SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: Hon. Edward G. McCabe,
Supreme Court Justice

NASSAU COUNTY

In the Matter of the Application of the
CITY OF GLEN COVE INDUSTRIAL DEVELOPMENT
AGENCY TO Acquire Certain Property to be Acquired
For Public Purposes as Set Forth on Maps Showing, Index No.: 017614/05
Property to be Acquired, in the Vicinity of Garvies
Point, City of Glen Cove, County of Nassau,
State of New York

Reputed Property Owner: John Doxey and
10 Garvies Point Road Corporation

X

The following papers were read on this application:

Order to Show Cause.....1
Notice of Motion.....2
Reply Affidavit.....3
Affidavit in Opposition to Condemnee's Motion
for Discovery.....4

Order to show cause by the petitioner the Glen Cove Industrial Development Agency ["IDA"] for an order, *inter alia*: (1) enjoining respondent Garvies Point Corporation and John Doxey from interfering in any manner with the petitioner's legal right to enter the subject property and obtain permanent possession of same; (2) mandatorily directing 10 Garvies Point Corp. and/or John Doxey, to immediately vacant the subject premises together with all of their possessions and property; (3) enjoining the respondents from illegally using the property; and (4) permitting the petitioner IDA to deposit an "advance payment" into Court pursuant to EDPL §§ 304[D], 405[A] pending a determination of all

other issues, including whether the respondents have caused additional and further contamination to the property during their occupancy.

Cross motion pursuant to CPLR 408 by the respondent 10 Garvies Point Road Corporation ["Garvies"] for leave to conduct stated discovery.

The petitioner Glen Cove Industrial Development Agency ["IDA"], is a public benefit corporation and currently the fee owner of the subject waterfront property, located on Hempstead Harbor at 10 Garvies Point Road, Glen Cove, New York.

The property – an irregularly shaped, water front parcel containing approximately 32,731 square feet – was originally acquired in 2006 by the IDA through the exercise of its eminent domain authority.

That public acquisition was made in furtherance of the "Glen Cove Waterfront Revitalization Plan," whose objective was to assemble a number of contiguous parcels and collectively remediate blighted waterfront areas by, *inter alia*, developing commercial, retail, residential and/or other water-dependent uses.

Prior to IDA's public acquisition of the parcel, the property was owned by the respondent-condemnee Garvies, in which John Doxey is a principal (Doxey Aff., ¶¶ 1-2, 24). Non-party "Doxside Industries, Inc" ["Doxside"] is the current tenant still in possession at the premises, where it apparently conducts an excavation contracting business (Levinson Aff., ¶¶ 23-24). Significantly, the record indicates that the property is located in proximity to certain federally designated "superfund" sites and that it was subject to contamination well prior to the Garvies' ownership of same (Levinson Aff., ¶¶ 12-15).

According to IDA's counsel, immediately before the IDA acquired title to the property in June 2006, he and Garvies' former counsel – Edward Flower, Esq. – entered into an oral stipulation in open court. Pursuant to the oral agreement, it was agreed, *inter alia,* that Garvies would be permitted to retain possession of the property until the IDA made its advance payment offer pursuant to the EDPL, *i.e.*, specifically, that the IDA would take "no steps to obtain possession of * * * the real property, personalty or fixtures * * * until payment shall have been made * * * to the respondents [Garvies] * * * [as] mandated by the Eminent Domain Procedure Law" (Tr., at 4; Besunder Aff., ¶ 5, Exhs., "1", "2"; Levinson Aff., ¶ 22; Pet's Exhs. "1-3" *see*, EDPL§ 304[A]).

In exchange, Garvies agreed that it would: (1) not submit additional opposition to the IDA's "vesting" application; (2) that in lieu of paying rent to the IDA, Garvies would waive interest on any amount later paid by the IDA with respect to the taking; and (3) that Garvies would authorize the IDA to enter the property upon notice for the purposes of completing an appraisal – and conducting any tests necessary to complete that appraisal (Besunder Aff.,¶¶ 6-7).

