

Dashley Realty, Inc. v State of New York

2017 NY Slip Op 32900(U)

February 24, 2017

Court of Claims

Docket Number: 118613

Judge: Debra A. Martin

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STATE OF NEW YORK COURT OF CLAIMS
DASHLEY REALTY, INC.,

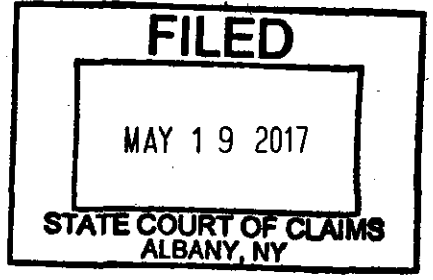
Claimant, DECISION

-v-

STATE OF NEW YORK,

Claim No. 118613

Defendant.



BEFORE: HON. DEBRA A. MARTIN
Judge of the Court of Claims

APPEARANCES:

For Claimant:
KEANE & BEANE, P.C.
BY: JOEL H. SACHS, ESQ.
BY: SAMUEL L. NEWMAN, ESQ.

For Defendant:
HON. ERIC T. SCHNEIDERMAN
New York State Attorney General
BY: J. GARDNER RYAN, ESQ.
Assistant Attorney General

This is a timely filed claim resulting from the partial appropriation of property pursuant to Sections 30 and 349-C of the Highway Law and the Eminent Domain Procedure Law. The subject properties are described in three appropriation maps titled "City of Peekskill: US Route 9 Arterial Highway, S. H. No. 59-7", Westchester County, Map Nos. 87, 88 and 89, Parcel Nos. 96, 97 and 98. Claimant alleged in their verified claim filed on July 6, 2010, that the notice of appropriation was served on claimant on or about July 17, 2007. These maps and the property

descriptions set forth therein are hereby adopted by the Court and incorporated herein by reference.

The maps and property descriptions were filed with the Westchester County Clerk on July 2, 2007 (vesting date). This claim has not been assigned or submitted to any other Court, tribunal or officer for audit or determination. The properties were viewed by the Court, with the parties and counsel, on November 30, 2015.

The Property

Claimant, Dashley Realty, Inc., owned five abutting parcels of property located at the southeasterly corner of the intersection of Central Avenue and South Water Street in the City of Peekskill, Westchester County, hereinafter referred to as Parcels I, II, III, IV, and V.¹ Four of these parcels, marked in yellow on Exhibit 1², were appropriated by the State with the filing of three acquisition maps on July 2, 2007 (vesting date). Parcel V, marked in green on Exhibit 1, was not taken but claimant argued that its value was diminished by the appropriation.

There is no dispute that the evidence of the chain of title for Parcels I, II, III, IV and V proved that claimant was the owner at the time of the taking. However, the claim alleged that two other contiguous properties were owned by claimant and taken as part of the same appropriation. Those were delineated as "Circle 30" and "Circle 33"³ on Exhibit 1 and marked in red. Claimant's ownership of these two parcels was disputed by the State.

¹ The parcels are so numbered in the Ward Carpenter Survey, claimant's Exhibit 1, with which the State agrees. Parcel I is also referred to as Tax Lot 8 by some of the witnesses.

² The location of the various properties was identified by color-coding on Exhibit 1. That map was used extensively at trial and witnesses often used the colors to identify the various properties.

³ The reference tracks designations on an older map, Exhibit J, and deed descriptions.

A review of the deeds placed in evidence does not prove that the claimant ever owned the Circle 30 and 33 properties. Claimant all but conceded this point in arguing that Mr. Rodriguez, the principal of Dashley, thought he was purchasing all of the property in the area, including Circle 30 and 33 when he acquired the properties in December 2003. Claimant produced evidence that the City assessed taxes to it for these parcels, some of which were paid until the entirety of the Dashley real estate holding went into tax foreclosure. Assuming, *arguendo*, that it was assessed for taxes on Circle 30 and 33 (which is not actually clear on the record), the City of Peekskill tax assessor testified that the deeds, not the tax records, established ownership of property. The case law is clear that payment of taxes assessed against the property is not determinative of title (*see City of Mount Vernon v New York, New Haven & Hartford R.R. Co.*, 232 NY 309, 319 [1922]; *Walsh's Inc. v County of Oswego*, 9 AD2d 393, 395 [4th Dept 1959]). That being the case, claimant failed to prove ownership of the Circle 30 and 33 properties and the Court will not consider them in the assessment of damages.

