Matter of Board of Commrs. of the Great Neck Park Dist. of the Town of N. Hempstead v Kings Point Hgts., Inc.
2007 NY Slip Op 33762(U)
November 15, 2007
Supreme Court, Nassau County
Docket Number: 5483-01/
Judge: Edward G. McCabe
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SCAN

MEMORANDUM

Present: HON. EDWARD G. MCCABE
Justice

STATE OF NEW YORK
SUPREME COURT, NASSAU COUNTY

In the Matter of the BOARD OF COMMISSIONERS of the GREAT NECK PARK DISTRICT of the TOWN OF NORTH HEMPSTEAD Acquiring a Parcel of Real Property at 100 KINGS POINT ROAD in the VILLAGE OF KINGS POINT Adjacent to Steppingstone Park as Shown on the Acquisition Map Entitled "Acquisition Map of Cohan Estates Property for the Great Neck Park District" Dated December 5, 2000 (as corrected), Town of North Hempstead, Nassau County, New York, and Described on the Nassau County Land and Tax Map as Section 1, Blk 144, p/o Lot 50 and Lot 51, which Parcel is being Acquired for Park Purposes,

Index No.: 5483/01

Petitioner/Condemnor,

-against-

KINGS POINT HEIGHTS, INC.

Claimant.

X

DECISION AFTER TRIAL

This is a special proceeding brought by the Great Neck Park District of the

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Town of North Hempstead to acquire a parcel of real property (EDPL § 402 et seq). Title to the subject property vested in the Park District on May 23, 2001. The former owner of the property, Kings Point Heights, LLC filed a notice of claim, seeking just compensation on June 4, 2001. A hearing on the issue of just compensation was conducted on October 19th, 27th, 31st, 2006 and November 1st -3rd, 2006.

The property, sometimes referred to as "Parcel 1," consists of 2.39 acres of vacant land, a portion of which is under water. Before the taking, Parcel 1 was part of a larger property, consisting of approximately 6.25 acres in the Village of Kings Point. The larger property was known as 100 Kings Point Road and was identified as Section 1, Block 144, Lots 50 and 51 on the tax map of Nassau County. The property was located in a Residential A-2 zoning district, requiring a minimum lot size of 40,000 square feet.

Well in excess of the required area, the larger property was a rectangular-shaped parcel approximately 1,100 by 245 feet. One of the shorter sides of the rectangle is underneath the Long Island Sound. Because the land slopes gently upwards from the Sound to Kings Point Road, the entire property had a panoramic view of the water. The portion of the property bordering on the Sound also adjoins Steppingstone Park, which is owned by the Great Neck Park District.

Steppingstone is a 13-acre park with a yachting facility, child's wading pool, band shell, and snack bar. The Park offers a variety of activities, including musical concerts and plays throughout the summer.

The larger property was originally known as "the Cohan Estate," having been acquired by George M. Cohan in 1915. Cohan was a famous actor, song writer, playwright, producer and director who played a vital role in the development of Broadway musical comedy.[1] The Cohan house is a white stucco, Mediterranean-style villa which was constructed some time before 1910. It is an excellent example of the grand country houses which were built on Long Island in the late 19th and early 20th century. The Cohan Estate subsequently became the home of Walter Annenberg, a publisher, philanthropist, and diplomat.[2] Unfortunately, the house suffered from neglect for a number of years and, when acquired by claimant, it was in need of structural repair and substantial renovation.

On June 14, 1999, Kings Point Heights purchased the property for

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[1] See www.musicals101.com.

[2] Annenberg was the creator of TV Guide and Seventeen magazine and the owner of the Philadelphia Inquirer. He gave generously to public education and established schools of communication bearing his name at the University of Pennsylvania and the University of Southern California. See www.wikipedia.org.

