

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X

In the Matter of the Application of the VILLAGE OF SPRING VALLEY, New York, relative to acquiring title in Fee simply to certain real property located along North Madison Avenue in the Central Business District of Such Village to effectuate the Village's Urban Renewal Plan.

**DECISION/
ORDER/JUDGMENT**

Relating to the following Tax Map Section, Block and Lot in the Town of Ramapo, Village of Spring Valley; 57.31-2-11, commonly known as 90-92 North Main Street, Spring Valley, NY 10977,

Petitioners,

Index No:
4304/05

-against -

N.B.W. ENTERPRISES, LTD.,

Respondent.

-----X

LaCAVA, J.

The non-jury trial of this Eminent Domain Procedure Law (EDPL) Article 5 proceeding, challenging the valuation by the Village of Spring Valley (Village or condemnor) of the real property taken by the Village in Eminent Domain from NBW Enterprises, Ltd. (NBW or claimant), took place before this Court on January 30, January 31, and February 7, 2007. In addition to the trial testimony and exhibits admitted into evidence, the following post-trial exhibits numbered 1 to 9 were considered in the findings of fact, conclusions of law, and the Decision and Judgment in the instant matter:

| <u>PAPERS</u> | <u>NUMBERED</u> |
|---|-----------------|
| PETITIONER'S POST-TRIAL MEMORANDUM OF LAW | 1 |
| RESPONDENT'S POST TRIAL MEMORANDUM OF LAW | 2 |
| PETITIONER'S POST-TRIAL REPLY MEMORANDUM OF LAW | 3 |
| RESPONDENT'S POST HEARING REPLY BRIEF | 4 |
| BECKMANN APPRAISAL | 5 |
| FEDERAL APPRAISAL | 6 |
| TRIAL RECORDS | 7-9 |

The instant property is owned in fee by NBW, and known and designated on the Official Tax Map of the Village of Spring Valley as 57.31-2-11, commonly known as 90-92 North Main Street, Spring Valley, New York. The premises has been described as a one and part two-story, mixed commercial/office property measuring approximately 2,730 square feet, situated on a .20 acre tax lot on North Main Street in the Village of Spring Valley.

By Order and Judgment of this Court, entered August 23, 2005, (Dickerson, J.), the taking was effected.

FINDINGS OF FACT

The Court credits the trial testimony of NBW's corporate officer, William M. Stern, that the premises was acquired by the Respondent sometime in the 1980s, for a purchase price of \$147,000. Officers of NBW include Stern, his wife, and his son. The total capital improvements by the Respondent were \$140,000. For some time, NBW was able to rent the Premises to commercial tenants with written leases covering multiple years, but, in early 2000, the Village commissioned a "blight study" that was performed by the planning firm of Saccardi & Schiff. Once the Premises were identified as being subject to condemnation, according to Stern, he believed that he could not raise rents for those years after condemnation was announced. The taking of the subject premises by the Village occurred on August 23, 2005, which the parties agreed was the "Valuation Date".

The Court further credits the testimony of the Respondent's expert, appraiser William R. Beckman, regarding his expertise in Real Estate Appraisal. Beckmann had been employed as a real estate appraiser for 25 years; for many of those years he has appeared before Courts in the Ninth Judicial District as an Expert Witness in the valuation of real property. Beckmann was also the Tax Assessor for the Village for 19 years. Mr. Beckmann was qualified as a Member of the Appraisal Institute since 1990 and was a Counselor of Real Estate ("CRE") since 2000 as well as a member of the Royal Institute of Chartered Surveyors and a member of the IAO.

The Court further credits Beckman's testimony regarding the subject premises. Beckman testified that the premises consisted of 1,730 square feet of retail space and 1,000 square feet of office space, for a total of 2,730 square feet for the subject premises. (Notably, as set forth below, this was some 250 feet greater than the measurement arrived-at by condemnor's expert.)

In addition, the Court credits Mr. Beckman's testimony that he examined the assessment records for the Village relating to the subject property, and determined that the premises had an assessed value in 2005 of \$24,100.00. Further, he testified that the Equalization Rate, established by the State of New York, for the Village at that time was 9%, and that therefore the equalized value of the subject premises in 2005 was \$267,778.00.

The Court further credits Mr. Beckman's testimony that, in analyzing the highest and best use for the subject premises, he concluded that said use was the current use being employed for the property, namely a mixed retail/office commercial premises.

