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

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In the Matter of the Application of the

VILLAGE OF DOBBS FERRY for the acquisition of fee title interest in land situated in the Village of Dobbs Ferry, for the construction of a permanent, municipal garage and storage facility for the Village of Dobbs Ferry Department of Public Works,

DECISION/ ORDER/JUDGMENT

Index No: 3660/00

Petitioner,

-against -

STANLEY AVENUE PROPERTIES, INC.; CHAIN LOCATIONS OF AMERICA, INC.; THE CHILDREN'S VILLAGE; PEOPLE OF THE STATE OF NEW YORK; JEFFREY COHEN (as referee),

Respondents.

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LaCAVA, J.

The trial of this Eminent Domain Procedure Law (EDPL) Article 5 proceeding, challenging the valuation by the Village of Dobbs Ferry (Village or Condemnor) of the real property taken by the Village in Eminent Domain from Stanley Avenue Properties (Stanley or Claimant), took place before the Hon. Thomas A. Dickerson on March 3, March 9, March 13, April 10, May 11, and May 31, 2006[1].

[1]By stipulation entered into between the parties and so-ordered by the Court on April 18, 2007, the parties agreed to have this Court rule on the instant matter, notwithstanding that the matter was tried before Justice Dickerson.

In addition to the trial record, the following post-trial submissions numbered 1 to 11 were considered in this matter:

PAPERS	NUMBERED
APPRAISAL OF REAL PROPERTY	1
ENGINEERING REPORT	2
REBUTTAL REPORT TO APPRAISAL	3
PRE-TRIAL MEMORANDUM	4
PRE-TRIAL MEMORANDUM	5
POST-TRIAL MEMORANDUM	6
POST-TRIAL MEMORANDUM	7
POST-TRIAL MEMORANDUM	8
POST-TRIAL REPLY MEMORANDUM	9
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW	10
SELF-CONTAINED REAL ESTATE APPRAISAL REPORT	11

The instant property, known and designated on the Official Tax Map of the Village of Dobbs Ferry as Section 9, Sheet 27, Lot P40-D, and on the Official Tax Map of the Village of Hastings–on-Hudson as Section 11, Sheet 22, Lot P-7G, is owned in fee by Stanley, which acquired title on June 2, 1994 by deed recorded in the Westchester County Clerk's Office (Division of Land Records) from Chain Locations of America, formerly known as Carvel Stores Realty Corp. The property has been described as an irregularly shaped, elongated, sloping and at times rocky parcel, which has frontage along Stanley Avenue and Ogden Avenue in the Village, immediately adjacent to the Saw Mill River Parkway.

As early as 1997, Stanley made proposals to the Village Planning Board in connection with pre-submission conferences for development of the parcel. These proposals included plans for 34 lots in Dobbs Ferry and 4 in Hastings, and, later, plans showing 17 lots with a road going around a proposed Department of Public Works (DPW) facility. One feature of the subdivision was utilization of a single entry and exit road, which road as proposed exceeds, by some considerable amount (1200 to 1200 feet), the 400-foot dead-end road restriction set forth in the subdivision regulations. The Village Planning Board can, and in some instances has, waived this 400-foot restriction in some manner in Village subdivisions in the past. In the claimant's consultant's discussions with the Planning Board concerning the road, and in the 40 to 50 meetings held, although no final decision had been made, objection to the road length was made on only one occasion, and Stanley was in fact told to proceed with the engineering plans for the road as designed.

After many meetings and discussions on the project, the Village Planning Board indicated a preference for development of the property for use as an assisted care living facility for

elderly residents, as more compatible with the proposed adjacent Village DPW facility. Claimant, in recognition of the Planning Board's preference, petitioned the Village Board of Trustees in 1999 for an amendment to the Zoning Code to permit such use.

While the Planning Board recommended to the Board of Trustees that such amendment be approved, the Board of Trustees never put the amendment proposal on its agenda, and the issue became moot when the below-described taking was proposed, and no action was taken on the amendment issue. In late 1999, it became clear that the Village would be taking a portion of the property in eminent domain for a proposed DPW facility; nevertheless, claimants resubmitted their residential subdivision proposal. The March 2000 site plan and subdivision application was admittedly filed with the Village in anticipation of the taking, and, due to the impending condemnation, the Village advised claimant that it would neither accept nor process the application.