$5,200,000. The purchase also included Block 197, lot 11, a 1-acre parcel on the opposite side of Kings Point Road. Kiumarz Geula, the principal of the Kings Point Heights, had originally planned to demolish the Cohan house and subdivide the property. However, on October 31, 1999, the Village of Kings Point Landmarks Preservation Commission recommended to the Village trustees that the house be designated a landmark based upon its' historical association and architectural style. The Preservation Commission further recommended that Geula be prohibited from demolishing the house, except for a bowling alley addition,

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unless he undertook to construct a "true replica." However, the Commission also recommended to the Village Planning Board and Zoning Board of Appeals that in evaluating "any applications" with regard to the subject premises, consideration should be given to the "financial burden" on the owner imposed by the landmark designation. The Village trustees subsequently designated the Cohan house a landmark and appear to have considered the Commission's recommendation as to alleviating the financial burden upon the owner.

Around October 2000, the Village of Kings Point Planning Board granted preliminary approval of a subdivision of the property into four parcels. According to the subdivision plat, the parcels were to be situated "one behind the other." Parcel 4, the site of the Cohan house, was to be 1.8 acres fronting on Kings Point

Road. Parcel 3, a 1.019 acre site, was to be behind Parcel 4. Parcel 2, a 1.026 acre site, was to be behind Parcel 3. Parcel 1 was to be a 2.39 acre site behind Parcel 2 with .95 acres extending into the water.

The subdivision plan involved the granting of zoning variances for three of the four parcels. Parcel 1 was to have 17.6 feet of lot frontage, in lieu of the required 150 feet. Parcel 1 was to have a shoreline setback of 90 feet, instead of the required 230 feet. Parcel 2 was also to have only 17.6 feet of lot frontage.[3] Parcel 4 was to have a rear yard setback of 5.2 feet in lieu of the required 40 feet. Additionally, a garage was to be constructed on Parcel 4 with a rear yard setback of 5.2 feet instead of the required 28 feet.

As a condition of these zoning variances, Parcel 1 was required to have its' front yard adjacent to Steppingstone Park and to have a front yard of at least 60 feet with no above-ground structures. Aside from the front yard restrictions on Parcel 1, the subdivision plan did not require any concessions to the Park District, such as dedication of property for park purposes or a financial contribution to the Village's Park and Recreation Fund. However, as an additional condition to plat approval, Guela was to demolish and remove certain existing structures on Parcels

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[3]Parcels 1 and 2 were to have contiguous driveways leading from Stepping Stone Lane. The ends of the driveways were the only "lot frontages" of the parcels.

2, 3, and 4 which were once ancillary to the Cohan Estate. Guela was also to take "all necessary steps" to stabilize the Cohan house so that it did not sustain any further structural deterioration. On December 4, 2000, the Village of Kings Point Planning Board gave final approval to the subdivision of the property.

In their written approval of the plat, the Planning Board found that there was no "specific need" for a park at the location of Guela's property. However, on November 14, 2000, the Town Board of the Town of North Hempstead adopted a resolution determining that a proposed acquisition of Parcel 1 by the Great Neck Park District was in the public interest.[4] The Park District's stated purpose of the acquisition was to extend Steppingstone Park. The Park District estimated the maximum cost of the acquisition to be $3.1 million, including engineering, appraisal, legal, and other costs.

Litigation soon ensued between the Village of Kings Point and the Great Neck Park District concerning the authority of the Park District to acquire the property. On November 28, 2000, the Village commenced a declaratory judgment action in this court, seeking a declaration that Parcel 1 could not be acquired by

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[4]The proposed acquisition included the portion of the parcel which was under water but did not include a 17' wide strip, starting at Stepping Stone Lane and running along a portion of the southern boundary of the property.

the Park District, without the consent of the trustees of the Village.[5]

On January 17, 2001, the declaratory judgment action was discontinued, pursuant a settlement whereby the Village and the Park District jointly executed a document known as the "Declaration of Covenants and Restrictions." In the Declaration, the Village trustees consented to the acquisition of Parcel 1, and the District issued certain covenants purporting to run with the parcel. The District covenanted that no concerts or other, similar "noise producing events" would take place on the subject premises. The District covenanted that no above- ground structures would be built, other than boundary line fences and park benches.[6] With regard to the latter prohibition, the Declaration recites that the Village sought to insure that there would be no adverse impact upon the scenic view of "residents of adjacent parcels of property." It is unclear whether the Declaration refers to the scenic view from other parcels within the subdivision or the view from other properties in the area.

