Matter of City of Glen Cove Indus. Dev. Agency
2013 NY Slip Op 34075(U)
November 6, 2013
Supreme Court, Nassau County
Docket Number: 17614/05
Judge: Thomas A. Adams
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS A. ADAMS,
Acting Supreme Court Justice

TRIAL/IAS, PART 25
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, Property to be acquired, in the vicinity of Garvies Point, City of Glen Cove, County of Nassau, State of New York

INDEX NO. 17614/05

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

Reputed Premises Tenant: Doxside Industries, Inc.

Memorandum After Trial

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 has 200 feet of frontage on Glen Cove Creek and 220.8 feet along Garvies Point Road. The property – an irregularly shaped waterfront parcel containing approximately 34, 800 square feet – was originally acquired in 2006 by the IDA through the exercise of its eminent domain authority. This 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 developing commercial, retail, residential and/or other water-dependent uses. John Doxey and 10 Garvies Point Road Corporation were the owners of the property. Respondent Dockside Industries, Inc. is a tenant at the property. The Fee Claimant purchased the property from Hawkins Cove Oil Supply Corp. who lawfully operated a fuel oil storage and distribution facility at the property from the early 1970s until approximately 1993. Hawkins' oil facility was allowed as a Special Permit Use under the City of Glen Cove Zoning Ordinance. The City of Glen Cove issued two Certificates of Occupancy for Hawkins' oil facility. The Certificates of Occupancy confirmed that Hawkins' use of the property for fuel oil storage and distribution was lawful, and complied with the Zoning Ordinance (Zoning Ordinance § 280-11).

When the Fee Claimant took possession of the property in 1993 and later acquired it in 1997, the property was zoned I-3 (Industrial-3District). The property was re-zoned in 1999 to MW-3 (Marine Waterfront-3 District) as part of the City of Glen Cove's plan to develop the waterfront.

The purchase price was $125,000. The contract of sale included all building and improvements on the property. The IDA offered a condemnation award for the fee in the sum of $980,000 and fixtures in the sum of $323,688.25, totaling the sum of $1,303,668.25. The Fee Claimant demanded $6,900,000 for the fee and $4,285,300 for the fixtures, totaling the sum of $11,185,300.

Ultimately, a trial was held on June 27, 2012 and June 28, 2012 as well as June 13, 2013, June 17, 2013 and June 20, 2013. The petitioner called the following witnesses: (i) Richard Summa, Building Department Director of the City of Glen Cove, (ii) James G. Taylor, MAI, SRA , a licensed appraiser in the State of New York of Rogers & Taylor Appraisers, Inc., (iii) Daniel P. Deegan, Esq., former attorney to the City of Glen Cove and IDA, and (iv) Daniel Falasco, P.E., a licensed engineer in the State of New York, of Savik & Murray, LLP.. The claimants called the following witnesses: (i) Mr. John Doxey, who testified that he is the owner of the fee claimant and fixture claimant, (ii) Michael C. Sordi, Esq., who testified he represented Doxey for an unspecified time, (iii) Mr. Andrew Markos, who testified that he sought to buy a rock crusher from Doxey and use it on his own property in Babylon, but did not subsequently purchase it for financial reasons, (iv) Edmund Chiang, a licensed appraiser in the State of New York, of E. Appraisal Services, Inc., and (v) Bernard M. Sencer, a fixture appraiser of Sencer Appraisal Associates, Inc..

The petitioner alleges that the claimants illegally operated a junkyard, as defined in Town Zoning Ordinance § 280-6, on the property for almost 18 years including for almost five years after the June 22, 2006 vesting date. Further, the petitioner contends the illegal use of the property as a junkyard precluded its entitlement to nonconforming use after the 1999 MW-3 re-zoning.

The claimants assert they operated a "material yard and stone business" and, although not permitted under the new MW-3 zoning, the premises should be considered a legal nonconforming use because that use was permitted under the prior I-3 zoning. A junkyard is defined under Zoning Ordinance § 280-6 as follows:

> "The use of more than 200 square feet of the area of any lot, whether inside or outside a building, or the use of any portion of that half of any lot that adjoins any street for the storage, keeping, abandonment or sale of wastepaper, rags, scrap metals or other scrap or discarded materials; or for the collection dismantling or abandonment of automobiles or other vehicles or machinery or parts thereof; or the processing of such materials in any way."

