

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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In The Matter of GERALD E. D'ONOFRIO
AS CONDEMNEE,

**FILED AND
ENTERED ON
DATE
July 18, 2005
WESTCHESTER
COUNTY CLERK**

-against-

Index No. 5620/00

THE VILLAGE OF PORT CHESTER TO ACQUIRE
TITLE TO CERTAIN REAL PROPERTY LOCATED
IN THE VILLAGE OF PORT CHESTER, WESTCHESTER
COUNTY, STATE OF NEW YORK, AND DESIGNATED
ON THE TAX MAPS OF THE VILLAGE OF PORT
CHESTER AS SECTION 2, BLOCK 99, LOTS 7.1,
15, 16, 18A, 18B, 18D, 18E, 18F, 18G, 18H
AND 19 AS CONDEMNOR.

DECISION & ORDER

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DICKERSON, J.

CONTAMINATION REMEDIATION COSTS EXCLUDED IN CONDEMNATION TRIAL

Ready For Trial

This condemnation proceeding is scheduled for trial on October 31, 2005 with the Condemnee, Gerald E. D'Onofrio [" the Claimant "], having filed his Appraisal¹ with a value conclusion of \$830,000 and the Condemnor, The Village of Port Chester [" the Village "], having filed its Appraisal² with a value conclusion of \$600,000 subject to the

statement that " The above estimate of market value does not reflect deduction for unpaid real estate taxes, if any and deduction for the costs of contamination remediation, if any ". Presently before this Court is the Claimant's Motion In Limine seeking " an order to exclude evidence at the trial of this action as to any diminution in the value of the condemned property by reason of cleanup or remediation costs resulting from its alleged environmental contamination ".

For the reasons set forth below the Claimant's Motion In Limine is granted. However, any condemnation award will be used to satisfy outstanding tax liens³ with the balance held in escrow pending the outcome of a separate proceeding to determine the Claimant's responsibility, if any, for the contamination remediation costs related to the subject property.

Condemnation, Advance Payments & Remediation Costs

The Claimant was the owner of a small industrial property⁴ located in the Village of Port Chester, New York which was condemned as part of the Marina Urban Renewal Redevelopment Project⁵ [" the Marina Project "] by Order of this Court on September 11, 2002⁶. Thereafter, the Village offered, pursuant to E.D.P.L. § 303⁷, and the Claimant accepted, as an advance payment, \$50,000 representing the Village's " highest approved appraisal of just compensation for the foregoing property interest, as well as the...contamination remediation

costs...estimated to exceed \$1.5 million for the subject property and the adjoining property "8. It is the intent of the Village to introduce evidence at trial " relating to the effect of the contamination on market value including the costs to remediate the contamination "9.

A History Of The Site

The subject property was the location of a manufactured gas plant [" MGP "] " built in 1862, closed during the early 1890's and demolished at an undetermined time between 1895 and 1902...Con Edison's predecessor companies-the Westchester Gas & Electric Company, the New York Suburban Gas Company and the Westchester Lighting Company-owned the site from January 4, 1897 until September 16, 1916 "10. The " MGP produced and stored ' coal gas ' which was transmitted by pipe for local commercial and residential heating and lighting needs "11." The sites were subsequently redeveloped, however, the MGP facility remained buried on the site. After MGP operations terminated, the Property was used for various industrial operations including the operation of above and below ground fuel tanks, which added to the environmental problems at the site "12.

The Contaminants

The Village's Environmental Consultants have reported that " some contamination specifically heavy metals and semi-volatile organic compounds (SVOC) is likely related to the operation of the former MGP...However...since the MGP operation ceased prior to 1915, more recent operations have added similar contamination on the site...For example, leaking vehicle fuel tanks were observed during recent operations at the (Claimant's) property, as well as surface spillage of fuel and waste oil. A leaking oil underground storage tank (UST) and associated contaminated soil, was removed from the Rosenberg property. A fire was reported at the site in the 1990's and a warehouse building was reported to have burned...Since the contamination associated with each of these problems is similar to that produced by historic MGP operations, the relative percentage of contamination associated with MGP operations versus more recent site operations has not been determined "¹³.

The Owners Of The Site

It appears that the subject property was owned by, amongst others, Con Edison and its predecessor companies-The Westchester Gas & Electric Company, the New York Suburban Gas Company and the Westchester Lighting Company from January 4, 1897 until September 16, 1916¹⁴, by the Village

of Port Chester¹⁵ which purchased the property in 1920¹⁶ and the Claimant who purchased the property in 1976 and 1977 allegedly " totally unaware and had no knowledge of the existence of the MGP which apparently was buried on (the) properties "¹⁷.