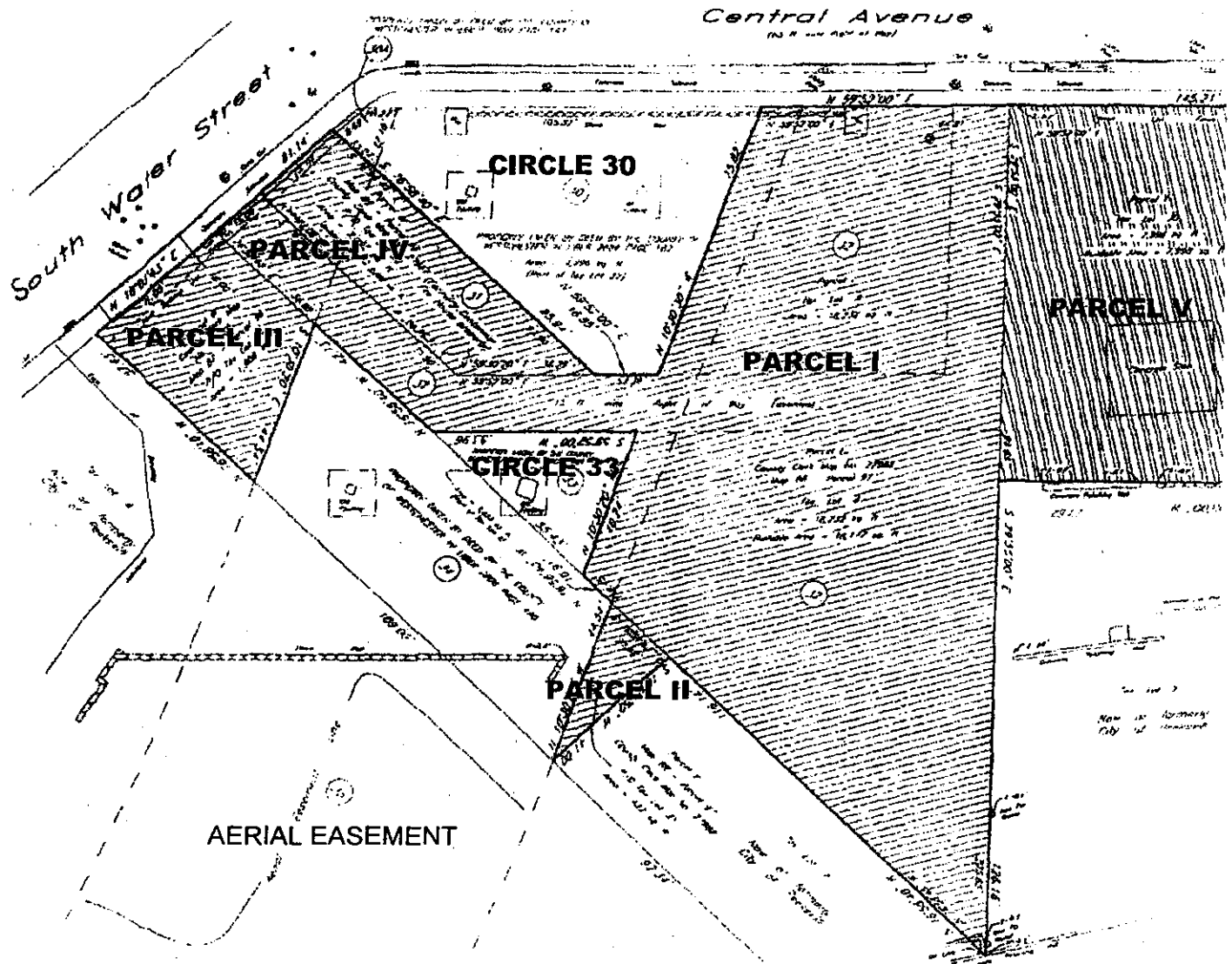
The valuation of Parcels I, II, III, and IV, is complicated by their location directly abutting or partially underneath the Route 9 viaduct or bridge, over Central Ave. Prior to the taking, the State had an aerial easement over a portion of the properties to allow for enlargement of the bridge, which, in fact, occurred as a result of the appropriation. Furthermore, without the Circle 30 and 33 properties, the parcels were joined at irregular angles, lacked significant frontage and were bisected by an old 15-foot right of way easement of unknown viability. Figure 1 (attached) shows the location of the parcels, with the parallel lines running roughly north-south representing the location of the State's pre-taking aerial easement associated with Route 9. The parcels are described as follows:

FIGURE 1

Dashley Realty property
Peekskill, New York

July 2, 2007
Page 12

SURVEY, ENLARGED FOR DETAIL



Parcel I: At 18,232 sq. ft., it was the largest single parcel but irregularly shaped. It abutted all of the properties, with 65 feet of frontage on Central Avenue and a westerly extension of a 15-foot right of way easement that fronted on South Water Street. A significant portion of the southernmost end of the property was steeply sloped and not developable. At one time, there was an old industrial building on the parcel that was removed prior to the taking. This parcel abutted Parcel V which was not appropriated but which claimant alleged suffered consequential damage as a result of the taking.

Parcel II: This was a land-locked, small, triangularly shaped lot of approximately 437 sq. ft. to the south of Parcel I. Its value was nil both because of its size and steeply sloped topography, so it will be discussed as if it was part of Parcel I.

Parcel III: This was comprised of 1,908 sq. ft. with 41 feet of frontage on South Water Street, almost entirely occupied by a 972 sq. ft., one and one-half story concrete building. When purchased by Dashley in 2003, there was an HVAC business on the first floor and one or two empty apartments on the second floor. Historically, the building was referred to as a plumber's shop. The aerial easement of the Route 9 viaduct ran along the rear lot line of the property and the old 15-foot right of way ran along its north line.

Parcel IV: This was 2,092 sq. ft. having only 25 feet of frontage on South Water Street, with the 15-foot right of way running along two of its boundaries. Referred to as the "Centennial Firehouse" parcel because that dilapidated historic building was located on it until 2008 when it collapsed as the City tried to move it to another location. The 2-story firehouse was partially under the bridge, with a later-built 40' x 22' addition that extended onto the Circle 30 parcel to the north.

Parcel V: This was 7,998 sq. ft., lot with 80 feet of frontage on Central Avenue, abutting and to the east of Parcel I. It contained a concrete slab foundation of some former industrial use. To the east of this parcel was a viable window manufacturing business, Seekircher. After the taking, Seekircher purchased Parcel V in a tax foreclosure sale and expanded its factory onto that property.

Photographic evidence and witness descriptions of the area in the immediate vicinity of the Dashley properties proved that it was a commercial area with a lumber yard, masonry supply business, and a commercial bakery across the street. The train station was about a block away and was surrounded by commuter parking lots. The waterfront, itself, which was a short distance from the properties, had been attractively redeveloped with walking trails and a visitors center. The most prominent feature of the property was the viaduct for the Route 9 expressway, with its noisy truck traffic and long-casting shadow.

The City Planner testified that the City of Peekskill adopted a Local Waterfront Revitalization Plan (LWRP) in 2004⁴, prompted by new legislation and statewide regulations. That resulted in a plan for the Peekskill waterfront on the Hudson River, which was in the vicinity of the Dashley properties. New zoning designations were established with the intent of improving the shoreline with a large park and walking trails, and to change the general character of the neighboring streets.

The zoning in the area in which the Dashley properties were located was changed to WF-2, which permitted a variety of smaller commercial uses, including retail stores, small

⁴ City of Peekskill Local Waterfront Redevelopment Plan:
http://www.cityofpeekskill.com/sites/peekskillny/files/file/peekskill_lwrp_w_maps.pdf

manufacturing of original artwork, furniture, and musical instruments, and business offices. Special permits could also be sought for other uses such as attached or semi-attached residential development, larger retail, offices, art studios, furniture and cabinetry fabrication, and parking garages.⁵ Ginsberg Development, a known local developer, worked with the City to create a redevelopment plan and was selected as the Preferred Developer. In connection with this, in 2005 all of the property owners in the area, including Dashley, were alerted to the fact that Ginsberg may be looking to purchase their property or the City may condemn it.

Christopher Lynch, a former employee of Ginsberg, discussed the ideas they had for the area, including some residential development of a portion of the Dashley properties, and that some of the preexisting, nonconforming businesses, such as Seekircher, were going to stay because they added to the eclectic feel of the area. Ginsberg did buy up some properties but their plan did not progress because they realized the "Great Recession" in the residential housing market was about to explode, which did occur in early 2008. The City Planner testified that the Ginsberg Development Plan was removed from the City's website in 2006 and no further action was ever taken by the City to implement the plan, work with Ginsberg, or acquire properties by condemnation. So, despite the City's admirable plan to change the historical character of the area to one that was livable and walkable, with attractive shops, amenities and restaurants, that did not come to fruition.