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[5]Town Law § 198(4) provides that "No property situated within an incorporated village...shall be acquired in any manner for park purposes, unless the permission and consent of the board of trustees of such village...is first obtained."

[6]The Declaration was recorded with the Nassau County Clerk. The Declaration was issued, pursuant to a Municipal Cooperation Agreement which contained essentially the same terms. The Municipal Cooperation Agreement also contained a provision that the Park District would not permit non-residents of the Village to attend concerts held at Steppingstone Park, except as guests of Village residents.

Following the taking of Parcel 1, Guela obtained a new 3-lot subdivision and proceeded to offer Parcels 2 and 3 for sale as vacant land. Guela claims that his original reason for subdividing into four lots was not to sell the land, but rather to build homes for himself and his three siblings. There is no evidence to corroborate Guela's claim that the subdivision was intended as a "family compound," rather than a short-term investment, other than the fact that Guela has three siblings. Nonetheless, Parcel 2 and Parcel 3 were subsequently sold, pursuant to the subdivision plan. Parcel 2 was sold for $2.5 million in April 2003, and Parcel 3 was sold for $2.1 million in September of that year.[7] According to Geula, the parcels were sold without scenic easements protecting the views of the other properties because restrictions would have severely impacted the marketability of the parcels.

Claimant seeks damages of $5,145,000, including $2,950,000 for the loss of Parcel 1 and $2,195,000 for indirect damages to the other parcels. Claimant's appraiser, Kevin McAndrew, arrives at his estimates by a comparable sales analysis. McAndrew posits that the highest and best use of the property was as a

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[7]Lot 11, the property across the street from parcels 2 and 3, was sold for $775,000 in August 2001.

four lot subdivision, with the homes "staggered" on the four lots so as to preserve the water view of each parcel. The Park District asserts, based upon its' appraisal of Parcel 1, that the property taken is worth $2,000,000. The Park District argues that claimant is not entitled to severance damages because the taking of Parcel 1, and the prohibition of above -ground structures, actually enhanced the value of the other parcels. The Park District further argues that McAndrew's analysis is flawed because the actual placement of the homes on Parcel 2 and 3 is very different from the layout which he envisioned.

As a threshold issue, the Park District maintains that the claimant is not entitled to compensation for the portion of the property which is under the Long Island Sound. Generally speaking, the ownership of land under navigable waters is held by the State in its' sovereign capacity in trust for the people of the State. (*Water Resources Comm. v. Lieberman*, 37 A.D. 2d 484, 488 [3d Dept. 1971])

However, Public Lands Law § 75 authorizes the Commissioner of General Services to issue grants of land under water to the owners of adjacent property to promote commerce and for certain other purposes, including the beneficial enjoyment of the owner. The statute refers to specific navigable waters, including those "adjacent to and surrounding Long Island"(Public Lands Law § 75[6]). The traditional manner of conveying unappropriated state land to a private party is by

letters patent (Public Lands Law § 5). Section 75, authorizing the granting of letters patent as to land under navigable waters, was enacted in 1917. However, the statute is a codification of a state practice which was in effect long before that date (see, *Health Commissioners v. Mauran*, 5 Denio 389, 395 [1848]).

Cohan acquired title to the .95 acres underneath the Long Island Sound by letters patent which were issued in 1917, the very year that Public Lands Law § 75 was enacted. The Park District argues nonetheless that the letters patent were ineffective to grant any compensable interest because the letters were made

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"subject to revocation by the State under its' trust powers for the benefit of the people of the State." However, the State's power of eminent domain is itself described as a form of "public trust"(see, *In re Saratoga Avenue*, 226 N.Y. 128, 134 [1919]). Thus, the court interprets the language in the letters patent as referring to the state's power to reacquire the underwater property by eminent domain should the state deem it in the public interest to do so (see, *In re Commissioner of Docks*, 124 A.D. 465 [1st Dept. 1908]). The language in the letters patent, referring to the Town of North Hempstead's interest in the property, is of a similar nature.