By Order and Judgment of this Court, entered July 6, 2000 (Palella, J.), the taking for the DPW facility was effected. Nevertheless, in August 2000, Stanley submitted an additional application for subdivision approval, which application was not placed on the Planning Board calendar due to advice from Village (and current trial)counsel. Subsequently, in March 2001, an application was submitted for subdivision approval for the remaining portion of the parcel, claimant arguing that 21 lots could be built after the taking. Revisions and additions were and have been directed by the Planning Board and the Village Round Table (a meeting of several Village Executive departments); a scoping session under the State Environmental Quality Review Act (SEQRA) took place and a lengthy and detailed scoping document was adopted; and the Planning Board requested that Stanley prepare a draft environmental impact statement (DEIS), which would include alternatives, including both a cluster design and alternate roadway layouts (a looped road) for the proposed 21-unit development.

FINDINGS OF FACT

The Court makes the following Findings of Fact:

The Court credits the testimony of the witnesses for the claimant, particularly consultant Padraic Steinschneider, that, as early as 1997, the respondent-claimant submitted subdivision layouts to the Village of Dobbs Ferry Planning Board in connection with pre-submission conferences relating to the subdivision. These layouts included plans for 34 building lots in Dobbs Ferry and, later, plans showing 17 lots in Dobbs Ferry with a road going around the proposed DPW premises. The 34 parcels, as evidenced by Claimant's Appraisal by Eugene Albert of Albert Valuation Group, were appropriate for either single or 2-family houses on each lot.

After many meetings, the Village planning Board indicated its own preference for the use of the property as an assisted care living facility for elderly residents, since it would, in their opinion, be more compatible with the proposed Village DPW facility. Based on that preference, the claimant petitioned the Village Board of Trustees in 1999 for an amendment to the Zoning Code to permit such use. Soon thereafter, the Planning Board recommended to the Board of Trustees that such amendment be approved; however, the Board of Trustees never put the proposal to amend the Zoning Code to permit such use on its agenda, and it became a moot issue when, in late 1999, it became clear that a taking for the DPW facility would soon occur.

The Court further credits Steinschneider's testimony that, in March of 2000, claimants submitted a formal site plan and subdivision application to the Village, in anticipation of the expected taking by the Village for the DPW facility. In light of the impending Taking, the Village declined to accept this application or process it. On June 19, 2000, the Village's Taking became effective by reason of the Order and Judgment filed in the County Clerk's Office. In August 2000, the claimant submitted an additional application for subdivision approval; however, the application again did not go forward because the Planning Board Chairman received a letter from Village (and trial) Counsel advising the Planning Board to remove the matter from its calendar.

The Court further finds that, on March 21, 2001, another application, consistent with the 2000 applications, was submitted for subdivision approval, this time for the 21 lots remaining after the taking. After numerous meetings, the plans were repeatedly revised and supplemented to meet the requests made by the Village Planning Board. The claimant's proposed subdivision had been extensively discussed at the Village Round Table, where the only negative issue raised was whether there was sufficient water pressure present. The Planning Board also held a special meeting, which was a scoping session under the State Environmental Quality Review Act (SEQRA), and adopted a lengthy and detailed scoping document. The Planning Board requested that the claimant prepare a draft environmental impact statement (DEIS), which would include alternatives, particularly a cluster design and alternate road layouts.

The Court also finds that claimant had, at the time of trial, nearly completed a lengthy DEIS, which study includes various layouts such as clustered townhouses and looped roads, all with the same post-taking 21 unit density. The conventional subdivision submitted by the claimant complies fully with the Village Zoning

Code, including all area requirements, steep slopes deductions, and compliance with the Village's Rectangle Law. While the proposed subdivision, like past subdivision plans, also contains a single road which exceeds the 400-foot dead-end road restriction set forth in the subdivision regulations, the Village Planning Board has the authority to waive this restriction where it believes the single roadway is the best option available given all of the factors involved, and indeed has done so in the case of numerous subdivisions in the past. In the alternative, the Board can request, and the plans contain such contingency, that the development be clustered; while there is a statutory 20-acre minimum for clustering, the Board is empowered to waive, and has frequently waived, that requirement as well. Clustering notably would permit development with a loop road, rather than the planned single, dead-end road, avoiding the 400-foot dead-end road restriction.

In particular, regarding prior waiver of clustering or dead-end road limitations, the Court credits Steinschneider's testimony that the Livingston Ridge development, while only just over 2 acres (far less than the 20 acre minimum for clustering), was built as a clustered development at the Village's request; as was the Fireman's Development (2.5 acres); Villas on the Ridge (approximately 3 acres); the Washington's Headquarters development (approximately 1 acre); and Springhurst Acres. The Court also credits Steinschneider's testimony that the DEIS pending before the Board for the subject property currently includes clustered development, as well as a loop access roadway, as alternate features. Notably, it was Steinschneider's opinion that the original, 34-lot subdivision for the property could also have included a loop road, with no dead-end, and a separate entrance and exit.