The first photograph in Exhibit 1 introduced and relied upon by the claimants to represent the conditions at the property during their occupancy confirms that the property was used almost exclusively as a junkyard. When asked to describe the claimants' business on the property, Mr. Doxey answered, the "nature of our business consisted of excavation, demolition, drainage, buying and selling of stone materials and also a salvage business, which consisted of cutting and processing steel." (Tr. 16). He testified that he used hydraulic shears to cut up old machines and vehicles. (Tr. 19) and that "really anything that consists of steel we brought in and processed" into scrap steel

pieces "to sell to the steel vendors" (Tr. 18). When describing the operations at the property, the Claimants' fee appraiser, Mr. Chiang, testified, "[a]bsolutely. It's a scrap metal type business." (Tr. 147). Mr. Doxey testified at trial that "I really don't like to use the word 'junkyard' " (Tr. 64). Instead, he prefers to characterize his operation as a "steel processing yard" or a "salvage yard" (Tr. 64-65).

The claimants' expert fixture appraiser, Mr. Sencer, acknowledged that the property was "the most cluttered site I had ever seen." (Tr. 231). The petitioner's fixture expert, Mr. Felasco, concurred, testifying that "[w]hen I arrived at the site I saw a site that was in pretty much a state of disrepair." (Tr. 451). Its fee expert, Mr. Taylor, agreed testifying that the property "was basically a piece of property that, to me, there was just no order to it. There was just stuff all over the place" (Tr. 352).

The petitioner asserts that the evidence belies the claimants' argument that the property was used as a material storage or contractor's yard. It argued that a material or contractors' yard is commonly understood in the field of land use and zoning to mean a passive yard, where equipment and tools are stored in an organized fashion in connection with an off-site business or trade, such as landscaping or construction work *(see, e.g.*, Town of Poughkeepsie Zoning Law, § 210-9 defining "Contractor's equipment storage/contractor's yard" as land "used to store and maintain construction equipment and other materials and facilities customarily required in the contractor's trade, but excluding storage of materials or equipment for on-site or off-site sale"). A few of Mr. Doxey's photographs do show some piles of crushed stone, which was delivered to the property from off-site. However, even assuming, *arguendo*, that he was operating a material storage or contractor's yard, simply because that was permissible under the I-3 District did not make it a legal use pursuant to Zoning Ordinance § 280-71A(4). It would have also required site plan and other land use approvals. At no time during the trial did Mr. Doxey establish his use of the property as anything resembling what is commonly understood to be a "contractors' or material storage yard." On the contrary, the claimants kept scrap metal, inoperable end-of-life vehicles and other junked materials in a haphazard manner on the property.

Moreover, the City Building Department Director, Mr. Summa, testified that Mr. Doxey's rock crushing activities also were prohibited under the I-3 District (Tr. 322, 324). The I-3 District permits only "[s]tone cutting and monument works" (see Zoning Ordinance § 280-71A[8]). He explained that the craft of stone cutting and monument work and the crushing of large boulders of rock in a large, vibrating machine, "are two different things" (Tr. 341). The petitioner asserts that stone cutting is commonly understood to mean cutting stone for a variety of indoor and outdoor decorative purposes, usually involving hand held saws or similar pieces of smaller-sized equipment and tools. Monument work is commonly understood to refer to the shaping and crafting of tombstones, mausoleums, memorials and other similar monuments (*see, e.g., S. Goldstein Monument Works, Inc. v Graves*, 254 AD 798, describing defendant's business of "selling monuments, headstones, footstones, and mausoleums"; *Nesin v Long is. Granite Co.*, 205 Misc 765 [Sup. Ct. Queens County, 1954] explaining that defendant's monument works business involved the manufacture of "monuments and tombstones'). Rock crushing was not a permitted use under the

Zoning Ordinance in the I-3 District. It also was not a permitted use in the MW-3 District (*see* Zoning Ordinance § 280-73.2).

The claimants would therefore have had to obtain a use variance from the Zoning Board of Appeals ("ZBA") and site plan approval from the Planning Board in order to lawfully convert the use of the property from Hawkins' fuel oil storage/distribution to a junkyard. Both approvals also would have been required for rock crushing. Indeed, site plan approval would have been needed even for a material storage or contractors' yard (*see* Zoning Ordinance § 280-13A[3]; Tr. 323, 331-32). These important approvals provide the appropriate review boards an opportunity to study a proposed use of land before operations commence, to ensure that such use would not result in any adverse impacts to the environment and surrounding community (*see* Zoning § 280-14). Neither a use variance or site plan approval was, however, ever sought or secured by Doxey. (Tr. 332). Nor did the Glen Cove Community Development Agency (CDA) make the property lawful for use as a junkyard.