The IDA contends that it thereafter proceeded with its efforts to appraise the property so as to make its "offer in advance of payment" (Besunder Aff.,¶¶ 8-9; EDPL § 304). As part of its appraisal process, the IDA attempted to perform environmental testing at the property so as to assess the extent of any contamination. However, Garvies allegedly refused to permit the IDA's environmental consultants to enter the property. In response, the IDA obtained an order from the Appellate Division, Second Department in November of 2005, requiring Garvies to permit the IDA to take water and soil samples (Besunder Aff., ¶¶ 9-10, Exh., "5").

The IDA's experts were ultimately permitted to perform the tests, apparently at some point in 2006 (Levinson Aff., ¶¶ 18-20). These tests results – which have not been annexed to the IDA's motion papers – supposedly revealed significant contamination, with an estimated remediation cost of some $629,500.00 (Besunder Aff.,¶¶ 12-15, 32).

Counsel for the IDA further advises that he "has been informed" by sources associated with the City of Glen Cove that, *inter alia*, Garvies is allegedly violating certain zoning code provisions; that the City has received unspecified complaints regarding Garvies' business operations at the site; and that the City has commenced zoning violation proceedings against Garvies relative to these allegedly illegal activities, which allegedly include operation of an illegal "scrap metal business" (Besunder Aff., ¶¶ 34-36; Exh., "11").

According to Garvies' counsel, however: (1) it was public knowledge that the property constituted a so-called "Brownsfield" site, *i.e.*, "property * * * which may be complicated by the presence or potential presence of a contaminant" (ECL §§ 27-1403,1405[(2]); (2) the property – which is also surrounded by "superfund" locations – was already contaminated well before Garvies purchased it; (3) that in the year since he was retained, Garvies' counsel has not received a single request from the IDA for access to the subject property; and (4) that in any event, his

client is – and has been – ready and willing to grant access as soon as an actual request therefor is made (Levinson Aff., ¶ 18; Exh., "A").

Counsel has also asserted that in 2006 the Federal Environmental Protection Agency ["EPA"] has awarded the IDA a $200,000.00 grant to clean up the site (*see*, website of the United States Environmental Protection Agency, http://www.epa.gov/ ["Brownfields Grant Fact Sheet" 2006]).

Garvies' counsel alleges that despite its current claims that any contamination revealed by the June 2006 testing poses an "immediate and serious health and safety threat," the IDA has not taken any legal action relying on this claim during the years after it acquired the property (Levinson Aff.,¶¶ 12-13; Reply Aff.,¶¶ 2[d],[e], [h]; Besunder Aff., ¶ 36[c], [d]). Nor has the IDA ever requested that Gavies pay anything toward remediating the property, much less the sum of $629,500.00 – a figure which counsel claims has never appeared in the case before, and which has not been substantiated through the submission of a single, supporting document (Levinson Aff., ¶¶ 11-12).

As to the citizen complaints and the Glen Cove zoning code violations, Garvies' counsel advises that the IDA's claims are based upon hearsay allegations and are misleading, since the IDA has omitted reference to the fact that the subject violations were all dismissed in October of 2008 – prior to the IDA's current, November 2008 application (Levinson Aff., ¶¶ 21-22).

In June of 2007, Garvies filed a notice of claim with respect to the property alleging damage in the sum of $2.5 million for, *inter alia*, "permanent and temporary appropriation of land and improvement" by the IDA (Pet's Exh., "9"). Prior thereto, Garvies had unsuccessfully contested the original taking in the Appellate Division (*see, 10 Garvies Point Road Corp. v. Glen Cove Indus. Development Agency*, 28 AD3d 569).

By letter dated November 17, 2007, the IDA transmitted its advanced payment offer in the sum of $980,000.00 (Besunder Aff., ¶¶ 16-17, 26, Exh., "6"). According to the IDA, it received no determinative response to its November 2007 offer, which was apparently mailed to Garvies' then counsel Edward Flower – but not personally to Garvies or Doxey.