Remedial Action Work Plan

A full copy of the Remedial Action Work Plan (" RAWP ") was produced by the Village's Environmental Consultants¹⁸ and " calls for the removal of the MGP gas holders, the tar well, the meter room and any residual piping which contains coal tar...(At a projected cost of approximately \$1,850,000 for environmental investigation and remediation)"¹⁹.

The Voluntary Cleanup Agreement

In 2000 G & S Port Chester LLC [" G&S "], the designated developer of the Marina Project, demanded that Con Edison " come in and assume responsibility for the remediation of the contamination "²⁰. In April of 2002 the New York State Department of Environmental Conservation [" DEC "] signed a Voluntary Cleanup Agreement²¹ [" VCA "] " by which Port Chester was designated as a volunteer to investigate the extent of contamination at the site, prepare and submit to the DEC a plan for its remediation and undertake the remediation at

its own cost and expense under DEC supervision. The Property could then be acquired by Port Chester, remediated and used in the (Marina Project) without fear of any liability for owning environmentally contaminated land "22.

The Purdy Avenue Site Agreement

On May 28, 2002 the Village, Con Edison, G&S and the Port Chester Industrial Development Agency entered into the Purdy Avenue Cooperation and Settlement Agreement²³ [" the Purdy Avenue Site Agreement "] wherein G&S assumed the Village's responsibilities under the VCA for investigation and cleanup costs and G&S and Con Edison agreed to pay most, if not all, of the investigation and remediation costs of cleaning up the subject property²⁴. The Claimant was not involved " with or asked to participate in the various negotiations which led to the execution of the (VCA and the Purdy Avenue Site Agreement) "25 and " admits that he was not financially capable of investigating or remediating the contamination or litigating with Con Edison "26.

The Rationale For The Motion In Limine

It is clear that the Village would like to reduce the value of the subject property by the " costs of contamination remediation " for which the Claimant, among others, may be responsible. The Claimant denies

responsibility for the contamination and would like to counterclaim against the Village and implead Con Edison but is unable to do so within the confines of this condemnation proceeding²⁷. In addition, it is not altogether clear why the Village is " attempting to diminish the value of the D'Onofrio property based on remediation costs which under the Purdy Avenue Agreement it is not obligated to pay "²⁸.

DISCUSSION

While it is clear that " environmental contamination " should be " considered in assessing real property tax " [Matter of Commerce Holding Corp. v. Board of Assessors of the Town of Babylon, 88 N.Y. 2d 724, 727, 649 N.Y.S. 2d 932 (1996) (" The cardinal principle of property valuation for tax purposes...is that property ' assessments shall in no case exceed full value '...The concept of ' full value ' is typically equated with market value, or what ' a seller under no compulsion to sell and buyer under no compulsion to buy ' would agree to as the subject property's price...In view of this market-oriented definition of full value the assessment of property value for tax purposes must take into account any factor affecting a property's marketability...It follows that when environmental contamination is shown to depress a property's value, the contamination must be considered in property tax assessment...the reality (is) that a purchaser of the site, on notice of the environmental contamination,

nevertheless would be liable for the cleanup costs under CERCLA (see 42 USC § 9607(a)) "); Matter of Northville Industries Corp. v. Board of Assessors of the Town of Riverhead, 143 A.D. 2d 135, 137, 531 N.Y.S. 2d 592 (2d Dept. 1988)(" The record establishes that during the tax years under review, the subject property was not in compliance with Suffolk County Sanitary Code article 12, and the petitioner correctly asserts that the full cost of compliance should be deducted from each of the tax year's assessments on the subject property...Given this principle, it is reasonable to assume that a knowledgeable buyer who desired but is not compelled to purchase the property would have been unwilling to do so unless either the work necessary to comply with the code was done or there was an abatement in the purchase price...the full cost of compliance should be deducted from the total assessments for each of the tax years under review "); Matter of Welch Foods, Inc. v. Town of Westfield, 222 A.D. 2d 1053, 1055, 635 N.Y.S. 2d 400 (4th Dept. 1995)(" The court's downward adjustment of \$526,000 to the assessment of the office building...to account for asbestos contamination and the costs of remediation, is fully supported by the record ")] it seems equally clear that contamination remediation costs should not be considered in a condemnation valuation proceeding. This is so for two reasons, i.e., to prevent a " double taking " and on the grounds of due process.

