it, clearly hold that, although such things as executory leases could be given **some** weight, using an unrealized stream of income as the sole basis to value a premises is improper. Hence, to the extent that Hisert and Fisher relied **solely** on the assumed income and expenses of a hypothetical mining business operated on the subject to determine market value for the taking claim, their methodology in that respect would have to be rejected as well. Upon analysis, therefore, the Court agrees with MTA that, based upon the aforementioned assumptions as it is, and employing the terms of contracts which were never properly negotiated, much less executed, and for a business never truly operational by claimant's own witness' admission, the DCF analysis in

particular is faulty and it is therefore rejected (see *Erie Blvd. Hydropower, L.P. v. Town of Ephratah Bd. of Assessors*, 9 A.D.3d 540 (3rd Dept. 2004); (see also *Orange and Rockland Utilities et al v. Town of Haverstraw,* 7 Misc. 3d 1017A (Supreme Court, Rockland County, 2006), striking appraisals with DCF holding periods of longer than 10 years; The *Appraisal of Real Estate*, Appraisal Institute, 12th Edition (2001), at p. 570, recommending DCF holding periods of 5 to 15 years.) Nevertheless, and despite the rejection by the Court of the methodology employed by Hisert and Fisher to value the subject parcels, the data used in some instances (specifically, comparable quarry properties) will be utilized by the Court in its own analysis.

b. Washed Aggregate Stock Sale as Evidence of Value

Condemnor also protests claimant's appraiser's failure to consider a recent sale of the subject, namely the stock sale of Washed Aggregate several months before the taking. It is well-settled under New York law that "the purchase price set in the course of an arm's length transaction of recent vintage, if not explained away as abnormal in any fashion, is evidence of the 'highest rank' to determine the true value of the property at that time." *Plaza Hotel Assoc. v. Wellington Assoc.,* 37 N.Y.2d 273, 277 (1961); *F.W. Woolworth Co. v. Tax Comm. of City of New York,* 20 N.Y.2d 561, 565 (1967); *Matter of Grant v. Srogi,* 52 N.Y.2d 496, 511 (1981); *Matter of Allied Corp. v. Town of Camillus,* 80 N.Y.2d 351, 356 (1992). Where there exists a "significant and unexplained disparity between the purchase price of the subject property and the prices for comparable properties," a sale may be deemed to be "abnormal." *Matter of Kishor Patel-Fredonia Motel, Inc. v. Town of Ponfret,* 252 A.D.2d 943 (4th Dept. 1998). The burden of persuasion falls upon the party alleging an "abnormality." *See, e.g., Plaza Hotel Assoc.,* 37 N.Y.2d at 277.

It is the claimant's position that there was no sale of the subject real estate and that the corporate sale of Washed Aggregate is not a valid indication of market value for the subject parcels. While claimant concedes that there was a sale of the corporate entity, which included the underlying real estate, as well as corporate assets and liabilities, and goodwill, claimant argues that such a sale is "irrelevant to the market value of the subject property." In making this assertion, claimant suggests that the transaction between the seller, Rennia, and the buyer, Peburn, was not an arm's length transaction, based primarily upon the business relationship between the two men. In

addition, claimant relies on the condemnation of the property itself, and also points to Mr. Rennia's prior health concerns as being indicative of the sale being made under stress or duress. Furthermore, claimant submits that, even if there was a valid arm's length transaction, the sale is not determinative with regards to the market value of the real property.

Condemnor maintains that the recent corporate sale is the best indicator of the subject property's market value and must be considered by an appraiser. Condemnor further claims that the sale was indeed an arm's-length transaction and, therefore, represents a reliable measure of market value. Finally, MTA also contends, properly, that claimant bears the burden of convincing the court that the sale be perceived as "abnormal" and they have failed to meet this burden.

The corporate sale of Washed Aggregate to Peburn for $675,000 occurred just two months prior to the acquisition of a portion of the property by MTA. Because the stock sale included all corporate assets and debts, along with other intangible property, it follows that the sale price of $675,000 sets a ceiling on the value of the underlying real property (since it includes the other assets in addition to the subject parcels.) In addition, it is indisputable that this transaction qualifies as a sale of "recent vintage," as it was nearly contemporaneous with the taking. Because claimant urges the court to disregard the sale as a valid indicator of market value, Washed Aggregate bears the burden of persuasion on this issue.