Further, the Court credits Steinschneider's testimony that Hunter's Run, a clustered town house development in the Village, was built with a loop road far in excess of 400 feet, without alternate emergency access, and with the tacit approval of the Village's engineering consultant; that the Fireman's project has a loop road (not a parking lot with a road extension, as argued by the Village) exceeding 400 feet in length without alternate emergency access; and that the Springhurst project includes a single road with a loop at the center of the development, the roadway totaling in excess of 400 feet. Steinschneider testified further, and the Court credits this testimony, that the Ogden Place development has a single entry and exit road ending in a cul-de-sac, extending over 700 feet, which has no alternate emergency access; that the Russell Avenue/Lewis Road project includes a road which ran for over 400 feet in the development, and ends in a cul-de-sac, without secondary emergency access; and that the Keller Lane/Manor House Drive development consists in essence of a single

road dividing into several extending portions, totaling over 600 feet, which ends in a cul-de-sac, and which contains no alternate emergency access.

The Court also notes, and credits Steinschneider's testimony, that the Planning Board never advised claimants that the plan incorporating a single access road would not be approved; in fact, claimant's consultants had detailed discussions with the Planning Board, as well as the Village Rountable, concerning the road, and although no final decision had been made, the claimant was told by the Board to proceed with the engineering plans for a singular road. And, the Court credits consultant Steinschneider's testimony that not only could looped roads be done on the subject property, prior to or post taking, with the property still maintaining the same density, but also that looped roads were part of the alternative plans currently before the Board.

While details of the subdivision, such as width and configuration of roads, have yet to be finally determined, the Court finds, as a result of the testimony, that there was a reasonable probability that a subdivision containing 38 units would have been approved had there been no taking, and further that there was a reasonable probability that a subdivision containing 21 units would be approved following the taking.

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 or her 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.)

In *In re City of New York,* 25 N.Y.2d 146 (1969), cited by the Village, the claimants' expert had testified that the vacant property had a highest and best use as the site for a high-rise apartment building, with a value of $ 3.25 to $ 3.35 per square foot. The City's expert testified that the land had a highest and best use as a site for one and two-family dwellings, with a value of from $ 1.50 to $ .75 per square foot. Without a written opinion, the trial court awarded the claimants $ 2.90 a square

foot, and the Appellate Division affirmed. On appeal, the Court found:

> Undoubtedly, the trial court based its award upon a determination that the highest and best use of the premises was as a Mitchell-Lama site....The city's expert gave uncontradicted testimony that an apartment building could be built on the site only if...a subsidy were obtained. Claimants' expert appraiser testified that the highest and best use of the land was for subsidized high-rise apartments. Finally, claimants' attorney characterized the testimony of his three expert witnesses as supporting a highest and best use as a Mitchell-Lama high-rise site.
>
> 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 NY 2d 337, 339 [1968].) Generally fair market value is determined by reference to the sales prices of similar parcels in the area. (See *Village of Lawrence* v. *Greenwood*, 300 NY 231 [1949].) In using this method of valuation, the expert witness begins with the sales prices of the comparable parcels and makes adjustments upon them based upon his own experience to arrive at a probable market price for the subject premises for its highest and best use. *(Latham Holding Co.* v. *State of New York*, 16 NY2d 41 [1965].) It is likely that the expert would consider the availability of financing, costs of construction, taxes, possible profits and the like in arriving at his conclusion concerning the highest and best use of the land, and its probable market price. (25 NY2d, 149.)

3. It is acknowledged that in determining value, the reasonable probability of the development through zoning changes or approvals may properly be taken into account. *Matter of Town of Islip*, supra, 360-361.