Mr. Beckman testified, and the Court credits this testimony, that, in furtherance of his analysis pursuant to the income capitalization method, he made use of the actual income derived from the operation of the subject premises in order to arrive at his conclusions. He gathered this information by both a personal inspection of the premises during business hours, and also by a survey of the property's tenants. He also evaluated these income figures in light of market conditions, by an examination of the income amounts he gathered from an analysis of nine Retail and six Office comparable properties. In each instance he either acquired a copy of the 2005 lease or lease abstract, and/or verified the rental income conditions with the owners of those premises. To these amounts he added the income generated by the subject from the basement storage area and the adjacent parking lot.

From this analysis, Beckmann arrived at a total gross potential income for 2005 of \$56,800.00. To this he applied a vacancy and collection loss estimate of 5%, to generate an Effective Gross Income of \$53,960.00. Mr. Beckman then conducted an expense analysis of the subject property by gathering the actual expenses incurred in the operation of the subject premises, through tax return analysis, including expense figures for, among other things, management, insurance, repairs, miscellaneous expenses, and property taxes, to arrive at total expenses of \$19,837.00. He then, as was the case with the income generated by the premises, evaluated these expense figures by a market analysis, by examining the expense amounts reported by the same nine Retail and six Office

comparable properties. Finally, Mr. Beckman was able to generate a Net Operating Income (NOI) figure from this analysis of \$34,123.00.

To this NOI amount, due to his conclusion that the subjective premises was not institutional grade, he applied a Capitalization Rate of 10% that he derived from the Korpacz Real Estate Investor's Survey, for non-institutional properties. Based on the Income Capitalization method, he was thus able to arrive at a fair market value for the premises on August 23, 2005 of \$341,230.00, which he rounded to \$340,000.00.

Finally, Beckman tested the accuracy of his income capitalization conclusions by analysis of four comparable properties in a Sales Comparison approach. Beckman utilized two sales in the Village, one for \$180,000.00 and another for \$250,000.00. He also used two sales outside the Village but still within the Town of Ramapo, one for \$465,000.00 and one for \$375,000.00. After making adjustments for, *inter alia*, the age of the sale; the location; the size of the lot; the size of the improvement on the property; and the condition, Beckman arrived at a market value estimate on August 23, 2005 of \$125.00 per square foot, or \$341,250.00, which he rounded to \$340,000.00.

The Court generally declines, in large respect, to similarly credit the testimony of the Village's expert, Mark Pomykacz. Pomykacz conceded in his testimony that he had no retail appraisal experience in the Village before being assigned to appraise the 15 parcels along with the subject property that were the subject of the instant Eminent Domain proceeding, although he did have some residential and commercial appraisal experience in Northern New Jersey and Southern New York State, and had commercial real estate appraisal experience in New York City. He also testified that his current employment involves valuation of utility properties and other tax issues. In addition, he stated that he appraised approximately two properties per year, in recent years, in Rockland County, although none of them of a similar size to the subject property.

Pomykacz toured the property, noting that it was generally well-maintained and in slightly better condition than other properties on the same street. However, rather than measure the improved portions of the property, Pomykacz admitted that he performed "take-offs" using the survey to arrive at an estimated measurement calculation of 2,452 square feet for the premises. While he stated at one time that he did conduct measurements, he conceded elsewhere that he did not.

Pomykacz also performed, like Beckman, a highest and best use analysis. He agreed that the current utilization of the property was the highest and best use. He also employed, like Beckman, both the Sales Comparison and Income Capitalization methods of valuing the subject property. For the Sales Comparison method, he analyzed eight comparable sales, and seven properties (one property involving two separate sales), ranging in adjusted values from just over \$40.00 per square foot up to approximately \$106.00 per square foot. Eliminating those two as statistical extremes, Pomykacz concluded that the average values ranged from approximately \$66.00 per square foot to approximately \$101.00 per square foot, leading him to a final valuation conclusion of \$75.00 per square foot, or \$184,000.00.

Notably, Pomykacz was cross-examined extensively regarding the \$66.00 per square foot comparable sale, since the deed made clear that only a one-half interest in the property had been deeded, providing strong evidence that the actual market value should be twice the sales price recorded by him. He was also questioned about his failure to use, in his analysis, a subsequent sale, which occurred just 10 months after the valuation date involving a second comparable property, where the sale price was nearly two-thirds higher at the time of the resale.