Claimant's contention that the sale was not the product of an arm's length transaction lacks merit. While Claimant asserts that *JB Park Place v. Assessor of Village of Bronxville,* 13 Misc.3d 1233(A), 831 N.Y.S.2d 353 (Supreme Court, Westchester County, 2006), sets "the standard" factors for determining when an arm's length transaction took place, their reliance on this case is misplaced, since, in *JB Park Place,* the "credible indicia" of an arm's length transaction discussed by the court were applied specifically to the facts of that particular case and do not, by any means, attempt to establish a general standard. *Id.*

According to Peburn's testimony at trial, he and Rennia had "only" a business relationship that began in 1996. Without more, it is doubtful that this brief business arrangement between Peburn and Rennia could possibly account for Rennia's willingness to sell the property for a

mere five to six percent of its purported value (at least as argued by claimant.) Furthermore, the testimony indicates that, at the time the business relationship commenced in 1996, there already was an agreement in place for Mr. Peburn to purchase Washed Aggregate. Negotiations for the purchase of the company in fact took place over the course of approximately two years. Both parties were represented by counsel and both Rennia and Peburn had sufficient knowledge of the mining business: Rennia, who was the owner of Washed Aggregate for more than twenty years, had "at least a working knowledge" of the gravel business, while Peburn, who describes himself as a "dirt merchant," also had extensive experience with properties containing sand and gravel. The evidence shows that Peburn initially learned that Washed Aggregate was for sale after hearing rumors from people in town, and that Peburn was aware of other potential purchasers before he first approached Rennia, indicating that the property had "adequate . . . exposure in the open market." (*See* The Appraisal of Real Estate , *supra*, at p. 24).

To be sure, it is the case here that the seller (Rennia) took back a mortgage from Peburn, a distinctive form of financing which is certainly worthy of note and a factor for consideration for an adjustment by an appraiser in a sales comparison analysis. When a buyer obtains independent financing through a bank, this may be a factor that tends to weigh in favor of finding an arm's length transaction, however, it would be inaccurate to state that a seller taking back a mortgage necessarily negates the finding of an arm's length transaction, and there is nothing in the nature of this transaction that would suggest that, solely on the basis of the financing arrangements, the transaction was not "arm's length." As discussed above, the burden of persuasion on this issue rests upon the claimant, as the party alleging an abnormality in the sale. Here, claimant falls short of demonstrating that the corporate sale of Washed Aggregate was not an arm's length transaction.

Claimant also argues that, even if the sale was conducted at arm's length, the 1998 purchase price of Washed Aggregate for $675,000 is nevertheless not a valid indicator of the subject property's market value, because the sale was made under stress or duress. While sales between willing buyers and sellers, occurring under ordinary market conditions, provide valuable evidence of market value, it is recognized that "actual sales do not reflect market value where made under stress." *806 Fifth Ave. Corp. v. Tax Comm.*

of City of New York, 8 N.Y.2d 29, 31 (1960). To support the argument that stress or duress negatively influenced the corporate sale price, the Claimant points to Rennia's prior health concerns and the fact that the sale occurred while the property was under the threat of condemnation.

The only non-hearsay evidence relating to Rennia's health that claimant properly presented at trial consists of a letter sent on behalf Rennia to the DEC in support of his mining permit renewal application on July 31, 1998. The letter requests that, although the permit had actually already expired, the permit application be treated as a renewal, stating that "Mr. Rennia underwent triple bypass heart surgery in the spring [of 1991] and was unaware that the mining permit had expired." Claimant did not present any further evidence relating to Rennia's health. The Court also notes that the bypass surgery occurred approximately seven years prior to the sale of Washed Aggregate. Due to the remoteness in time and lack of additional evidence on the issue of the impact, if any, of Rennia's health on the sale, claimant has failed to demonstrate that Mr. Rennia's surgery had any bearing on the sale of the company whatsoever[3].