The fourth Whereas clause in "the Land Swap Agreement," upon which fee claimant relies, merely declares that Mr. Doxey's "salvage and yard waste recycling" uses were consistent with the I-3 District, and inconsistent with the MW-3 District (Ex. 4 at fourth Whereas clause). The clause does not address the legality of such uses. It also does not address whether Mr. Doxey obtained the appropriate zoning approvals to operate "salvage and yard recycling" activities at the property. Mr. Deegan testified that, at best, the fourth Whereas clause was a "gratuitous insertion" in a document that "was probably drafted, looking at it . . . by . . . Doxey's attorney" (Tr. 438). Moreover, the "Land Swap Agreement" did not become operative. (Tr. 436). It was "never approved by the board of the CDA." (Tr. 436; *see* Tr. 437, 439; *John Doxey et al., v Glen Cove Cmty. Dev. Agency, et al.*, No. 04-014434, Slip Op at 1-5 [Sup. Ct. Nassau County, January 27, 2005] confirming that as "there is no document showing that [t]he agreement was approved [,] the court must view the agreement as not having been approved"). Furthermore, the CDA had no power under Section 280-9 of the Zoning Ordinance to permit or authorize a land use that did not comply with zoning.

"A condemnation proceeding is not a private litigation. There is a constitutional mandate upon the court to give just and fair compensation for any property taken. This means 'just' to the claimant and 'just' to the people who are required to pay for it. The rule is abundantly clear that the property must be appraised at its highest and best use and paid for accordingly (*Micali Cadillac-Oldsmobile v State of New York* [*Reiss*], 104 AD2d 477, quoting from *Matter of County of Nassau*, 43 AD2d 45, 48).

To satisfy the "legally permissible" prong of this strict four-part test, the alleged highest and best use must be permitted under zoning at the time of the taking (*see In re Town of Islip* (*Mascioli*), 49 NY2d 354, the "potential uses the court may consider in determining value are limited to those uses permitted by the zoning regulations at the time of taking"; *see also* 4-12B Nicholas on Eminent Domain § 12B.322[1] [3d ed. 2009]). The only potential exception applicable here is the Fee Claimant's allegation that the property's material yard was a legal, pre-existing, nonconforming use which was allowed to continue to operate notwithstanding that it was not allowed under the

property's MW-3 zoning designation at the time of taking (see Zoning Ordinance § 380-73.2). A highest and best use that is no more than a "speculative or a hypothetical arrangement in the mind" of the claimant may not be accepted as the basis for a condemnation award (*see, e.g., City of New York v Jamaica Arms Hotel*, 14 AD3d 699, rejecting claimant's highest and best use where the City of New York passed a local law eliminating the use of the property as a privately-owned hotel as transitional housing).

Mr. Taylor, the petitioner's expert witness, determined that the highest and best use of the property as of the vesting date was as vacant commercial land available for development pursuant to the MW-3 District regulations (Tr. 355). The MW-3 District was the zoning classification in effect as time of the taking and it remains so today (see Zoning Ordinance § 280-73.2). Mr. Taylor testified that, in his professional opinion, the MW-3 District is essentially a commercial zoning district (Tr. 355). He further testified that based upon his due diligence in reviewing the Zoning Ordinance, the property did not enjoy protected "grand-fathered" status as lawful, pre-existing, non-confirming use (Tr. 356). Thus, he did not consider any I-3 uses as the highest and best use because they were not permitted at the property as of the vesting date (*Id.*). This was confirmed by Richard Summa, Director of Glen Cove's Building Department (Tr. 321-22).