For the Income Capitalization method, Pomykacz made use of Stern's deposition, and tax returns, for actual rents, but concluded that those figures were unreliable. Thus, he conducted a market rent analysis of 11 comparable properties in the area of the subject premises as well, relying, however, on asking prices for un-rented properties, not actual rents for rented properties. It must be noted that Pomykacz included no leases or lease abstracts in his appraisal. He concluded that small spaces commonly sought renters for \$15 per square foot, while spaces over 2400 square feet commonly sought renters for \$10.00 per square foot. Based on the same 2453 square foot estimate made earlier, this led to a Potential Gross Income conclusion of \$25,623.00; Mr. Pomykacz allowed for a 10% vacancy and credit loss, or \$2562.00, which led to an Effective Gross Income of \$23,061.00.

Pomykacz then performed an expense analysis of the subject premises, based on Stern's tax returns, as well as a market expense analysis. Including, among other things, insurance, operating expenses, management expenses, and tenant improvements, Pomykacz determined expenses for the property to be \$2.02 per square foot, or \$4,950.00. Here it must be noted that Pomykacz declined to include taxes as an expense, despite claimant's having paid those taxes, arguing that his ultimate valuation did not support the then-current equalized value. This compelled him to weight the

capitalization rate as in the assessors formula employed in tax certiorari cases. Pomykacz did not explain, however, why he used market rates for other expenses but did not do so for taxes.) Pomykacz then, from this expenses estimate, arrived at an NOI figure of \$18,411.00.

Having arrived at an NOI, he then proceeded to capitalize the result by employing both a "Band of Investment" analysis and a market survey method, both of which led him to decide on a capitalization rate of 10%. To this he derived a weighted rate by adding the taxes (as set forth above), which weighted rate was 13.70%. This led to a capitalized value of \$132,000.00. Pomykacz then reconciled these two amounts by weighting the sales comparison method in preference to the income capitalization method, based on his conclusion that properties such as the subject property are commonly owner-occupied, purchased more for the owner's use than for income-generation, leading most potential investors to value price over the potential income from a property. From this analysis he concluded that market value for the subject property was \$171,000.00, or \$70.00 per square foot.

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. Condemnation Blight

Claimants have alleged the effect of "Condemnation Blight" upon the subject property, which had the effect of reducing the value of the premises prior to the taking on the agreed-upon valuation date.

In *Buffalo v. J. W. Clement Co.*, 28 N.Y.2d 241, 257-8 (1971), the Court of Appeals stated

the aggrieved property owner has a remedy

where it would suffer severely diminished compensation because of acts by the condemning authority decreasing the value of the property (*Niagara Frontier Bldg. Corp. v. State of New York*, 33 A D 2d 130 (4th Dept. 1969), affd. 28 N Y 2d 755, decided herewith). In such cases where true condemnation blight is present, the claimant may introduce evidence of value prior to the onslaught of the "affirmative value-depressing acts " (*City of Buffalo v. Irish Paper Co.*, 31 A D 2d 470, 476 [4th Dept. 1969]) of the authority and compensation shall be based on the value of the property as it would have been at the time of the *de jure* taking, but for the debilitating threat of condemnation (see, also, *City of Detroit v. Cassese*, 376 Mich. 311, 317-318 [Supreme Court, Michigan, 1965]; *City of Cleveland v. Carcione*, 118 Ohio App. 525 [Ct of Appeals of Ohio, 8th District, Cuyahoga County, 1963]; 4 Nichols, Eminent Domain [3d ed.], §12.3151; Owen, Recovery for Enhancement and Blight in California, 20 Hastings L. J. [Univ. of Cal.] 622, 643-649 [Jan., 1969])). This, in turn, requires only that there be present some proof of affirmative acts causing a decrease in value and difficulty in arriving at a value using traditional methods (*City of Buffalo v. Irish Paper Co.*, 31 A D 2d 470 [4th Dept. 1969], affd. 26 N Y 2d 869 [1970])).

Consequently, and as a first step, claimant must present evidence of affirmative acts by the condemning authority, which acts caused a decrease in the value of the property. Not just any acts will suffice, however; rather, as the Second Department stated in *Matter of Port Chester v. William D. Brody*, 2007 NY Slip Op 6700 (2nd Dept. September 11, 2007).

the claimant failed to set forth any affirmative conduct by the Village that unreasonably interfered with or further depressed the value of the subject properties sufficient to transform the already disadvantageous market conditions into "condemnation blight"

(See also *Samfred Belt Line Corp. v. State*, 43 A.D.2d 62, [3rd Dept. 1972].)