Claimant also states that, "[b]y its very nature a pending condemnation places the seller under stress or duress because it impacts that marketability of the property and the owner's continued use and enjoyment of the property." Claimant is apparently alleging that the value of the subject property was reduced due to the effects of condemnation blight, without explicitly making such a claim. "'[C]ondemnation blight' relates to the impact of certain acts upon the value of the subject property." *Buffalo v. J.W. Clement Co.,* 28 N.Y.2d 241, 255 (1971). Unlike a taking in the Constitutional sense, "[b]light is a method devised by the courts which attempts to give to the condemnee a more realistic valuation in the subsequent de jure proceeding." *In re Village of Lynbrook,* 348 N.Y.S.2d 115, 117 (1973). As a result, it has been said that "condemnation blight is not a cause of action, but in

[3] The Court also recognizes that, even if Rennia's health concerns did place him under some degree of stress or duress as would influence him to sell at a reduced value, it appears highly unlikely that he, an experienced mine executive, would be under such stress, under these circumstances, as to agree to sell Washed Aggregate, including the underlying property and all ancillary items, for only five to six percent of its purported value.

reality is a rule of evidence of valuation of real property that has been the subject of a taking in condemnation, de jure, or de facto." *Fisher v. City of Syracuse,* 78 Misc.2d 128, 128 (Supreme Court, Onondaga County, 1974).

While there is no specific mention of "condemnation blight" here, claimant generally asserts that the pending condemnation negatively affected the subject property's marketability, which subsequently placed the seller under stress or duress; as a result, claimant maintains that the 1998 sale price does not accurately reflect the value of the subject property. In essence, then, this argument is indistinguishable from one alleging condemnation blight. When a property owner "would suffer severely diminished compensation because of the acts by the condemning authority decreasing the value of the property," the property owner may be entitled to compensation. *Buffalo v. J.W. Clement Co.*, 28 N.Y.2d, at 257-58; *Niagara Frontier Bldg. Corp. v. State of New York,* 33 A.D.2d 130 (4th Dept. 1969), *aff'd* 28 N.Y.2d 755 (1971).

In order to have a remedy for condemnation blight, this Court has held that the aggrieved property owner must satisfy two requirements: first, "claimant must present evidence of affirmative acts by the condemning authority, which acts caused a decrease in the value of the property;" second, claimant must demonstrate "diminution in value of the subject property prior to those acts." *Spring Valley v. N.B.W. Enterprises, Ltd.*, 19 Misc.3d 1108(A), 859 N.Y.S.2d 907, (Supreme Court, Rockland County, 2008). In *Buffalo v. J.W. Clement Co., supra,* evidence that the city delayed the formal condemnation of certain property for over a decade came within the scope of "affirmative value-depressing acts" by the condemning authority. *Buffalo v. J.W. Clement Co.,* 28 N.Y.2d, at 257-58. In the instant case, claimant has failed to present any evidence that Respondent engaged in any affirmative acts which led to a diminution in value of the subject property and therefore, claimant has not demonstrated condemnation blight, and use of the actual sale price of the subject property in 1998 may not be avoided on this ground.

Finally, the claimant, relying on *Hardele Realty Corp. v. State,* 125 A.D.2d 543 (2nd Dept. 1986), contends that even if the sale constituted an arm's length transaction and was not explained away as abnormal, the subject sale is not necessarily determinative of property's market value. Claimant goes so far as to describe the corporate sale as "irrelevant to the market value the subject property" and,

as a result, claims that the sale was property disregarded by Washed Aggregate's appraiser. However, Claimant's reliance on *Hardele* is misplaced. In *Hardele*, the court stated that other factors, such as comparable sales, may be taken into account. (*Id,* citing *Matter of Kings Mayflower v. Finance Admin. of City of New York*, 63 A.D.2d 970 [2nd Dept. 1978].) In *Hardele,* the appellate court found that the lower court did "not give sufficient weight" to the sales that occurred years before the taking.

In sum, claimant, having the burden of persuading the Court that in some manner the stock sale is not indicative of the market value of the subject parcels, has failed to convince the court that any of the alleged abnormalities exist pertaining to the corporate sale of Washed Aggregate. As a result, it would be proper for the appraisers, and the Court, to consider the stock sale price as evidence "of the highest rank" in determining the value of the subject parcels at the time the acquisition took place.

4. Highest and Best Use

In *In re City of New York,* 25 N.Y.2d 146 (1969), the Court 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]).

Furthermore,

> 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, supra; see also Keator, supra; Chemical v. *Town of E. Hampton, supra.*

The appraisers herein essentially agree to the highest and best use; Fisher concluded that the highest and best use of the property after the taking was the use to which it had been put immediately prior to and following the taking - as

a quarry, while Powers testified that the highest and best use of the property after the taking was its historical use as a quarry, or for agricultural purposes, or for passive recreational use.