As the Court further stated in *City of New York, supra*,

> However, it must also be established as reasonably probable that the asserted highest and best use could or would have been made of

> the subject property in the near future. (1 Orgel, Valuation Under Eminent Domain, p. 141.) A use which is no more than a speculative or hypothetical arrangement in the mind of the claimant may not be accepted as the basis for an award. (*Triple Cities Shopping Center* v. *State of New York*, 26 AD2d 744 [3rd Dept. 1966], affd. 22 NY2d 683 [1968].)
>
> We hold that upon a proper showing of probability that a Mitchell-Lama subsidy would have been granted, and upon proof that such a project could or would have been constructed upon the subject premises in the foreseeable future but for the appropriation, there is no reason to prevent the court from finding that this was the highest and best use of the land....Indeed, we have held that a particular best use of condemned property may be the basis of an award even though governmental activity in the form of issuance of zoning variances is required, provided it is established that the granting of such variances was reasonably probable. (25 NY2d, 146, quoting *Masten* v. *State of New York*, 11 AD2d 370 [3rd Dept. 1960], affd. 9 NY2d 796 [1961]; *Genesee Val. Union Trust Co.* v. *State of New York*, 11 AD2d 1081 [4th Dept. 1960], affd. 9 NY2d 795 [1961]; *Yochmowitz* v. *State of New York*, 25 AD2d 930 [3rd Dept. 1966], mot. for lv. to app. den. 18 N Y 2d 579 [1966].)

As set forth previously in the Court's Findings of Fact, while the particular details of the subdivision as now proposed remain fluid, the Court has found that there was a reasonable probability that a subdivision containing 38 units, whether it were provided with a single entry/exit road which was a dead-end, but which was permitted by the Village in spite of the dead-end road ordinance; or whether it was a clustered development for which a looped road would be permitted; would have been approved by the Village, and that the subdivision could or would have been constructed in the foreseeable future but for that approval. Therefore, pursuant to *City of New York, supra*, such a project was the highest and best use of the land.

Further, as also set forth previously in the Court's Findings of Fact, and again while the particular details of the subdivision as now proposed remain fluid, the Court has found that there was a reasonable probability that a subdivision containing 21 units, again whether it were provided with a single entry/exit road which

was a dead-end, but which was permitted by the Village in spite of the dead-end road ordinance; or whether it was a clustered development for which a looped road would be permitted; would have been approved by the Village post-taking, and that the subdivision could or would have been constructed in the foreseeable future but for that approval. Therefore, pursuant to *City of New York, supra*, such a project was the highest and best use of the land, post-taking.

4. The Dobbs Ferry Village Code, § 268-10, provides:

> Dead-end streets shall generally not exceed four hundred (400) feet in length. A paved circular turnaround having a radius of forty (40) feet for the outside curb shall be installed at the closed end of each such street.

Here, claimant argues that the ordinance merely provides that, **generally**, dead-end streets shall not exceed four hundred feet in length, meaning, simply, all or most such streets should conform to the limitation. As set forth above, the claimants cite to several completed village projects where such roads currently exist, concluding that the Village waived the "general" requirement with respect to these projects. The Village, to the contrary, urges the Court to find that many or most of the projects which were arguably the beneficiaries of waivers of the dead-end road restriction, merely involve extensions of existing roads.

However, the Village never provided proof as regards any single project, the status of its roads, or the effect of the extension; in any event, the Court is not persuaded that the statute should be construed differently (*e.g.* that approval might not be required in such cases) as applied to extended streets, given the lack of mention in the statute of an exception for street extensions, and particularly where there was no proof as to whether or not such extensions made those streets, for the first time, in excess of the 400-foot limit or not.

To be sure, the Court in *City of New York, supra*, was concerned with proof showing that the necessary approvals were probable.

> There is a total absence in the record of any evidence concerning the chances of success or failure in obtaining a Mitchell-Lama subsidy. While the record does indicate that there was some possibility of obtaining a Mitchell-Lama subsidy for the subject premises, the absence of evidence adequately establishing the

> likelihood of securing a subsidy makes it impossible to say that there was a *reasonable probability* that a Mitchell-Lama subsidy could have been obtained to develop this property as a profitable high-rise apartment building site. Without such proof, the award cannot stand. (25 NY2d, 150.)

Here, on the other hand, as set forth in the Findings of Fact, above, claimant pointed to no less than four recent other projects where the size of the development was less [indeed far less] that the minimum for cluster development, and the Village waived such discrepancy; and to no fewer than five recent projects containing dead-end roads in excess (and at times far in excess) of the 400-foot maximum for such roads, which excess was also waived by the Village. Consequently, there is here no "absence of evidence adequately establishing the likelihood of securing" an approval, making it possible "to say that there was a *reasonable probability*" of obtaining the necessary approval[2].

Therefore, the Court finds, as a matter of law, that the dead-end street limitation was waivable (and, as set forth previously, was indeed waived) by the Village. Consequently, pre-taking, the full 10.1 acre parcel could have been developed, while after the taking the full 7.53 acres remaining could be developed.