The claimants' attorneys challenge Mr. Taylor's appraisal by asserting that (i) the percentage adjustments he made for "location" was too high, and (ii) gross adjustments should have been used instead of net adjustments. Mr. Taylor testified that he used six (6) comparable sales of commercial properties, and that his research did not reveal any recent sales at the time involving waterfront properties (Tr. 362-63). He also adjusted his six (6) comparable sales for various factors, such as location, water frontage, lot size, zoning, shape and utility (Tr. 360). Mr. Taylor's rationale for making such adjustments are explained in his appraisal, and were as elaborated upon at trial (Tr. 360-64; Ex. Z at 37). New York Courts have found that adjustments of approximately 25%-30%, or even higher, are reasonable and credible under the particular facts of a case *(see, e.g. In re Vill. of Haverstraw* [*AAA Electricians*], 2011 WL 6155720, at 14 [Sup. Ct. Rockland County December 9, 2011] concluding that net adjustments ranging from 15% to 60% were proper; *see also, In re City of New York [Sanitation Garage Brooklyn Dist. 3 and 3A]* 2010 WL 4781415, at 27 [Sup. Ct. Kings County, November 18, 2010] 25% adjustment for size deemed appropriate). Here, Mr. Taylor used adjustments of 25% and 30% with respect to his adjustment for "location" only (Ex. Z at 36). With respect to his 25-30% adjustment for location, the appraisal explains that the comparable sales are "located in significantly more favorable, established and developed commercial areas as compared to the subject." (*Id.* at 37). Mr. Taylor testified that the location adjustment takes into account whether the property is "in a highly developed area, versus a secondary removed-type location" (Tr. 361-62). He therefore adjusted his Sale No. 2 downward because of its location by 25% (Tr. 370) and testified that the "comparable is located in the Village of Freeport on Atlantic Avenue. It's an area with a far superior amount of exposure to the subject." (*Id.*) He followed the same approach with respect to his other comparable sales (Ex. Z at 36). However, the claimants' appraisal did not refute or even substantively address the location adjustment at trial. Moreover, Mr. Taylor used a separate adjustment for "water frontage" (Tr. 362). More specifically, he adjusted the comparable sales upward (*i.e.*, added value) to reflect positively that the property "sits right on the water." (*Id.*).

He thereafter distinguished these adjustment categories and the manner in which they affect comparable sales when arriving at his total fair market value. He noted that net adjustments are standard industry practice (*see, e.g., Vill. of Brewster v Merriweather Estates*, 2012 WL 1676988, at 12 [Sup. Ct. Putnam County, May 14, 2012] concurring with net adjustments ranging as high as 25%-35%; *In re Metro. Transp. Auth.* [*Longridge Assoc.*], 2012 WL 6013825, at 17 [Sup. Ct. Putnam County, December 4, 2010] accepting net adjustments ranging up to 20%). Consequently, net adjustments depict a more accurate overall picture of the subject property as compared to the comparable sales than gross adjustments (Tr. 419-21, 426-27). Otherwise stated, Mr. Taylor opined that net adjustments provide the "true picture" as far as how the sale compares to the subject property, whereas gross adjustments are "nothing more than a summation of the adjustments that you've made" (Tr. 426). There was no credible expert testimony by the claimants as of the vesting date that refutes Mr. Taylor's professional opinions. The Court therefore has not considered as relevant the prior purchase price of $125,000 agreed upon in 1997 or Mr. Taylor's testimony that the property could have had an adjusted value of $176,000 as of the vesting date based on market trends between 1997 and 2006 (*see Gold-Mark 35 Assoc. v State*, 210 AD2d 377) (Tr. 372-73).

The claimants' reliance on *City of New York v Mobil Corp.*, 23 AD3d 77 and the allegation that the condemnor's appraisal is defective merely because it contains discussions of contamination and the cost to remediate is misplaced. Mr. Taylor did not apply any deductions or consider the cost to remove any groundwater and soil contamination due to the ambiguity involved in determining the degree to which those costs might be incurred (Ex. Z p. 27). In *City of New York, supra* at p. 79, the Court stated ". . . it would be 'fundamentally unfair' to allow the City to value the property as contaminated for condemnation purposes, and yet still recover the remediating costs." Alternatively, in the within proceeding there is no indication that Mr. Taylor valued the property with the cost of remediation as a factor.

The non-confirming use and project influence rule issues raised by the claimants only serve to obscure a proceeding where their appraisal fails to adequately refute the valuation of the condemnor's expert as of the vesting date as set forth in Mr. Taylor's appraisal and the testimony at the trial.

More specifically, the claimant are correct in asserting that the failure to procure a permit or certificate of occupancy does not make a use illegal for the purpose of nonconforming use status (*see Kennedy v Zoning Board of Appeals of Town of North Salem*, 205 AD2d 629, 631). Even if a Certificate of Occupancy was in fact required, "[a] use which is otherwise lawfully maintained may be continued as a nonconforming use although the user failed to procure or renew a license, certificate or other permit required by law . . . The failure to obtain a license does not render the use unlawful in the sense intended by zoning ordinances which preserve lawful uses") (id. at 631quoting *Anderson, New York Zoning Law & Practice* § 6.12, at 219-220 [3d ed.]; *Rubin v Wallace*, 63 AD2d 763). However, here the claimants' activities were in violation of the existing zoning laws from the day it was acquired. The claimants' use of the premises as a junkyard is and was prohibited under the I-3 District regulations (see Zoning Ordinance §§ 280-71B; 280-69B[4]). Also, the claimants' alleged rock crushing use is not a permitted use under the I-3 District regulations and thus prohibited.