5. Valuation

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, the appraiser's trial testimony, and the corresponding market values, and the Floor, based on the actual assessments set by the Respondent Assessor, the condemnor's appraisal, the appraiser's trial testimony, and the corresponding market values, are as follows (Ceiling and Floor, for each claim, in bold):

	Claimant	Assessment	Condemnor
Direct Taking (12.29 acres)	**$ 913,951**	**$ 598,100**	**$ 61,099**
Consequential Damages (100.671 acres)	**$ 10,890,605**		**$ 0 / $ 481,301**
Total Damages	**$ 11,804,556**		**$ 542,400**

(Note that, while condemnor asserts that no indirect taking took place, and thus there are no consequential damages, it computes a valuation for the subject which would yield a value of $ 481,301 for the 100.271 acres of the consequential damages claim. When added to their submitted value for the direct taking, this yields a total of $ 542,400 for the value of the entire 113 acres.)

a. Direct taking--Sales Comparison Method

As set forth previously, the Court has found it necessary to reject claimant's appraisers' combined DCF valuation method due to its speculative nature. However, in the course of his DCF direct taking valuation method, Fisher did examine 28 commercial sales in eastern New York State, 15 of them in Dutchess County alone. From this group he extracted a list of four comparable sales to arrive at a base price per square foot before the taking, enabling the Court to conduct its own sales analysis. An examination of these properties indicates that the comparable property most nearly approaching the subject assembled parcels, and utilized by Fisher in his analysis, is his Comparable 3, Dutchess County Resource - West Hook Sand and Gravel, a property of 73.10 acres located in East Fishkill, New York, which, coincidentally, is a sand and gravel quarry, and which, at a sale price of $ 325,000.00, had a per acre value of $ 4,446.

In arriving at a value for the southern parcel, Fisher adjusted this premises (and all his comparable properties) by 3 to 6% per year (1/4 to ½ % per month) for time, reflecting his calculation of a market increasing in price at that rate during the period 1995 to 1998. While Silver asserted that 0 % would be the proper adjustment for time in this period, this Court holds that the proper adjustment is closer to the former amount, which represents negligible but some annual growth, and reflects an adjusted value of the same $ 4,884 per acre. Fisher also adjusted this parcel for location (-20%), due to the significantly better location in East Fishkill); access (10% - the comparable had only a right or way); size (5%); topography (-15%); utilities (5%); and zoning (20% - the comparable was zoned residential), for a net adjustment of 5%, which yields an adjusted value of $ 5,128 per acre.

In deriving a corresponding value for the northern parcel from this same comparable, Fisher adjusted for location (again, -20%); access (10%); topography (-15%); utilities (5%); and zoning (20%), for a net adjustment of 0%, and the same value of $ 4,884 per acre. Thus, using the per acre values arrived-at by claimant's own appraiser for a similar quarry property, the taking of 3.685 acres from the southern parcel visited a direct taking damage to claimant of $ 18,896.68, or $ 18,900.00 rounded (r), while the taking of 9.044 acres from the northern parcel caused a direct taking damage to claimant of $ 44,170.90, or $ 44,170.00 (r). This yields total direct taking damages to Washed

Aggregate, from values calculated by claimant's own appraiser of $ 63,070.00.

As also set forth in greater detail above, MTA's appraiser, Powers, used solely a market analysis to arrive at a value for the direct taking parcels. Powers included among his comparable sales the stock sale of Washed Aggregate, just months before the taking, and considered that sale, at $ 675,000.00 (or $ 5,973 per acre) to be a primary indicator of the subject parcels' market value. His sole adjustment, as it was (except as indicated) essentially the same property sold contemporaneously with the taking, was to discount the sale 20% to account for the inclusion of other assets in the sale; this yielded an adjusted sale price of $ 4,778 per acre. The Court finds, however, based on the extensive testimony regarding the equipment owned and the operation of Washed Aggregate during the period immediately prior to the taking, that Powers discounted the stock sale for those other assets at a figure larger than the evidence justifies; rather, the stock sale should have been adjusted by only - 10%, rather than - 20%, for the other assets included in the sale, for an adjusted value of $ 5,376 per acre.