At approximately the same time, *i.e.*, November of 2007, the IDA claims to have completed its appraisal of the property, which it thereafter filed in January of 2008 with the clerk of the Court – although the appraisal itself has not been annexed to the IDA's papers and it does not appear that the document was ever separately mailed to Garvies (Besunder Aff., Exh., "7").

In January of 2008, IDA's counsel wrote Garvies' former attorney, observing that Garvies had not yet accepted the offer and that it was his understanding that "[u]pon [the City's] making payment * * * your client will vacate the premises" (Besunder Aff., Exh., "12").

Significantly, Garvies' current counsel (Bruce Levinson), was substituted at some point in April of 2008, pursuant to a handwritten stipulation which provides, *inter alia*, that upon receipt of payment or partial payment from the IDA, Garvies would thereupon pay Mr. Flower a counsel fee of $18,000.00 (Flower [Dec. 4 2008] Aff., Exh., "A").

By letter dated May, 9, 2008, IDA's counsel again advised that the City of Glen Cove "is ready to make * * * [its] advanced payment" in accord with the stipulation and that, in fact, "the City was eager to make arrangements for the advance payment and to have * * * [Garvies] vacate the premises * * *" (Levinson Aff., Exh., "B").

Counsel for Garvies responded by advising IDA's counsel that Garvies' "fixture" appraisal was then being conducted, but that its fee appraisal – which was "in the works" – would take somewhat longer (Levinson Aff., Exh., "B"). Counsel further noted that the file he received from his predecessor (Edward Flower), did not contain the IDA's appraisal.

In July of 2008 – and insofar as the parties' submissions indicate – counsel for the IDA for the first time in writing claimed that Garvies was in breach of the June, 2006 stipulation – and was therefore illegally in possession of the premises, this because the IDA had "made" its advance offer in July of 2007 (Levinson Aff., Exh., "B").

By letter dated July 28, 2008, Garvies' counsel replied that he had not received the IDA's appraisal, and that according to his filing service, the appraisal had not been filed. Counsel also requested that IDA's forward a copy of the subject appraisal to him. In his responsive letter, IDA's counsel reiterated that the

appraisal had indeed been filed – although he apparently declined to attach a courtesy copy of that document to his letter.

By letter dated September 5, 2008, Garvies' counsel again requested the appraisal, noting that he had been unable to personally retrieve it; that it was never provided to him or his predecessor; that there has never been an issue as to access to the property; and that if the IDA supplied some dates for its "fixture" appraiser to enter the premises, he would pass them along to his client for review (Levinson Aff., Exh., "B").

By letters dated September 18, and October 14, 2008, Garvies' counsel advised IDA's counsel, *inter alia,* that the IDA had not yet responded to his September 5 letter; that the requested appraisal had never been supplied; and that it was unclear, in any event, if the offer amount originally referenced by the IDA ($980,000.00) covered the land, the fixtures or both.

Significantly, counsel also contends that the IDA's offer – $980,000.00 – was patently insufficient and "an insult to the Court's intelligence" since the subject property comprises "almost one acre of prime Nassau County Gold Coast waterfront with 200 feet of deep water frontage" (Levinson Aff., ¶ 25).

The IDA claims that Garvies has, to date, refused to remove itself from the property in violation of the June, 2006 oral stipulation and that the IDA has allegedly been unable to obtain proper access to the property to conduct further environmental tests – although the specific details surrounding any recent efforts to obtain access have not been provided.

Moreover, according to the IDA, unless it secures sole possession of the property, it cannot properly conduct these tests and definitively assess whether Garvies has further contaminated the property (Besunder Aff., ¶¶ 33-34).

By order to show cause dated November, 2008, the IDA now moves for mandatory and/or other injunctive relief directing that Garvies immediately remove itself from the subject property and/or refrain from interfering IDA's rights to enter thereon.

According to the IDA, it has complied with all legal requirements to secure ownership and possession of the property, but that it allegedly cannot obtain

access thereto. Since there is a "continuing threat of contamination" which supposedly cannot be remediated while Garvies remains there, the IDA claims that it will be irreparably injured absent an award of the requested, injunctive relief.