The Park District asserts that the letters patent provided that the grant would terminate if a suitable pier or a stone wall at the high water mark were not built

within five years from the date the letters were issued. However, the burden of proof as to the occurrence of a condition subsequent, alleged to have nullified the property granted by letters patent, is upon the party challenging title (*Rubin v. Conn. Gen. Life Ins. Co.*, 56 A.D. 2d 256 [1st Dept. 1977]). The Park District offered no proof as to when the stone wall was constructed. The court concludes that claimant had good title to the portion which was under water and is entitled to just compensation for the entire parcel.

Stressing that Parcel 1 had 235 feet of frontage on the Sound, claimant

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seeks to recover "full riparian rights" as an item of damages for the property taken. Strictly speaking, riparian rights are the various privileges incident to ownership of land running along a river or stream (*Oyster Bay v. Commander Oil Corp.*, 96 N.Y. 2d 566, 571 [2001]). Such rights include access to the water for navigation, fishing, and drawing water. Land running along the shore of a sea or tidal water is referred to as "littoral"(Id). However, the distinction is vestigial, and compensation may be allowed for "riparian rights" pertaining to property along the seashore (Id). While riparian rights are a component of the value of the property, an award should ordinarily not be calculated based on the number of feet of ocean frontage (*Matter of Ocean Parkway*, 230 A.D. 407 [2d Dept. 1930]). In any event, the court declines to give an enhancement for riparian rights because

the water bordering on Parcel 1 is too shallow for boating and the beach is too narrow for swimming or sunbathing purposes.

Both the State and Federal Constitutions require that owners receive just compensation when private property is taken for public use (*520 E. 81st Street Associates v. New York*, 99 N.Y. 2d 43, 47 [2002]). Just compensation puts the property owner in the same relative position it would have enjoyed had the taking not occurred (Id). New York courts generally examine the issue of just compensation in equitable terms and determine just compensation as the fair market value of the property, that is the price a willing buyer would have paid a willing seller (*New York v. Mobil Oil Corp.*, supra, 12 A.D. 3d at 81). The 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 Islip*, 49 N.Y. 2d 354, 360 [1980]). This principle applies to residential as well as commercial property (*In re Suffolk*, 47 N.Y. 2d 507 [1979]). Nonetheless, there is no formula or set of rules by which the term "just compensation" is translated into a dollars and cents figure (*New York v. Mobil Oil Corp.*, 12 A.D. 3d 77, 81 [2d Dept. 2004]).

Ordinarily, the potential uses the court may consider in determining value are limited to those uses permitted by zoning regulations at the time of taking

(*Matter of Islip*, supra, 49 N.Y. 2d at 354). When there is a reasonable probability of rezoning, some adjustment must be made to the value of the property as zoned. An increment should be added to this amount if there is a reasonable probability of rezoning to a less restrictive category. Conversely, the value of the property as zoned should be reduced or subject to a discount when the probability is that rezoning will result in the loss of a valuable use. The rationale is that a knowledgeable buyer, recognizing the potential changes in the available uses, would make similar adjustments in valuing the property (Id).

In addition to direct damages for the value of property actually taken, the State may also be liable for consequential, or severance, damages reflecting diminution in value of the condemnee's remaining property (*Murphy v. New York*, 14 A.D. 3d 127, 132 [2d Dept. 2004]). Impairment of aesthetic aspects, such as a scenic view of remaining property may be considered on the question of consequential damages (*Waxman v. New York*, 57 A.D. 2d 244, 252 [3d Dept. 1977]). Nevertheless, it is always open to dispute whether aesthetic impairment has actually affected the market value of the remaining property (Id).