In addition, claimant argues, and the Court agrees, that the other comparable properties used by Powers differ vastly from the subject, both in use (residential) and particularly in their size (none are closer than 1/3 the size of the southern parcel, and 1/5 the size of the northern parcel.) From these comparable sale properties, and the stock sale, Powers concluded a value of $4,800 per acre, which would yield a total value of $61,099 for the 12.729 acres of property acquired by MTA in the direct taking. Valued instead using the Court's adjusted figure of $ 5,376 per acre (based on the aforementioned adjustment to the stock sale), the total value of the direct taking damages would be $ 68,431.00.

Notably, the value calculated for the taking by the Court, from Fisher's nearest comparable (the West Hook Sand and Gravel Quarry), is less than $ 2,000.00 more than the value arrived-at by condemnor's appraiser, the latter relying heavily on the stock sale of the subject. The Court also notes, as set forth previously, that the assessed value of the parcels was a total of $ 598,100.00, which is a taxable value of $ 5,600.00 per acre for the southern

parcel, and $ 5,060.00 for the northern parcel, or a mere 5 and 10% greater than the values calculated by Fisher, by the Court in its own analysis of the comparable quarry property, and by Powers. Finally, the Court's own adjustments to the stock sale alone yield a value of $ 5,376 per acre, again less than 10% greater than condemnor's appraisers own calculated values.

Consequently, the Court elects to derive from these calculated values (excluding the assessment), an average value of $ 5,250 per acre for the southern parcel, and $ 5,050 per acre for the northern parcel, for the portions thereof which were the subject of the direct taking. This calculates to $ 19,346.00 r for the southern parcel, and $ 45,672.00 r for the northern parcel, or to a total of $ 65,000.00 r, in direct taking damages caused to Washed Aggregate by the acquisition herein.

6. Consequential Damages

a. Was Access to the Parcels Diminished by the Taking

Prior to the taking, the parties agree that the Southern Parcel had access to Route 22 via the southern haul road, a roadway running east and west approximately 1,000 feet, from its intersection with Route 22, gradually down a slope from the highway, over a bridge, and into the main portion of the mining area of the southern parcel. This road had a right-of-way which was 50 feet wide, and, while the roadway may have been considerably less than that in width (perhaps as little as 15 feet for the regularly traveled portion), the evidence discloses that the slope and vegetation on both sides of the road permitted vehicles of greater width to pass each other simultaneously, or for one vehicle to pull over to allow another to pass. A road also allowed access to Route 81 from the southern parcel. Claimant further asserts, and the Court agrees, that the evidence (several maps, prepared at various times up nearly to the date of taking; an aerial photograph obtained from the State of New York; and the observations made by Fisher on his examination of the premises) shows that a road led from Route 81 to Route 22 which was adjacent to the south-west boundary of the northern parcel, which northern haul road was and had been used by prior owners of the northern parcel (or indeed the parcels when they were in common

ownership) to access Route 22 in the area opposite Whalen's Garage from the northern parcel. Finally, the Court finds that claimant did prove the existence of a culvert under Route 22 from the northern parcel to a parcel on the west side of Route 22, for which culvert claimant had an easement to traverse, and therefore that, irrespective of the northern haul road, some degree of alternate access thus did exist from the northern parcel out to Route 22. The value of the culvert as a means of ingress and egress of mining vehicles and/or equipment or as a means of facilitating the transportation of sand and gravel mining product under Route 22 was not proved to the satisfaction of the Court at this trial. Although Washed Aggregate had a right of way through the culvert, the use of same for mining operations would require the permission of the D.O.T. via permit and the cooperation of the landowners to the west of the culvert in allowing the mining related activities and access to Route 22 on their property - none of which was proved by the complainant at the trial.

The Court also finds that, the reservation of rights to access for the southern parcel notwithstanding, the results of the taking included the deprivation of access to Route 22 from both parcels, in particular the deprivation of a right-of-way suitable for truck traffic related to mining operations in the south, and the total deprivation of an intersection with Route 22 from the northern parcel that would provide for safe truck traffic related to mining operations in that area. While condemnor argues, and the Court agrees, that the intersection with Route 22 from the southern parcel itself , designed as it was by DOT, presents after the taking a considerably-better opportunity for traffic to enter to and exit from Washed Aggregate's premises, the re-designed haul road suffers from several deficiencies which actually substantially diminish access for claimant. First, unlike the previous haul road, the new roadway is only 13 to 14 feet wide, as opposed to the previous 15 or more feet wide. Second, it is bounded on both sides for much of its length with guardrails, and is raised to some degree above the surrounding terrain, unlike the prior road, which was not bounded by guardrails and/or raised above the surrounding terrain. Traffic (going one or both directions at the same time) now, after the taking, simply cannot exceed the width of the bounded roadway, which precludes either single vehicles wider than 13 to 14 feet from proceeding down the road, and/or precludes pairs of

vehicles exceeding those widths from passing each other at the same time on the road.