Based on the evidence which was presented, including the 2000-2001 Blight Study, there is little doubt that the area surrounding the subject premises suffered from deteriorated conditions. However, claimant failed to demonstrate any acts, much less unreasonable ones, undertaken by the Village, which diminished the value of the property. As condemnor points out, such actions might include an early designation of a particular property for the taking, and/or an unreasonable delay in effecting the taking, but neither took place in the instant matter, the subject property remaining unidentified as a taking target until 2002, followed just over three years later by the taking itself.

Further, and even had claimant established the existence of unreasonable acts by the Village, to demonstrate the existence of condemnation blight, it is also necessary for claimant to present evidence of the diminution in value of the subject property prior to those acts. It should be noted initially that the parties agreed on the valuation date--August 23, 2005. To be sure, claimant also testified of his perceived inability to raise rents among his tenants after 2000, due to the latter's refusal, knowing of an eventual taking, to pay higher rents in the face of an uncertain rental future. Beckman too testified to this general inability to raise rents himself, although he presented no evidence that he personally interviewed any tenants to substantiate his opinion. He also stated that he did consider condemnation blight in his valuation of the property.

However, claimant simply presented no other evidence at all of the specific value of the subject premises at any time or date earlier than the valuation date, either from the claimant himself, or from Beckman's appraisal, or in fact anywhere else. "As the defendant offered no evidence of value in 1968 based upon market data nor did the city offer any valid appraisal evidence, we lack competent evidence upon which an award could be fashioned." *Buffalo v. J. W. Clement Co.*, *supra*, 258. Absent evidence, including a specific opinion of the value of the property prior to the effect of the alleged condemnation blight, from which the Court could subtract the market value on the taking date and additionally award the difference, the Court is unable to find that condemnation blight had a particular effect on the premises.

5. Valuation by Income Capitalization Method

a. As an income-producing property, it is proper to rely on the Income Capitalization Method. However, where the property may also be purchased for operation by the owner, the sales comparison method is equally proper. (*Appraisal of Real Estate*, 12th Edition, 472-3, 419.) Regarding the subject property, while it is owner-occupied, the owner occupied only a modest portion of the premises (approximately 40%), with the remainder let to other businesses.

Thus, it is appropriate to weight the Income Capitalization Method slightly over the Sales Comparison Method.

b. Square Footage

Claimant adequately demonstrated that the total area of the subject premises was 2730 square feet, consisting of 1730 square feet of retail space, 1000 square feet of office space.

c. Income

Claimant, through Beckman's testimony, adequately demonstrated, through an analysis of actual rental income and market rents, the range of proper income for the subject premises. Using actual rents, the subject premises generated \$22,800.00 in rent from its retail portion, and \$12,000.00 from its office space portion (space used by the owner), for a total rent of \$36,800.00. (Claimant conceded, however, that he had not paid himself rent for some time.)

Further, Beckman, utilizing leases from nine comparable retail commercial properties, as properly adjusted for factor variances, concluded that the range of rents for such premises was \$18.59 to 23.38 per square foot, with \$20.00 per square foot as the appropriate market rent for the retail portion of the subject property, or \$34,600.00.

However, the Court concludes, from an analysis of the most nearly comparable of the retail leases utilized by both condemnor and claimant, that the appropriate market rent for the retail portion of the premises is slightly lower than that set forth by claimant, namely \$19.00 per square foot, or \$32,870.00.

Beckman then utilized leases from six comparable office commercial properties, as properly adjusted for factor variances, and concluded that the range of rents for such premises was \$11.06 to \$14.94 per square foot, with \$12.00 per square foot as the appropriate market rent for the retail portion of the subject property, or \$12,000.00. From an analysis of the most nearly comparable of the office leases utilized by both condemnor and claimant, the Court concludes that the appropriate market rent for the office portion of the premises is, as argued by Beckman, \$12.00 per square foot, or \$12,000.00.

The Court also concludes that there is ample foundation for Beckman's assertion of \$3,600.00 rental income for the garage storage space, and \$6,600.00 for the parking lot, for a total potential gross income of \$55,070.00. In addition, while condemnor's appraiser used a 10% vacancy and collection loss figure, the Court concludes, based on analysis of the history of the subject property, that the 5% figure used by Beckman is more

appropriate. Thus, \$2,785.00 is subtracted from the potential gross income, for an effective gross income of \$52,285.00.