(Zoning Ordinance § 280-3A; Tr. 322, 324). Nor did the claimants obtain a certificate of occupancy to operate a material storage yard. "[A] nonconforming use may not be established where, as here, the existing use of the land was commenced or maintained in violation of a zoning ordinance" (*Marino v Town of Smithtown*, 61 AD3d 761). A basic principle of zoning and land use law is that a pre-existing, nonconforming use must have been legal in order to be protected (*see Town of Virgil v Ford*, 160 AD2d 1073, holding that the defendant did not have a legal nonconforming use for its vehicle storage yard, and therefore did not establish that this use occurred prior to the enactment of the applicable ordinance provision. Likewise, in *Centereach Car Care v State*, 271 AD2d 391, the highest and best use of property at the time of taking was an auto repair station, not as a gasoline station, since the property owner was not authorized to use nonconforming underground gasoline storage tanks which encroached on state land). Whether the property is characterized as a junkyard, a salvage yard, steel processing yard, or construction yard, it operated illegally between 1993 and 2006 to the extent the claimants failed to procure the proper permits, a variance or certificates of occupancy. The fact that the City may have acquiesced in the illegal use of the property should not be considered in the calculus to enhance the condemnation award.

In determining the value of a condemned property, any enhanced or depressed value to the property caused by the project for which the property was condemned cannot be considered. This rule is known as the "project influence" rule or the "Miller rule" after the U.S. Supreme Court's discussion of the rule in *United States v Miller*, 317 369, 376-77. The rule has been adopted by the Courts of New York. Properties at issue must be valued in accordance with the industrial zoning designation that would apply if the redevelopment plan did not exist (*see Matter of Queens West Dev. Corp.*, 289 AD2d 335). The testimony at the trial demonstrated that the 1999 re-zoning (changing the zoning classification of the property from I-3 to MW-3) that occurred seven years before the 2006 taking was not intended to depress the value of the property. (Tr. 434-35). The re-zoning that affected approximately 100 acres was adopted pursuant to the City's longstanding overall vision to remediate and revitalize the waterfront area along Glen Cove Creek (Tr. 431, 434-35).

The fee claimant did not offer any evidence of a depressed property value due to the 1999 re-zoning (*see* Exhs. G & 9). The only appraisal entered into evidence by the Fee Claimant valued the property as of October 18, 2010. (*Id.*). The fee claimant also offered no testimony as to the property's value before and after the re-zoning in 1999. Any alleged decrease in value due to the re-zoning is therefore purely speculative. Indeed, the re-zoning was adopted in 1999, seven (7) years before the June 22, 2006 vesting date.

For the project influence rule to apply, there must be a specific project that caused a decrease in value. Contrary to the fee claimant's assertion, the 1999 re-zoning was not adopted for any particular waterfront project (Tr. 435). The record amply demonstrates that the City was not committed to any specific project at the time of the April 1999 re-zoning, and it would have occurred with or without the condemnation. All that existed was the City's longstanding vision to revitalize the waterfront (Tr. 431, 434-35). There was nothing "remotely resembling a formal approved project" at that time of the 1999 re-zoning. The zoning change that occurred seven (7) years prior to the vesting date and was a product of a decades' old vision to clean the waterfront. The City's

industrial makeup had long been relegated to dormancy and the City intended to adaptively reuse the waterfront area. (Tr. 434-35). There is no documentary evidence or trial testimony that runs counter to these facts. The fee claimant did not submit any documentation or elicit any trial testimony which remotely indicates that a development plan with a concrete, defined project was in place, that a developer was ever selected, or that any approvals or permits were ever sought by an entity related to any redevelopment at the time of the re-zoning. While the affidavit of the former CDA Executive Director and the Acquisition Petition both refer to waterfront "plans," this merely refers in a very general sense to the City's overall vision to remediate and restore the Glen Cove Creek area to active use. To reiterate, at the time of the re-zoning, there was no specific "plan" or project to which the City was committed. Nor did the fee claimant present any evidence at the trial that a concrete, definite "plan" existed.

Accordingly, based upon the credible documentary evidence presented at trial, including the petitioner's well reasoned and carefully analyzed comparable sales and adjustments, as of the June 22, 2006 vesting date, the Court determines that the fair market value for the real property fee is $980,000.00.