To Prevent A " Double Taking "

It is " fundamentally unfair " to devalue condemned property by its contamination remediation costs and to also subject the condemnee to full clean up costs in a separate proceeding which is either *pending* [See e.g., Matter of City of New York v. Mobil Oil Corporation, 12 A.D. 3d 77, 783 N.Y.S. 2d 75 (2d Dept. 2004) (" In the case at bar...it would be ' fundamentally unfair ' to allow the City to value the property as contaminated for condemnation purposes, and yet still recover the remediation costs. The condemnation of property which has been affected by petroleum discharge necessarily implicates other liability considerations (see Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 USCA §§ 9601-9675 [CERCLA]; Navigation Law § 170 et seq...)...it would be improvident to completely ignore the potential consequences of this law when undertaking the valuation of petroleum-contaminated property in an eminent domain proceeding. Therefore, the fact that a condemnee may face potential liability under the Navigation Law must somehow be acknowledged within the confines of an eminent domain proceeding. We conclude that the most efficacious way to accomplish this ' acknowledgment ' is...to value the condemned property as if remediated, but to hold in escrow any condemnation award pending the outcome of the Navigation Law proceeding. By excluding evidence of remediation costs in an eminent domain proceeding, the potential that the condemnee may incur a ' double taking

' is obviated ")] or prospective [See e.g., Matter of City of Syracuse Industrial Development Agency, __A.D. 3d__, 796 N.Y.S. 2d 503 (4th Dept. 2005)(" We further conclude that the court properly valued the property ' as if remediated ' without consideration of contamination or remediation costs, because petitioner may still recover remediation costs from respondents through other available avenues...contamination evidence or remediation evidence, or both, should be excluded in condemnation proceedings based on the fact that the condemnor can seek remediation costs in a separate action in which the condemnee's liability can be established "); See also: Matter of Northville Industries Corp. v. State of New York, 14 A.D. 3d 817, 818, 788 N.Y.S. 2d 464 (3d Dept. 2005); The Housing Authority of the City of New Brunswick v. Suydam Investors, LLC, 177 N.J. 2, 828 A. 2d 673, 686 (2003)(" When property is devalued for contamination in condemnation, landowners first receive discounted compensation in the condemnation proceeding and then are subject to the full cleanup costs, thus suffering what is colloquially denominated as a ' double-take '...Under that scheme, the condemnor receives a windfall by ultimately obtaining the property in a remediated state at the condemnee's cost, yet paying a discounted price due to the contamination. It seems to us that valuing property as if remediated assures just compensation insofar as it relates to the notion of ' highest and best use '. If property is valued as is, its contaminated state will necessarily circumscribe its uses,

concomitantly diminishing its fair market value despite the reality that it will likely be subject to cleanup. ")].

Any Condemnation Award Must Be Escrowed

Any monies awarded the condemnee must, of course, be held in escrow pending the outcome of a separate proceeding to establish liability for the clean up costs of the subject property [See Matter of City of New York, supra, at 12 A.D. 3d 85 (" In order to prevent any potential windfall to either side...to hold in escrow any award that may be rendered in the condemnation proceeding...to satisfy whatever judgment is recovered in the Navigation Law proceeding "); Matter of City of Syracuse Industrial Development Agency, supra, at 796 N.Y.S. 2d 507 (" value the property ` as if remediated, but to hold in escrow any condemnation award pending the outcome of [any] Navigation Law proceeding ` "); Matter of Northville Industries Corp., supra, at 14 A.D. 3d 818-819; The Housing Authority of the City of New Brunswick, supra, at 828 A. 2d 687-689)].

Due Process Considerations

As noted the Claimant will be unable to counterclaim against the Village or implead Con Edison within the framework of this condemnation

proceeding. It is both fair and reasonable to resolve the clean up responsibility issues in a separate proceeding [See e.g., Matter of City of New York, supra, at 12 A.D. 3d 84-86 (" Furthermore, it is logical that the subject of ' cleanup ' costs which arise as a result of petroleum contaminated property be handled in a proceeding commenced pursuant to the Navigation Law...In fact, the statute speaks to various topics, such as third-party liability, which could not even be effectively raised in a condemnation proceeding "); The Housing Authority of the City of New Brunswick, supra, at 828 A. 2d 686-688 (" We likewise view the treatment of disparate issues in appropriate forums as an important weight in the balance. Valuation is a relatively straightforward notion with which condemnation commissioners are familiar and experienced. Omitting the complications of contamination from the valuation process thus advances the speed and efficiency that are the hallmark of eminent domain proceedings...dealing with environmental issues in the cost-recovery proceeding makes sense. Such a proceeding allows for third-party claims against insurers, title companies and prior owners, none of whom have a place at the condemnation table...Admission of environmental issues into a condemnation trial circumvents (statutory defenses) as well as the possible joinder of third parties. That distinction is the basis for...the due process considerations ")].

Accordingly, the Condemnee's Motion In Limine is granted with the proviso that any condemnation award will be used to pay outstanding tax liens with the balance to be escrowed pending the outcome of a separate proceeding to determine the Condemnee's responsibility, if any, for the contamination remediation costs related to the subject property.