As set forth in Claimant's Memorandum of Law, "The Courts of this State have long held that in addition to the compensability for the direct damages of the

parcel actually taken, just compensation required an award for indirect damages to the remainder". See, *South B.R. Co. v. Kirkover*, 176 N.Y. 301 (1903). *Nimby Food Services v. State*, 241 A.D. 2d 542, 661 N.Y.S. 2d 237 [Second Dept. 1997]. Claimant also cites 4a of Nicholas Eminent Domain §14.01 for the premise "All elements of value inherent in the property merit consideration in the valuation process".

In this case Claimant's appraiser, Mr. Haberman, concluded the comparables had to be further adjusted to reflect that the subject property is not

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waterfront, does not enjoy riparian rights, has no water access through private easements and has no control over the uses to which the new public park facility may be put. He further observed the taking was not restricted to a passive park and that some of the restrictions can be vacated by a simple agreement with a majority of the Village Board. He further determined that the use to which the property was put, hosting up to 1,000 people, would clearly have a negative impact on the value of the property due to the loss of privacy. See, *627 Smith St. Corp. v. Bureau of Water Disposal*, 289 A.D. 2d 472 [Second Dept. 2001] for the loss of waterfront and riparian rights; *Dennison v. State*, 22 N.Y. 2d 409 [1968] for the loss of privacy and view and *Williams v. State*, 90 A.D. 2d 882, 426 N.Y. 2d 528 [Third Dept. 1982] and *Monsor v. State, 96 A.D. 2d 702, 466 N.Y.S. 2d 780*

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[Third Dept. 1983] for the use to which the part taken is put. Non-fee interests which must be valued include easements. See, *Rose v. State*, 24 N.Y. 2d 80, 85, 298 N.Y.S. 2d 968, 973-74 which finds the destruction of riparian rights to be compensable. The claimant also cites Nichols on Eminent Domain § 12 D.01 [1] for the following: "...if there is a destruction of the easement, either by a direct taking of the easement itself, or by a taking of the servient estate, the owner of the easement is damaged to the extent that the value of his dominant tenement has been impaired by such taking." The Court has taken all of these factors into consideration in reaching a determination as to claimant's consequential damages.

The Court rejects the Claimant's argument on consequential damages to parcels # 2, #3 and #4, the remaining parcels in the sub-division.

To carry out the McAndrews plan, substantial restrictions would have to have been imposed on parcels #2 and #3 in order to stagger the homes to be constructed, substantially limiting the size, height and style of the homes. Kiumarz Geula testified that he did not want such restrictions, since it would make the lots more difficult to sell and therefore less valuable. As to his parcel where the Cohan house is situated, its' elevation gives it a magnificent view of the water. The owners of Lot #2 also have an unobstructed water view provided by the condemnation of parcel 1. Parcel 3 was sold for $2.1 million approximately four

months after parcel 2 was sold for $2.5 million. The purchasers of parcel 3 know that they would have an obstructed view of the water based on the construction of a home on parcel #2. Easements on ingress and egress over parcels #2 and #3, as suggested by McAndrews and appraised by Haberman, would have lessened the value, not enhanced it. This is the reason the Claimant chose not to do it. As the Court has stated, the shore area is not a beach. The park has no beach since the area is not practical for swimming as the bottom is rocky and the depth of the water does not reach four feet until you are 150 to 200 feet from shore. Similarly, the use of a dock for yachts is impractical, since a permit to build a 200 foot T Float would be required which could only moor one boat. An examination of the area shows that docks of this type on neighboring properties are decaying and not in use. The Park District appears to cater to small craft owners who moor their craft in a special anchorage area. Any proposed dock would have to avoid this. The testimony as to any proposed dock was totally impractical and explains the lack of new docks in this area.

Accordingly, based upon all of the evidence, the Court awards Claimant just compensation in the amount of $2,950,000.00 for Parcel 1 as direct damages in

accordance with the value set forth in the Haberman appraisal, and does not award the Claimant any consequential damages to the other parcels. Settle judgment.

This shall constitute the decision and order of the Court.

ENTER:

Dated: November 15, 2007
Mineola, NY

HON. EDWARD G. McCABE
J.S.C.

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