5. Valuation

Using comparative sales, claimant's appraiser concluded that the 38 lots in the planned, pre-taking subdivision, should be valued at $ 80,000.00 per lot, or $ 3,040,000.00. The Village argues separately that this value is too high. The Court notes, however, that the Village's rebuttal appraisal, while purportedly narrow to the extent it only addresses claimant's appraiser's Discounted Cash Flow (DCF) Analysis-Before Taking, nevertheless employed "more appropriate comparable land sales" and nevertheless arrived thereby at an average price per lot of $94,000.00, or slightly **higher** than claimant's per lot price.

Regarding the DCF analysis proposed by claimant as a check

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[2]Petitioner argues that some evidence in this regard was improperly admitted during claimant's rebuttal case. A review of the trial record indicates that in most such instances petitioner failed to raise a proper objection to the testimony at the time of its introduction, or, if it did, said objection was promptly ruled upon by the trial court and denied. In any event, it is well within the discretion of the trial court to admit evidence during rebuttal which should more properly have been brought during a party's case in chief which. *See* Prince, Richardson on Evidence, § 6-504; *see also People v. Harris*, 57 NY2d 335, 345-346 (1982).

upon his use of the comparable sales method, the Village asserts that such analysis is flawed as purely speculative, as based on estimated expenses, although the Village, in a purported Rebuttal Report, supplied a correction to such analysis. Claimant argues that the method is customary and accurate, but fails to adequately address the basing of the analysis on estimated expenses. Upon analysis, the Court agrees that, based upon estimated expenses as it is, the DCF analysis is faulty and it shall be rejected. *See Erie Blvd. Hydropower, L.P. v. Town of Ephratah Bd. of Assessors*, 9 A.D.3d 540 (3rd Dept. 2004).

Further, the Village objects entirely to claimant's appraisal insofar as it values the land on a per lot basis, arguing that, as vacant land, it should be valued on a per acre basis. However, the Village cites minimal authority in support of its opinion, while claimants point to The Appraisal of Real Estate 343, which permits the use of the number of lots in a subdivision to determine the proper value[3].

The Village further asserts the inappropriateness of claimant's appraiser's reliance on the comparable sales offered in his appraisal. The Court notes, as petitioner argues, that three of the five properties offered Hudson River views, one of the prime qualities sought in Westchester County real estate. The subject parcel, to the contrary, not only fails to offer such views, but instead offers views of the Saw Mill River Parkway, commonly considered an inferior quality in the residential market. Four of the five also had final approvals, mostly for town houses, while the remaining property had its approvals lapse. In contrast, the subject property had no approval, nor was the ultimate housing configuration finally established.

However, the Court notes that the Village makes a declaration against interest, to the extent that its comparable sales average $175,000.00 per acre pre-taking. Since, as the Court has previously found, the entire 10.1 acre parcel, not the 4.25 acres alleged by the Village, can be developed, taking the Village's valuation as conceded yields a cost of $1,769,250.00 pre-taking for the subject parcel, or $ 46,559.00 per lot.

The Village makes a further declaration against interest, to the extent that its comparable sales average $376,000.00 per acre post-taking. Thus, post-taking, accepting again the Village's own conceded value for the entire remaining 7.53 acre parcel (not the 1.7 acres alleged by the Village), which larger portion may, the

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[3]The Court, upon due consideration, denies all motions and cross-motions with respect to the propriety and validity of the several appraisals and/or rebuttal appraisals, and/or subsequently-filed engineering reports.

Court has already found, be developed, yields a value of $376,500.00 post-taking, or $17,929.00 per lot.

The difference between the pre- and post-taking values is, of course, the loss from the taking, or $1,392,750.00. The loss of 17 lots from the taking, at the pre-taking cost of $46,559.00 per each of the 17 lots, is $791,503.00, which represents the Direct Taking Damages, while the Consequential Damages constitute the remainder, or $601,247.00.

6. Respondent Stanley Avenue Properties, Inc. is therefore awarded the calculated cost of the loss from the taking, namely the amount of $1,392,750.00, with interest thereon from the date of the taking, July 6, 2000, less any amounts previously paid, together with costs and allowances as provided by law.

Conclusion

Upon the foregoing papers, and considering the record of the trial held before the Hon. Thomas A. Dickerson on March 3, March 9, March 13, April 10, May 11, and May 31, 2006, 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 Stanley Avenue the amount of $1,392,750.00, with interest thereon from the date of the taking, July 6, 2000, 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
November , 2007

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

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