⁵ City of Peekskill Zoning Code: <http://ecode360.com/6433679>

The Appraisals

Claimant relied on Gregory Faughnan, an appraiser with Lane Appraisals, Inc. who prepared the report filed for this litigation on May 29, 2013 regarding his 2007 appraisal (Ex. 30)(hereinafter referred to as the 2007 appraisal). After the trial began, it was disclosed by claimant's counsel that Mr. Faughnan had performed an appraisal of the Dashley properties in 2005 (Ex. 46). At that time, Mr. Faughnan's client was the City of Peekskill and/or Ginsberg Development and the appraisal was performed in conjunction with the City's contemplation of condemning the property for redevelopment by Ginsberg. The inexplicable difference in Mr. Faughnan's 2005 appraised value of \$470,000 and his 2007 valuation for Dashley of \$2,165,000, and the numerous serious discrepancies in his reports and testimony require the Court to reject Mr. Faughnan's appraisal and opinions on any issue (*see Woods v State of New York*, UID No. 2008-010-003 [Ct Cl, Ruderman, J., May 21, 2008]).

It was clear that this appraiser slanted his opinions to suit the needs of his client. When working for the City/Ginsberg, he provided a lower appraisal. When questioned how his appraisal for Dashley just two years later could be almost five times greater, he cited a "tremendous" increase in market prices from the 2003 comparative sales he used in his earlier report. However, his 2005 report listed the median sale price of a condominium in Peekskill rising from \$250,000 in 2003 to \$280,500 in 2004. His 2007 report described the median price rose to \$322,000 in 2005 and fell to \$310,000 in 2007, which equates to only a 24% increase in median prices during those five years.

In 2005, Mr. Faughnan appraised Parcels I and II (collectively referred to as "Lot 8"), Parcel III (referred to as "Lot 32"), Parcel IV (referred to as "Lot 31"), and Parcel V (referred to

as “Lot 30”, the parcel not appropriated in 2007), with total appraised acreage of 31,128 sq. ft. (Ex. 46, pg. 4). It does not appear that he included the Circle 30 or 33 lots, although it is difficult to match exactly the old maps and designations with the parcels shown on Exhibit 1.⁶ In the 2007 report, he valued Parcels I, II, III, IV and Circle 30 and 33, a total 28,488 sq. ft. with a separate valuation of Parcel V for consequential damages only. Therefore, he appraised a larger property in 2005 than in 2007.

Mr. Faughnan opined in 2005 that the property would support a total of 22 dwelling units in 2 buildings. However, by the 2007 appraisal, which involved less acreage, that number had doubled to 45 units. He arrived at this higher figure by assuming the owner would be permitted a “bonus density” or the addition of multiple floors onto each building. However, he did not provide any layout of these potential buildings or describe how they could fit on the irregularly shaped parcels. He was totally unprepared at trial to answer questions about limitations on the use of Parcel I due to the steep slope at the rear, he equivocated about whether the parking would have to be constructed below ground and, if so, how many floors of underground parking would be required, and, after giving contradictory answers, finally admitted that a portion of a building would have to be under the viaduct. He admitted that he did no financial feasibility analysis of parking garages which, apparently, his valuation would require. And, even though he purported to present valuation for two scenarios—one with the title-disputed Circle Lots 30 and 33, and one without—he clearly added in the extra lots whenever he needed the square footage to build the 45

⁶ This conclusion is supported by the fact that in his 2007 appraisal, he valued Parcels I, II, III, IV, Circle 30 and Circle 33, for a total of 28,488 sq. ft. (Ex. 30, pg. 66). If one subtracts 5,819 sq. ft. for Circle 30 and Circle 33, the total is 22,669 sq. ft. for Parcels I, II, III and IV. To that add 8,000 sq. ft. for Parcel V, and the total of 30,669 sq. ft. is close to the area appraised in 2005.

units and provide parking. The Court is left with no confidence that the highest and best use of the properties was residential and without a clear picture of what could be built within the confines of the parcels, how sufficient parking would be provided and whether it would be economically feasible.