Dated: White Plains, N.Y.
July 18, 2005

HON. THOMAS A. DICKERSON
SUPREME COURT JUSTICE

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ENDNOTES

1. Complete Appraisal Report dated February 1, 2005 prepared by Lane Appraisals, Inc. and filed with the Court on March 2, 2005.

2. Self-Contained Real Estate Appraisal dated January 6, 2005 prepared by Sterling Appraisals, Inc. and filed with the Court on March 3, 2005.

3. See Condemnor's Memorandum of Law dated May 27, 2005 [" Village Memo. "] at p. 2 (" Taking into consideration the impact of the environmental contamination on the market value of the property, yet still wanting to make some payment to the condemnee, the...Village offered Claimant \$50,000.00 as payment for the property. Claimant accepted the \$50,000 plus interest as an advance payment. The entire advance payment including interest (\$54,349.32) was used to pay some of the outstanding tax liens on the property. At the time of the condemnation the Claimant owed over \$120,000 in outstanding property taxes dating back to 1999 ").

4. Affidavit of John S. Vasile sworn to March 1, 2005 [" Vasile Aff. "] at Exs. E, I, J & K [maps and deeds].

5. Vasile Aff. at Ex. B.

6. Vasile Aff. at Ex. A.

7. For a discussion E.D.P.L. §§ 303, 304 and advance payments see Matter of Village of Port Chester, 5 Misc. 3d 1031(A) (West. Sup. 2004)).

8. Vasile Aff. at Ex. C.

9. Affirmation of John E. Watkins, Jr. dated May 27, 2005 [" Watkins Aff. "] at para. 13.

10. Vasile Aff. at Ex. M, p. 1.

11. Vasile Aff. at Ex. F (New York State Department of Environmental Conservation Fact Sheet, Port Chester MGP Site, December 2000).

12. Vasile Aff. at Ex. D

13. Vasile Aff. at Ex. N.

14. Vasile Aff. at Ex. M.

15. Vasile Aff. at pp. 7-8 ("...Port Chester owned almost all of the land subsequently owned by claimant and now identified as part of the MGP's site, at a time when it was already contaminated by the remnants of the gasification plant...Under environmental regulations and statutes, Port Chester as a prior owner of the property is a potential responsible party and is jointly and severally liable with claimant and all other owners and operators for any contamination at the site and any response costs associated therewith ").

16. Vasile Aff. at Exs. E, I, J & K.

17. Affidavit of Gerald E. D'Onofrio sworn to March 1, 2005
[" D'Onofrio Aff. "] at p. 1.

18. Vasile Aff. at Ex. N.

19. Vasile Aff. at Ex. D.

20. Vasile Aff. at G.

21. Vasile Aff. at Ex. H.

22. Vasile Aff. at p. 6-7 (" If it performed in accordance with the (VCA), the DEC would give Port Chester a Release and Covenant Not To Sue insulating it and its lessees and assigns from liability for the specified contamination...These releases and covenants would be especially important to G&S in any efforts made to obtain mortgage financing of the redevelopment project ").

23. Vasile Aff. at Ex. M.

24. Vasile Aff. at pp. 8-9 (" The site " response " costs (the cost of investigating and remediating the site) would be divided between G&S and Con Edison under the following formula: a) Con Edison would pay the first \$400,000 of such cost; b) G & S would pay the next \$100,000; c) Con Edison and G&S would share equally all such costs between \$500,000 and \$1,500,000; and d) The parties reserved all rights against each other with respect to any such costs in excess of \$1,500,000...Con Edison agreed to lend Port Chester \$600,000 for site acquisition costs, interest free for a period of two years. Thereafter, this amount would

bear interest at 5% per annum ").

25. Vasile Aff. at p. 9; D'Onofrio Aff. at p. 2 (" Deponent states emphatically that if he were part of the negotiation leading up to the execution of the Purdy Avenue Site Cooperation and Settlement Agreement...he would have insisted that Con Edison be held responsible for the full cost of investigating and remediating the contamination at the subject property ").

26. Watkins Aff. at para. 9; D'Onofrio Aff. at p. 2.

27. Vasile Aff. at paras. 5-6.

28. Claimant's Reply Brief In Support of Motion In Limine dated June 23, 2005 [Claimant's Reply Memo. "] at pp. 3-4 (" G&S and Con Edison have agreed to pay such costs for the Village. Why then should Port Chester be allowed to offset such expense against the Claimant? This would result in a windfall to Port Chester which, if successful, will neither pay market value for the property, nor the remediation costs to clean it up. At the same time, claimant is still exposed to potential double liability in the event he is subsequently pursued for cleanup costs by the DEC or Con Edison ").