

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ROCKLAND

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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 -

Motion Date:  
8/24/09

N.B.W. ENTERPRISES, LTD.,

Claimant.

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**LaCAVA, J.**

The following exhibits numbered 1 to 3 were considered in connection with this motion by claimant NBW Enterprises LTD. (claimant) for an Order directing an additional allowance to claimant pursuant to EDPL §701:

<u>PAPERS</u>	<u>NUMBERED</u>
NOTICE OF MOTION/AFFIRMATION/AFFIDAVITS/EXHIBITS	1
REPLY AFFIRMATION	2
REPLY AFFIRMATION	3

The instant property was previously 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.

In a Decision and Order dated January 22, 2008, the Court held:

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**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.

Subsequently, condemnor Village of Spring Valley (Village) filed a Notice of Appeal on March 10, 2008, and their time to appeal was enlarged by Order of the Appellate Division, Second Department. The Village did not perfect the appeal of the instant matter, however, and on April 2, 2009 this Court signed a Judgment against the Village in the amount of \$197,221.42 (representing the \$160,000.00 difference between the advance payment and the Court's award, plus interest from the date of the taking to March 10, 2009), with interest going forward accruing at @ 26.30 per day, and ordinary costs amounting to \$3,025.00. Upon failure of the Village to pay the judgment, claimant was compelled to execute upon the judgment, and, following service of the execution on bank creditors of the Village by the Rockland County Sheriff, the Village, on June 9, 2009, paid the Judgment in the amount of \$199,913.02 (including sheriff's fees).

Claimant now moves for additional allowances pursuant to EDPL

§701, for the attorney's fees, appraisal fees, and other actual and necessary disbursements incurred to achieve just compensation from the taking.

EDPL §701 provides

§701. Additional allowance. In instances where the order or award is substantially in excess of the amount of the condemnor's proof and where deemed necessary by the court for the condemnee to achieve just and adequate compensation, the court, upon application, notice and an opportunity for hearing, may in its discretion, award to the condemnee an additional amount, separately computed and stated, for actual and necessary costs, disbursements and expenses, including reasonable attorney, appraiser and engineer fees actually incurred by such condemnee. The application shall include affidavits of the condemnee and all parties that have incurred expenses on the condemnee's behalf, setting forth inter alia the amount of the expenses incurred.

#### **Award Exceeds Condemnor's Proof**

It is conceded that the pre-taking offer by condemnor was \$165,000.00, and the Court's award was \$325,000.00. As claimant properly argues, the award exceeds the offer by \$160,000.00, or a factor of 97% over the pre-taking offer. Claimant also properly notes that, even if condemnor's proof at trial were considered, the award still exceeds the amount in value offered in proof by the Village at trial (\$ 171,000.00) by 93%.

As the Court stated in *Town of Islip v. Sikora*, 220 A.D.2d 434, (2<sup>nd</sup> Dept. 1995):

EDPL 701 "assures that a condemnee receives a fair recovery by providing an opportunity for condemnees whose property has been substantially undervalued to recover the costs of litigation establishing the inadequacy of the condemnor's offer" (*Hakes v State of New York*, 81 NY2d 392, 397; see also, *Matter of New York City Tr. Auth. [Superior Reed & Rattan Furniture Co.]*, 160 AD2d 705, 708, *supra*). It also vests the trial court with

discretion, "in order to limit both the incentive for frivolous litigation and the cost of acquiring land through eminent domain" (*Hakes v State of New York, supra*, at 397). The Legislature's determination to allow such fees and costs "merely allows a court in condemnation cases to ameliorate the condemnee's costs in cases it considers appropriate" (*Hakes v State of New York, supra*, at 398). We agree with the trial court that the actual value of the property which we have recomputed to be \$754,207 is substantially in excess of the condemnor's proof at trial of \$550,000, and the fees and disbursements were actual and necessary to obtain just compensation (see, *Matter of Town of Riverhead v Lobozzo*, 207 AD2d 790; *Zappavigna v State of New York*, 186 AD2d, *supra*, at 557; *Scuderi v State of New York*, 184 AD2d 1073; *Karas v State of New York*, 169 AD2d 816).

The Court notes that, in *Islip*, the award exceeded the condemnor's proof at trial by only approximately 37%, yet that excess was found to be substantial, justifying an award of costs under EDPL §701. (See also *E.D.J. Quality Realty Corporation v. Village of Massapequa Park*, 204 A.D.2d 321, [2<sup>nd</sup> Dept. 1994]--58% excess; *Scuderi v. State of New York*, 184 A.D.2d 1073 [2<sup>nd</sup> Dept. 1992]--41.4%); *Karas v. State of New York*, 169 A.D.2d 816 [2<sup>nd</sup> Dept. 1991]--41% excess. Clearly, since the award herein far exceeded the condemnor's proof at trial, the first condition of EDPL §701 has been amply established.