In addition, the placement of the MTA parking lot, at the level of Route 22, has meant that the previously-gradual slope of the haul road has changed significantly to one which is much steeper. The Court finds that large truck traffic will be impeded (by being considerably slowed) by this change, that sight lines with the increased slope now preclude observation, by vehicles entering from Route 22, of vehicles ascending the haul road, and observation, by vehicles ascending the road, of vehicles entering from Route 22, both of which changes will slow and, at times, prevent traffic from entering the road (due to the aforementioned width restrictions of the new road.) The Court also finds that additional noise will result from the driving of vehicles up the steeper haul road slope. These traffic restrictions greatly reduce the utility of the new Route 22 intersection for Washed Aggregate's entering and exiting truck traffic.

Condemnor has argued on numerous occasions that, even if its construction or other actions had in some way diminished claimant's access to Route 22, Washed Aggregate possesses alternate access in to and out from the mining facility, by way of its access gate to Route 81 in the east. The Court, however, finds that this alternate access is compromised at best, and non-existent at worst. As set forth in greater detail above, Fisher was of the opinion that, because the mining permit allowed excavation throughout the permitted area to a point between 37 and 47 feet below the level of Route 81, access to and from the latter Route would, as mining progressed on the eastern side of the southern portion, eventually become impossible. In addition, as set forth in the documentary evidence submitted by claimant, the Town committed itself to a policy of denying access from and to Route 81. While Route 81 is a Dutchess County roadway, and thus not subject to local (*i.e.* Town) restrictions, upon any attempt by claimant to exploit that eastern entrance and exit prior to access being made impossible by mining, the Town clearly intended to limit industrial access to the property to Route 22. The Town Attorney, David Hagstrom clearly indicated such in his letter of December 18, 2001 when he wrote that the Town's intent was to restrict industrial traffic on Route 81 to preserve the rural character of that corridor and to prevent

any disturbance to the "... tranquil, historic character of the Wassaic Hamlet to the south." The Court thus concludes that, for the aforesaid reasons, Route 81 is virtually unusable by claimant for ingress and egress, and therefore the value of the parcel is substantially diminished by decreased access to the parcel from either Route 22 or Route 81.

Regarding the northern parcel, Fisher's expert opinion was, and the Court's finding is, that, prior to the taking, claimant possessed two alternate means of access to Route 22 –- via the northern haul road directly to Route 22 opposite Whalen's Garage, and by an easement via the culvert under Route 22 and from the west side of that Road onto the Road itself[4]. Based on the taking of the western portion of the northern parcel immediately adjoining Route 22, access out to Route 22 from that parcel via either of the aforementioned methods was completely eliminated. As set forth in greater detail above, condemnor has asserted that no access to Route 22 previously existed, but that, even given diminution in claimant's purported access to Route 22 from the northern parcel, claimant here too has alternate access in to and out from the parcel, again by way of an access gate from the northern parcel to Route 81. The Court, however, finds that this alternate access is of equally minimal value to Washed Aggregate, since the Town is apparently committed to taking whatever steps it deems appropriate to keep claimant's industrial vehicles and/or equipment from accessing Route 81. As such, the value of this parcel too is significantly reduced by the reduction in access due to the taking.

b. Is the Diminution of Access Grounds for Compensation

Condemnor argues that consequential damages are not available to claimants, asserting that the taking itself did not in fact block access to either parcel; rather, it was the subsequent construction of the MTA parking lot, the new haul road, and the intersection with Route 22 that caused any access problems. Indeed, they argue, it was not until several years later (2000 or later) that entrance to or exit

[4] Condemnor has asserted, but pointed to no specific statute, which would bar the use by claimant of its easement through the culvert.

from the properties were affected at all. Nevertheless, the law is clear that, even where the taking leads only **eventually** to the diminution of access for the remainder parcel, that remainder still has suffered consequential damages from the taking. As stated in *Gengarelly v. Glen Cove Urban Renewal Agency*, 69 A.D.2d 524, 525 (2nd Dept, 1979):

> If the State's appropriation of highway-abutting land (true frontage), or the physical construction of the improvement itself, so impairs access to the remaining property that it can no longer sustain its previous highest and best use, then the State must pay consequential damages to the owner...a suitable means of access must be left an abutting owner or else he is entitled to compensation (*citations omitted*).