A condemnor may be required to pay a claimant just compensation for trade fixtures it condemned. In *Kaiser v Woodcraft*, 11 NY3d 353, 359, the Court of Appeals stated:

> "When the State takes property by eminent domain, the Constitution requires that it compensate the owner so that he may be put in the same relative position, insofar as this is possible, as if the taking had not occurred. Thus, [a]n appropriation of land . . . is an appropriation of all that is annexed to the land, whether classified as buildings or as fixtures. . . . The value of the fixtures ought, therefore, to [be] considered in estimating the total value of the property appropriated by the State (internal citations and quotation marks omitted)."

The measure of just compensation for a trade fixture is "the current sound value . . . of the trade fixture at the time of vesting" (*Matter of Village of Port Chester* [*Megamat Laundromat, Inc.*], 42 AD3d 465, 467. In order "[f]or an item to qualify as a trade fixture, it must pass the three-part test of annexation, adaptability and intention of permanency" (*Id.*; *see Kaiser Woodcraft*, 11 NY3d at 360 ["In the century and a half this Court has grappled with fixture issues, the three-pronged 'annexation-adaptability-permanency' test has remained central – in this and most other states – to determining whether an item is a compensable trade fixture or non-compensable personality."]). The first prong, "annexation," includes items that are physically attached to the land as well as items that are "constructively annexed" to the land (*Id.*). The second prong, "adaptability," contemplates both fitting the chattel to the particular purpose of the freehold, and the necessity of the chattel for complete use of the freehold" (*Id.*). And the third prong "permanency," is an intention that attachment be permanent, requiring an objective interpretation of the installer's intention at the time of attachment" (*Id.*). In this regard, "New York takes a broad view in evaluating what improvements are to be regarded as [trade] fixtures" (*Id.* at 362, quoting *Rose v State of New York*, 24 NY2d 86).

The fact that a fixture can be moved from the property it is located on to another property does not negate its status as a compensable trade fixture. In *Matter of Bedford Stuyvesant (1) Community Develop. Plan*, 51 AD2d 147, the Second Department affirmed a trade fixture award for "detachable and movable dies, molds and 'make readies' " (*Id.* at 148), notwithstanding the City of New York's argument that such items should be treated as personal property. The Court quoted approvingly from *Matter of City of New York Ruppert Brewery Urban Renewal Project*, 67 Misc 2d 863, 871 (Sup. Court New York County, May 7, 1971), which analyzed the law of fixtures:

> Thus it appears that the law, as long established, has clearly negated removability as the test of a fixture. Nevertheless, in this case and in every case involving fixtures tried in this jurisdiction in recent times, the city has relied on physical removability as the principal criterion of compensability. . . . Despite the total rejection of this theory in case after case, the Corporation Counsel persists in the futile repetition of the argument that all removable fixtures are *per se* personal property. In face of the recent decisions in *Rose v State* (*supra*), *Cooney Bros. v State of New York*, (24 NY2d 387 . . .) and *Marraro v State of New York* (12 NY2d 285 . . .), the time has surely come for the city to lay this ancient ghost to rest and in the future to adapt its legal posture to conform to its responsibilities to all parties including the court (*Id.* at 149-50).

See Matter of City of New York (*Kaiser Woodcraft Corp.*,) 39 AD3d 131, 134. ("The courts have repeatedly emphasized that whether a claimed fixture is movable, or removable, is not the applicable criterion", *rev'd on the other grounds*, 11 NY3d 353 [2008]; *Kaiser Woodcraft*, 11 NY3d at 360; "Even if the machinery could be removed, the critical factor was whether its installation was intended to be permanent"; *Matter of City of New York* [*Melrose Commons* Urban *Renewal Area*, 2005 WL 6206424 [Sup. Ct. Bronx County, July 11, 2005]; "Movability is not the criteria upon which to determine whether or not a particular item is a compensable fixture."). The petitioner's fixture appraisal recognizes that items that are capable of being moved to another location can still be considered compensable trade fixtures because that appraisal considers various fixtures as compensable, such as fencing (item #1) and ornamental stones (items #5 and #6), notwithstanding the appraiser's acknowledgment that these items could be moved to another location (Tr. 497:4-19).

Conversely, the bulkhead came with the fee and is an integral part of the real property (*see In re Metro Transp. Auth. v 192 Broadway Jewelers*, 81 AD3d 434, and *Village of Port Chester v Megamat Laundromat, Inc.*, 42 AD3d 465) (Tr. 358-59; Tr. 515). Therefore, the Court will not consider the claimant's valuation of $1,501,131.74 as detailed in Exhibit 14. The fixture claimant as a tenant on the property did not own or install the bulkhead. The fee claimant acquired the bulkhead when it purchased the property from Hawkins. Mr. Taylor factored the bulkhead as part of the overall valuation of the property. At most, the fixture claimant installed capping and some cleats on the bulkhead (Tr. 56). Moreover, the fixture claimant has not offered any evidence demonstrating the anticipated cost of any potential secondary loss of use due to the taking (*see In re City of New York Terminal Markets* [*Hunts Point Area Bronx*], 20 AD2d 42). The fixture

claimant is therefore entitled to be compensated for the value of the capping, tie down fittings and maintenance, the items it contributed to the bulkhead in the sum of $5,395.00.