#### **Necessary to Achieve Just and Adequate Compensation**

Claimant details the following costs for which it seeks payment under RPTL §701:

Beckmann Appraisals, Inc.	\$ 19,442.50
Condon Resnick LLP	\$ 6,583.46
Feerick Lynch MacCartney, PLLC	\$ 77,381.86 (pre-motion)
	<u>5,886.60 (motion)</u>
	\$109,294.42

#### **Appraiser's Fees**

Claimant lists \$19,442.50 in fees for Beckmann Appraisals, as

follows:

Appraisal Report	\$ 7,500.00
Consultation and Testimony	\$ 8,500.00
Interest on unpaid balance, above	<u>\$ 3,442.50</u>
	\$ 19,442.50

Claimant has submitted billing records for this expense, and an affidavit from Mr. Beckmann with regard to his invoices. The Court concludes, as a matter of discretion, that interest on an unpaid professional invoice, even one incident to litigation, was not necessary here to achieve just and adequate compensation. Similarly, claimant would have had to engage an appraiser, and pay for an appraisal, whether the offer and/or proof presented at trial by condemnor was exceeded by the award or not. Hence the amount for the appraisal report was not necessary to achieve just and adequate compensation. Consequently, the only amount in appraisal fees for which the Court makes an allowance, as necessary to achieve just and adequate compensation, is \$ 8,500.00 in fees incident to the litigation of the instant matter by Beckmann Appraisers.

#### **Condon Resnick LLP**

Claimant lists \$6,583.93 in fees for Condon Resnick LLP, his attorney prior to trial. Claimant has submitted billing records for this expense, and an affidavit from David Resnick Esq. with regard to his invoices. All of the expenses appear to be directly related to the litigation, and are billed at the rate of \$225.00 per hour. The Court thus, as a matter of discretion, finds as necessary to achieve just and adequate compensation, \$6,583.93 in fees for Condon Resnick LLP.

#### **Feerick Lynch MacCartney, PLLC**

Claimant lists fees of \$77,381.86 (pre-motion) and \$5,886.60 (post-motion) for Feerick Lynch MacCartney, PLLC, its trial counsel. Claimant has submitted billing records for this expense, and an affidavit from trial counsel Dennis E. A. Lynch Esq. with regard to his invoices. The expenses appear to be directly related to the litigation, and are billed at the rate of \$375.00 per hour. As a matter of discretion, the Court finds as necessary to achieve just and adequate compensation, \$70,381.86 in fees pre-motion, and \$5,886.60 in fees post-motion, for Feerick Lynch MacCartney, PLLC.

#### **Interest on Unpaid Balances**

In addition, claimant lists \$10,797.34 as interest on fees

through July 30, 2009, as follows:

Beckmann Appraisals, Inc.	\$ 1,285.50 <sup>1</sup>
Condon Resnick LLP	\$ 1,310.59
Feerick Lynch MacCartney, PLLC	\$ 8,201.25
	<u>\$ 10,797.34</u>

As set forth above, the Court concludes that interest on an unpaid professional invoice, even one incident to litigation, was not necessary here to achieve just and adequate compensation, and thus, as a matter of discretion, the Court makes no allowance for said expenses.

### **Conclusion**

The Court thus finds, as a matter of discretion, that the following expenses were necessary to achieve just and adequate compensation in the instant matter, and thus makes an allowance for them pursuant to EDPL §701, as follows:

Beckmann Appraisals, Inc.	\$ 8,500.00
Condon Resnick LLP	\$ 6,583.93
Feerick Lynch MacCartney, PLLC	\$ 76,268.46
	<u>\$ 91,352.39</u>

Upon the foregoing papers, it is hereby

**ORDERED**, that the claim by claimant for an allowance for actual costs necessary to achieve just and adequate compensation in the instant matter, pursuant to EDPL §701, is hereby granted, to the extent that it is further

**ORDERED**, that condemnor Village shall pay as an EDPL §701 allowance to claimant NBW the amount of \$91,352.39, with interest thereon from the date of July 30, 2009.

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

Dated: White Plains, New York  
November 23, 2009

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<sup>1</sup> It is unclear what relation this interest amount bears to the interest amount of \$3,442.50 cited above as relating to Mr. Beckmann's fee.

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

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