The IDA further requests permission to pay the "advanced payment" offer into Court pending resolution of outstanding, related issues (EDPL §§ 405[A] *cf.*, 304[D]), and also demands additional relief enjoining Garvies from: (1) interfering with its right to "obtain permanent possession of same" and (2) "illegally" using the property and or operating "any manner of business" thereon.

Garvies has opposed the application, moved for an order authorizing it to conduct discovery, attaching a set of proposed interrogatories, to which the IDA objects (Brown Aff., Exh. "A").

The Respondent, Garvies' seeks leave to conduct discovery pursuant to CPLR 408, and has attached a series of interrogatories containing some 17 separately numbered items (Brown Aff., Exh., "A").

In general, disclosure is discouraged in a special proceeding since it is "inconsistent with [its] * * * expeditious nature" (*Rice v. Belfiore*, 15 Misc.3d 1105, 2007 WL 813335 [Supreme Court, Westchester County 2007] *see*, *People v. Bestline Products, Inc.*, 41 NY2d 887 [1977] *Bethlehem Baptist Church v. Trey Whitfield School*, ___Misc3d___, 2003 WL 21511332 at 1 [Supreme Court, Appellate Term 2nd Dept. 2003]). Nevertheless, permission to conduct discovery pursuant to CPLR 408 may granted in the Court's discretion, provided that the demands made are "carefully tailored" and that the movant carries the burden of showing, *inter alia*, "ample need" for the requested materials – a burden not carried here (*see, People v. Condor Pontiac, Cadillac, Buick and GMC Trucks, Inc.*, ___Misc3d___, 2003 WL 21649689 at 4-5 [Supreme Court, New York County 2003] *see, People v. Bestline Products, Inc.*, *supra*; *Lonray, Inc. v. Newhouse,* 229 AD2d 440, 441; *General Elec. Co. v. Macejka*, 117 AD2d 896; *Matter of Shore*, 109 AD2d 842, 843; *Rice v. Belfiore, supra*, at 8 *see also*, *Matter of American Cyanamid Co. v. Board of Assessors*, 255 AD2d 440.

At bar, the proposed interrogatories are extensive in scope, contain multiple subparts (*Botsas v. Grossman*, 7 AD3d 654), and in part, utilize disfavored, prefatory language such as "all," "each and every" and "any and all" (*e.g.*, Items "4" "5", "7" "12" 14" "15")(*MacKinnon v. MacKinnon*, 245 AD2d 690;

Benzenberg v. Telecom Plus of Upstate New York, Inc., 119 AD2d 717; *Hudson Valley Tree, Inc. v. Barcana, Inc.*, 114 AD2d 400; *Indo Canadian Realty Corp. v. Arroyo*, 14 Misc.3d 132(A), 2007 WL 117396 [Appellate Term, First Department 2007]). It is settled that Courts are not required to prune discovery notices and demands (*cf., Bell v. Cobble Hill Health Center, Inc.*, 22 AD3d 620, 621; *Erbesh v. Schwartz*, 21 AD3d 532, 533).

More significantly, many of the items request information lacking in relevance and materiality, including, among other things: (1) a series of detailed demands focusing upon contamination issues and/or remediation costs (*In re City of Syracuse Indus. Development Agency, supra,* 20 AD3d at 171; *Matter of City of New York v. Mobil Oil Corporation, supra*); (2) an open-ended demand for "all witnesses" the IDA intends to call at trial (Item "16"*see,* Siegel, *Practice Commentaries*, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C3101:41, at 89-90); (3) an attenuated request that the IDA identify the payment source of any condemnation award which might be later paid (Item "16"); and (4) various demands rehashing claims primarily raised by the IDA in connection with their removal/injunction application – claims which the Court has already discounted as unsubstantiated (*e.g.*, Items "3" -"7").

The Court also notes that Garvies has apparently yet to supply a final and formal response to IDA's original offer of payment and, insofar as the record indicates, has not completed its own appraisal of the propriety.