The petitioner argues there is no credible evidence in the record to substantiate the claim that, as of the vesting date, the rock crusher was assembled and operational in connection with an active business on the property. Mr. Doxey testified that it was in operation on the date of the condemnation (Tr. 24). In fact, he testified that it never ceased operating on the property (Tr. 85). As a result, the fixture claimant seeks $609,705 for the rock crusher (see claimants' Exhibit 12, - p.16) despite not having submitted into evidence an invoice, receipt or other proof of what he actually paid for it (*see In re Metro Transp. Auth.* [*192 Broadway Jewelers, Inc.*], 81 AD3d 434). His expert, Mr. Sencer, opined that it would cost an additional $32,000 to relocate the stone crusher (Tr. 195). Mr. Falasco contacted a company that specializes in this type of equipment and confirmed that the estimated value of this type of equipment would be approximately $250,000 (Tr. 468-69). His depreciated value of $125,000 is comparable to the "actual sound value" of $185,000 that Mr. Sencer wrote in the back-up notes to his appraisal (Ex. 16 at page 5, item 10]). Nor did Mr. Sencer explain why his initial value of $125,000 accelerated to a present value of $609,750. The fixture appraisal itself (see claimants' Exhibit 12) contains no information showing how Mr. Sencer arrived at his value. Consequently, after applying a depreciation rate of 50% to the $250,000 valuation of Mr. Falasco, the court determines the value of the rock crusher to be $125,000.

The fixture claimant seeks an additional $592, 204 for the Hitachi excavator without submitting into evidence an invoice, receipt or other proof of what Mr. Doxey actually paid for it (Ex. 7, Item 15). Mr. Sencer relied on the Hot Line Construction Equipment Guide. It indicated a retail value of $333, 269 to which Mr. Sencer made certain upward adjustments to arrive at $502,204 (Tr. 285-286; Ex. 16 contains a copy of the Hot Line Construction Equipment Guide). Mr. Falasco relied on his engineering experience of overseeing construction sites and discussions with a company that specifically "deals with machinery like this," to arrive at a depreciated value for the excavator of $220,000 (Tr. 470-71). He indicated that there are some "[m]iscellaneous items associated with this, maybe bringing the whole thing up to about $300,000." (Tr. 470-71). The Court will give the Hitachi excavator a value of $333,269.

Item numbers 16, 17 and 18 in the claimants' fixture appraisal are related items. Item 16 is a 35 x 35 aboveground fuel oil tank; Item 17 is two, 25 x 30 aboveground fuel oil tanks; and Item 18 is a 247 cubic yards of concrete for the slabs under each of the three tanks (Ex. 7, p.16). The photographs and testimony from Mr. Sencer, among others, make clear that Mr. Doxey cut huge openings in these tanks, and used them to store scrap metal, discarded materials, and other items related to the property (*see, e.g.*, Ex. Z at 3). Mr. Sencer acknowledged, inter alia, that "[t]hey cut holes in them to use them, more or less, as garages rather than storage tanks" (TR 250). Hawkins lawfully used these tanks for fuel oil storage. (Mr. Sencer also stated, "my impression was it came from the previous petroleum distribution company that was on the site.") (Tr. 249). He treated the tanks and the concrete slabs as separate items while Mr. Falasco valued the tanks and their respective slabs together pursuant to the 2010 RS Means (Tr. 472; Ex. AG; *see,* the spreadsheet in Mr. Falasco's Equipment Report, specifically Savik & Murray's Item #s 10-12). There is no factual

dispute that the tanks and slabs were "already in place" when Mr. Doxey purchased the property (Tr. 249-50). Moreover, Mr. Sencer mistakenly converted square feet to cubic yards when valuing the concrete slabs. He likewise miscalculated the value for the bolsters and used an erroneous depreciation amount of 15%. The fixture claimant's and petitioner's values for the tanks and slabs are, however, comparable when adjusted for these errors. The Court will therefore value the tanks and slabs at $140,000.