In *Gengarelly*, claimant sought consequential damages for construction (of a parking lot which would block access to a loading dock) which had not even occurred yet. In numerous other cases, awards for consequential damages have been granted and upheld, even where the taking is followed some time later by an improvement that reduces or eliminates the claimant's access. (*See Pollack v. State of New York,* 50 A.D.2d 201 [3rd Dept. 1975], aff'd 41 N.Y.2d 909 [1977]; *Cousin v. State of New York,* 75 Misc.2d 1096 (Ct of Claims 1972], aff'd 42 A.D.2d 1016 [3rd Dept 1973]; *Slepian v. State of New York*, 34 A.D.2d 880 [4th Dept., 1970]; *Red Apple Rest v. State of New York*, 27 A.D.2d 417 [3rd Dept. 1967]; and *Sukiennik v. State of New York*, 56 Misc.2d 148 (Ct of Claims 1966, aff'd no op. 29 A.D.2d 845 [4th Dept. 1968], all of which involve construction subsequent – sometimes years subsequent - to the taking, which construction diminished the claimants' access to their properties, and which supported claims for consequential damages.) The Court thus concludes that the taking, and the improvements that followed, have undoubtedly made entrance to and exit from Route 22 to Washed Aggregate's northern and southern parcels, respectively, impossible, or at least severely restricted; that no suitable access (to Route 81 or otherwise) exists; and that claimant may recover consequential damages therefore.

c. What Is The Measure of the Damages

Regarding the southern parcel, the Court has found that, despite the improvements to the Route 22 intersection itself, the reconstruction of the haul road, and in particular the re-grading and width restrictions thereto, will greatly reduce the utility of the intersection for claimant's Washed Aggregate's entering and exiting truck traffic, and that the Route 81 entrance, due to the threat of a zoning change, and subsequent litigation, by the Town, would only offer a small amount of access to the premises. The testimony by claimant's several witnesses, including experts, made clear that, although the actual intersection of the haul road (now through the southern portion of the parking lot) and Route 22 may arguably be safer for entry to that Route by introduction of a traffic light with dedicated northbound and southbound turning lanes, and while the crossing over the railroad tracks may arguably be safer due to the introduction of a warning signal and gate, traffic will nevertheless inevitably by impeded by the presence (absent before) of some commuter traffic entering and exiting the lot at the same time as some significantly increased number of trucks seek to enter or exit the haul road leading to the mining facility; simultaneous two-way traffic of most trucks is now impossible on the haul road itself due to the imposition of guard rails for most of its length; such traffic, even upon removal of the guardrails would still be impossible due to the current configuration of the haul road (raised, as it is, above the surrounding terrain, precluding "off-roading" by wide vehicles seeking to avoid striking each other) without substantial alteration to the roadway; and, even with the removal of the guardrails, the current grade of the haul road not only would slow outgoing and also incoming traffic down considerably from previously, but reduced sight lines, combined with the narrowness of the roadway, would impede entering and exiting traffic considerably.

To be sure, while MTA has consistently argued that the changes made to the intersection are an improvement over the previous haul road, and while that position undeniably has some merit as set forth above, MTA's argument that Route 81 presents an acceptable access alternative has substantially

less force. As set forth in greater detail above, the claimant's documentary evidence, from Town officials including the Town Attorney, is that the Town will make every effort to deny access by Washed Aggregate-related truck traffic to and from Route 81. In addition, the expert evidence accepted by the Court, and not seriously contested by condemnor, is that access to Route 81 will in any event be made impossible by mining out the approach thereto to a depth of perhaps 50 feet. For both of these reasons, the Court has reached the conclusion that Route 81 is not a reasonable or long-term alternative to Route 22 for truck access. So considerable, then, is the impact from the changes on the traffic situation due to MTA's construction, to the operation of claimant's business, that the Court determines that the taking has effected a net reduction in value to Washed Aggregate of 90% for this parcel.