Claimant, through Beckman's testimony, also adequately demonstrated, through an analysis of actual expenses, the proper expense figures for the subject premises. The Village's appraiser inappropriately utilized an analysis of both market and actual expenses which, among other things, excluded actual taxes from his calculation, and yielded an extremely low rate of expenses of approximately \$2.00 per square foot, or \$4,950.00¹. Using actual expenses in its analysis, the Court too finds that the subject premises incurred \$11.47 per square foot in expenses, or \$19,837.00. This yields an NOI of \$32,448.00.

Both parties agree that the proper capitalization rate is 10% (although condemnor improperly elected to utilize a tax weighted rate), and the Court concludes that the evidence adequately supports the use of that rate. Properly capitalized, the NOI reflects a market value estimate, on the agreed-upon date of taking, of \$324,480.00, or \$325,000.00 rounded.

6. Valuation by Sales Comparison Method

Claimant, through Beckman's testimony, which analyzed four comparable sales, concluded a market value for the subject premises of \$340,000.00 as a check on his income capitalization value. Condemnor, to the contrary, using eight comparable properties, arrived at a market value conclusion of \$184,000.00, which he weighted in preference to his income capitalization value.

Initially, the Court notes that two of claimant's properties were outside of the Village, although both were in the same town, Ramapo. Further, as noted previously, the Village utilized one sale--number five--with a price of \$155,000.00, wherein the fee simple interest transferred was only 50%, not 100%. The Court thus concludes that the appropriate value for that property is \$310,000.00, not \$155,000.00. When combined with what the Court herewith finds is an understatement of the correct square footage (2730) of the premises, this would create an increase in the sales comparison value estimate made by the Village to \$232,000.00.

The Court concludes, in addition, that an analysis of the four most nearly comparable of the properties offered by both parties--

¹The Court also notes that, had the Village's appraiser properly utilized the gross capitalization rate of 10%, rather than deriving a weighted capitalization rate by including the taxes, and applying this to his NOI, his market value conclusion would have been \$ 184,000.00, not \$ 132,000.00

Village's number three and five, and NBW's one and two--leads to the conclusion by the Court that the proper market value, as produced by the sales comparison method, for the subject property, is \$314,311.00, rounded to \$315,000.00. The Court accepts this value conclusion as an appropriate check on its Income Capitalization Method market value conclusion of \$325,000.00.

7. Additional Indicia of Market Value

The Court notes that the evidence at trial demonstrated that the equalized value of the property, for tax assessment purposes, is \$267,778.00, and that the purchase price plus improvements amounted to \$287,000.00.

8. Summary of Value Conclusions

| <u>Income</u> | <u>SF</u> | <u>\$ SF</u> | <u>Rent</u> |
|----------------------------------|-----------|--------------|---------------|
| Retail | 1730 | \$ 19.00 | \$ 32,870.00 |
| Office | 1000 | \$ 12.00 | \$ 12,000.00 |
| Garage | -- | | \$ 3,600.00 |
| Lot | -- | | \$ 6,600.00 |
| Potential Gross Income | | | \$ 55,070.00 |
| Vacancy and Collection Loss (5%) | | | \$ 2,785.00 |
| Effective Gross Income | | | \$ 52,285.00 |
| Expenses | | | \$ 19,837.00 |
| Net Operating Income (NOI) | | | \$ 32,448.00 |
| Capitalization Rate (10%) | | | |
| Market Value | | | \$ 324,480.00 |
| ROUNDED | | | \$ 325,000.00 |

Conclusion

Upon the foregoing papers, and the trial held before the Court on January 30, January 31, and February 7, 2007, it is hereby

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

ORDERED, that petitioner Village shall pay as compensation to claimant NBW the amount of \$325,000.00, with interest thereon from the date of the taking, August 23, 2005, less any amounts previously paid, together with costs and allowances as provided by law.

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

Dated: White Plains, New York
January , 2008

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

Lawrence A. Zimmerman, Esq.
Hiscock & Barclay
Attorney for Petitioner
50 Beaver Street
Albany, New York 12207-2830

Dennis E.A. Lynch, Esq.
Feerick Lynch MacCartney, PLLC
Attorneys for Respondent
96 South Broadway
South Nyack, New York 10960