Mr. Sencer's values a New Jersey concrete barrier (claimants' Exh. 7, p.15) at $6,493 and a "concrete block" at $4,380 (id.). Mr. Falasco did not indicate any alternative value for these items in either his appraisal or rebuttal report. The truck scale was a compensable trade fixture, installed and used by Mr. Doxey on the property prior to the vesting date. The Court therefore gives the truck scale a value of $74,400 (Tr. 540).

The fixture claimant has not met its burden that items 25-29 in the 2010 Amended Fixture Claim (claimants' Exh. 7, p.17) were on the property as of the vesting date. Mr. Falasco testified that these items all relate to a building that "was being built after the vesting date" (Tr. 489). Mr. Sencer also conceded that "[t]hese were the items for the new building that had not been installed yet" as of Sencer's site visits in 2008 and 2010 (Tr. 295). There was no building permit or other approval for the construction of this building in the City's files (Tr. 334, 490). Items 25-29 are the following: cement slab for radiant heating (item 25); aluminum siding for new shop building (Item 26); custom ordered vertical roll up doors (item 27); custom ordered heating system (not installed) (Item 28); custom ordered bathroom appliances (item 29). All of these items, which were not installed in 2008 or 2010 or on the vesting date, could be moved without damaging their functional utility. There is nothing custom or special about them (Tr. 489-91). Mr. Sencer testified that the aluminum siding (Item 27), in particular, could be moved without damaging it. (Tr 297). He also testified that the aluminum siding was not installed when he inspected the property in 2008 and 2010 (Tr. 297). In addition, while he testified that "[r]adiant floors are a big deal today. I have one in my bathroom. It's marvelous," he did not explain why they would be needed, or adapted for use at the property (Tr. 205). A distinction can also be made between the existing office trailer building on the property as of the vesting date, and the new shop building that was still not completed as of 2010. Mr. Falasco agreed that the items attached to the existing office trailer building on the property, such as plumbing (Item 19) and an electrical panel box (Item 20), are fixtures.

The court will exclude the custom steel "I" beam framing (item # 23) since Mr. Sencer acknowledged the framing was not "attached' or annexed to the property.

In summary, the valuation by the Court of the trade fixtures in dispute shall be as follows: bulkhead $5395; rock crusher $125,000; Hitachi excavator $333, 269; tanks and concrete slabs $140,000; New Jersey concrete barrier $6493; concrete block $4380; truck scale $74,400. Excluded from the award for fixtures shall be the following items: 25, 26, 27, 28 and 29. The remaining items were considered trade fixtures by Mr. Sencer and Mr. Falasco. Mr. Sencer valued them at $97,386.50 and Mr. Falasco at $74,999.37. For those items not excluded or valued by the Court in this decision, but agreed to by the respective appraisers as being trade fixtures, the valuation used

by Mr. Sencer shall be credited over the valuation used by Mr. Falasco in light of Mr. Sencer's credible testimony, extensive experience and education in the field of fixture appraising.

The court will make an award for fixtures as follows:

Bulkhead	$5,395.00
Rock Crusher	$125,000.00
Hitachi Excavator	$333,269.00
Concrete Slabs	$140,000.00
N.J. Concrete Barrier	$6,493.00
Concrete Block	$4,380.00
Truck Scale	$74,400.00
Remaining Trade Fixtures	$97,386.50
	$786,000.00 (rounded)

Mr. Sencer added soft costs of approximately 31.31% (Exh. 7 at 19). Mr. Falasco added soft costs of approximately 46% (Pet. Exh. AG at 7). Charges that are typically termed soft costs, such as architect fees, contractor's profits, costs of procuring necessary licenses and other essential overhead or incidental expenses must be included in the reproduction cost (*see In re City of New York*, 43 NY2d 512,516). Considering the nature and scope of the project, the court will award soft costs as follows:

Sales Tax on materials assume ½ @ 8.625%	$9,575.77
Contractor's overhead	$78,000.00
General contractor's profit	$78,000.00
General conditions	$39,000.00
Engineering permits	$15,720.00
	$220,295.00

A summary of the court's determination is as follows:

Fee Claimant	$980,000.00
Fixtures Claimant	$786,000.00 (rounded)
Soft costs	$220,295.00
Total award	$1,986,295.00

Doxside Industries is entitled to interest at 9% per annum from the vesting date (see Eminent Domain Procedure Law §514(A); "a condemnee shall be entitled to lawful interest from the date of acquisition to the date of payment").

IDA made an advance payment to fee claimant of $980,000.00 and to the fixtures claimant of $323,668.25.

Settle judgment providing for an award in favor of the claimants as outlined herein.

DATED NOV 0 6 2013

J.S.C.