It is settled that the trial court's discretion and control over disclosure is particularly broad "in a special proceeding * * * where the Legislature has specifically given the court greater control of disclosure than in actions" (*General Elec. Co. v. Macejka, supra*, at 897 *see, Niagara Mohawk Power Corp. v. City of Saratoga Springs,* 2 AD3d 953).

Under the circumstances, and considering the delays which have already ensued, the Court declines to exercise its discretion in favor of Garvies' application for discovery and therefore, the motion is denied.

The Court has considered the respondents' remaining contentions and concludes that they are lacking in merit.

With respect to the Petitioner's motion as to the advance payment, an offer of "advanced payment" – which is "a creature of statute", the EDPL requires the condemnor, *inter alia*, to make a written offer advising the condemnee that the offer made constitutes its "highest approved appraisal," which the condemnee may then: (1) reject; (2) accept as payment in full; or (2) accept as an "advance payment" while reserving the right to later recover additional compensation (EDPL §§ 303, 304[A][1]-[3] *see, Brody v. Village of Port Chester,* 345 F3d 103, 116-117 [2nd Cir. 2003]; *Application of City of New York v. City of New York*, 11 Misc.3d 1080(A), 2006 WL 992361[Supreme Court, Queens County 2006]; *Cronk v. State*, 100 Misc.2d 680, 684 [Court of Claims 1979; *ERA Realty v. State*, 281 AD2d 388; 51 NY Jur2d, *Eminent Domain* § 364 *see also, Mazur Bros. Realty, LLC v. State*, 59 AD3d 401 *see generally, In re City of New York,* 11 NY3d 353, 359-360 [2008]; *In re City of New York,* 6 NY3d 540, 546 [2006]; *Molly, Inc. v. County of Onondaga*, 2 AD3d 1418, 1419).

EDPL § 405 states, in part, that where the condemnor "has a right to possession" – and provided that it has either paid the advance payment or made a deposit of same "in accordance with article three of this law" – it may then remove an occupant from the premises, "pursuant to the procedures of landlord and tenant law," by a writ of assistance or by other law (*In re Dormitory Authority of State of New York*, 26 AD3d 227; *The New York State Urban Development Corp. v. MJM Exhibitors, Inc.*, 193 AD2d 523; *Application of City of New York*, 178 AD2d 168).

The statute further provides, however, that "no condemnee shall be required to surrender possession prior to the condemnor's payment to him of its advance payment or the deposit of such amount in accordance with article three of this law" – unless the condemnee has failed to comply with its pre-vesting appraisal and or discovery obligations (EDPL § 405[A] *see, The New York State Urban Development Corp. v. MJM Exhibitors, Inc., supra*; *see also, In re Village of Port Chester*, 303 AD2d 416; 51 NY Jur.2d, Eminent Domain § 402).

Therefore, it is

ORDERED, the petitioner is directed to deposit the advance payment with the Nassau County Treasurer within 30 days of this order; and it is further

ORDERED, that proof of said deposit shall be made giving notice by certified mail on the Respondents and the Respondents' counsel; and it is further

ORDERED, that the Respondents shall quit the premises within **15** days of the mailing of the notice; and it is further

ORDERED, that if Respondents fail to quit the premises the Petitioner is directed to seek and Order of Assistance, which is the proper remedy, not injunctive relief; and it is further

ORDERED, that the parties prepare and file with the Court, within **60** days of this order, both the Trial Appraisals and Engineering Reports; and it is further

ORDERED, that Edward Flowers, Esq. has an attorney's lien of $18,000.00 upon the advance payment; and it is further

ORDERED, that the trial date in this action will be set for December 1, 2009, and the Petitioner shall purchase and file a note of issue and certificate of readiness within 90 days of the date hereof (see, CPLR §3216).

In all respects, the Petitioners' motion is denied. The above comprises the order of the Court.

ENTER:

Dated: July 6, 2009
Mineola, NY

HON. EDWARD G. McCABE
Supreme Court Justice