Regarding the northern parcel, it is conceded by all parties that, while some use of the northern haul road in connection with the concrete plant may have been made in the past, due to the lack of mining activity there for many years the northern haul road has not see use and has deteriorated to a state of almost non perceptibility. Neither was any evidence presented as to the past use of the culvert under Route 22. Nevertheless, claimant had every right, up until the date of taking, to make such use of or attempt to make use of either or both of these avenues of access to Route 22 in furthering of their mining operation as they had made before and which their license entitled them. Both these points of access, however, were completely eliminated by the taking, leaving claimant only a circuitous route through the northern parcel to Route 81 for future mining operations; there is, however, no evidence that this route was ever used, or was adapted for use, in the mining operation. And, as set forth above in greater detail, Town officials have made it a stated policy to deny truck access by Washed Aggregate-related traffic to and from Route 81, although perhaps the Town's likelihood of success in preventing such access is somewhat reduced due to the total absence of any other outlet for such traffic after the taking (unlike the southern parcel, where Route 22 is still an alternative). Thus, here too, the impact of the taking, combined with the staunch opposition of the Town to alternate use of Route 81, and the lack of any evidence that the alternate access road to Route 81 is in any way suitable for mining haulage, so burdens any future use of the parcel

for mining by Washed Aggregate, that the Court determines that the taking has effected a net reduction in value to Washed Aggregate of 80% for this parcel.

d. Final Conclusion of Value for Consequential Damages

Using the value adopted above by the Court for the southern parcel of $ 5,250 per acre, the value of the 41.32 acres of the southern parcel, at that rate of $ 5,250 per acre, yields a total value of $ 216,930.00 r. The taking of 90% of the value of these 41.32 acres of the southern parcel, at that same rate of $ 5,250 per acre, yields consequential damages for this taking of $ 195,200.00 r. Similarly, using the value established by the Court for the northern parcel of $ 5,050 per acre, the 59.36 acres of that parcel, at that rate of $ 5,250 per acre, yields a total value of $ 299,768.00. The taking of 80% of the value of those 59.36 acres of the northern parcel, at that same rate of $ 5,050 per acre, yields consequential damages for this taking of $ 239,800.00 r. This yields total consequential damages for the taking of $ 435,000.00; when added to the $ 65,000.00 direct taking damages calculated above, this yields total damages – direct and consequential - of $ 500,000.00.

Claimant Washed Aggregate Resources, Inc., is therefore awarded the calculated cost of the loss from the direct taking, namely the amount of $ 65,000.00, together with the calculated cost of the loss from consequential damages, namely $ 435,000.00, for a total of $ 500,000.00, with interest thereon[5] from the date of the taking, July 27, 1998, less any amounts previously paid, together with costs and allowances as provided by law.

Conclusion

[5] The Court rejects condemnor's argument that claimant should not be awarded interest for the period before early 2006; all adjournments prior to trial for the appraisal exchange and for discovery appear to have been on consent, or at the behest of MTA, and during the pre-trial period negotiations aimed at a settlement and to resolve other issues were freely engaged-in by both parties well into 2007.

Upon the foregoing papers[6], and the trial held before this Court on April 14, 15, 16, 17, and 18, May 27, May 28, and 29, June 30, July 1, and 2, August 11, 12, 13, 14, and 15, October 6, 7, and 8, November 24, 25, and 26, 2008, and January 12, February 2, 23, 24 and 25, and March 18, 2009, it is hereby

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

ORDERED, that condemnor Metropolitan Transportation Authority shall pay as compensation to claimant the amount of $ 500,000.00, with interest thereon from the date of the taking, July 27, 1998, less any amounts previously paid[7], together with costs and allowances as provided by law.

Settle Order.

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

Dated: White Plains, New York
August 31, 2010

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

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[6] The Court acknowledges the assistance of Beverly Baker, summer intern and third year student at Pace University School of Law, in the preparation of this Decision and Order.

[7] The Court has been advised that the pre-vesting offer of $ 37,611.00, plus $ 914.64 in interest, for a total of $ 38,525.64, made by the MTA to claimant, was accepted by claimant as partial compensation for the taking. *See* EDPL § 304 (A) 3.

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