Mr. Faughnan gave an implausible reason for characterizing the firehouse in 2007 as a \$400,000 asset to be added to the value of the property when it was a liability in 2005 requiring that he deduct the cost of its demolition from the value of the property. At trial, he justified that with an illogical explanation that he heard it cost the State and City that amount in their ill-fated attempt to move the dilapidated structure to another location in 2008. The 2005 report also listed the “plumber’s shop” as a building that would have to be demolished, the cost of which was deducted from that valuation, but that deduction was not mentioned in the later report. Clearly, any redevelopment that would require removal of buildings has to reflect that cost to the owner as a negative adjustment to the value of the property, and the failure to make that adjustment is “illogical” (*Acme Theatres v State of New York*, 26 NY2d 385, 388 [1970]).

A review of the two appraisal reports showed that they were identical in many respects, with the most obvious differences being in the selection of comparable sales and the projection of the number of potential housing units that could be built. However, subtler changes in the later report were further evidence of the appraiser’s pervasive bias. In the 2005 report, the descriptions of Parcels I and IV included:

“Route 9 passes over Lots 8 and 31, and this overpass bridge is plainly visible in the photographs of the property, particularly the photograph of Lot 31, with the firehouse building.

The presence of this overpass is a burden on future development of Lots 8 and 31.”⁷

(Ex. 46, pgs. 27 & 28). This negative comment is omitted from the descriptions of Parcels I and IV in the 2007 appraisal (see Ex. 30, pgs. 46 & 47). A similar negative comment about the bridge appeared again in the 2005 report:

“The Route 9 overpass bisects the combined site. The effect of the bridge overpass is that no building development would be expected, or allowed, to be under this overpass. Furthermore, no building would even be close to the bridge simply because of visual and noise pollution, and for safety reasons.”

(Ex. 46, pg. 41). Again, this comment was excluded from the later report.

The last discrepancy between the two appraisals to be noted was actually the most troublesome. The 2005 report stated:

“The total number of units the property could support, in our opinion, is 22 units.

It should be stressed this is a maximum number estimate and a final unit count that might be achieved, after an approval process that could take years and cost many thousands of dollars, may be significantly lower.”

(Ex. 46, pgs. 44-45). It is obvious that when this appraiser represented the City and Ginsberg in seeking to condemn the property, it was to their advantage to give a low valuation and to be disparaging of actually achieving that value. It is not surprising that this cautionary statement does not appear in the later report for Dashley.

Finally, Mr. Faughnan failed to disclose the existence of the 2005 appraisal, leaving the defendant and the Court to learn of it after the trial began. The 2005 report noted that he

⁷ Note that Lots 8 and 31 in this report refer to Parcel I and IV, respectively.

physically observed the property on March 10, 2005 and made subsequent observations of it, the last being on May 4, 2005. However, none of those dates were mentioned in the later report, which stated that the property was physically observed by Mr. Faughnan and another appraiser in his firm on January 10, 2012 and in 2007 “prior to the takings” (see Ex. 30, pg. 31). Since there was nothing in this description that would alert anyone of his prior involvement with this property, it was either intentionally misleading or significantly unprofessional. As another judge stated in obvious frustration with a similar situation:

“No self-respecting expert, conscious of the ethics and standards of his profession should change an opinion, honestly and properly arrived at at the behest of the party engaging him. Certainly an expert may and perhaps should, if he accepts an assignment, give the side selecting him the most favorable, honest limit of his professional judgment but he does himself, his client and the Court a disservice if he alters his opinion at the behest of a litigant.”

(*Murphy v State of New York*, 41 Misc2d 906, 908 [Ct Cl 1964]). Although I have no indication that either the claimant or its counsel requested Mr. Faughnan to inflate his valuation, the end result was to the claimant’s unfair advantage, and this Court cannot accept it.

Since the Court finds Mr. Faughnan’s appraisal and testimony to lack credibility, it rejects his calculation of consequential damages to Parcel V. It is also clear that he failed to follow generally accepted methodology in calculating consequential damages.

Having rejected the claimant’s appraisal, the Court is bound to accept that of the defendant and hereby adopts its findings (*Tilcon Materials v State of New York*, UID No. 2013-029-032 [Ct Cl, Mignano, J., Sept. 24, 2013]). Defendant’s appraiser, Mr. Golub, presented a credible analysis of the highest and best use of the property given its precarious location under a noisy viaduct in a neighborhood that, despite the City’s aspirations, could not overcome

economic instability. All of the evidence presented by claimant regarding the highest and best use of the property as residential was speculative, based on redevelopment that was never to occur; with no final development plans for this property offered into evidence, no commitment to fund such a project, and no prospect of municipal approval in the near future (*see Matter of City of New York (Rudnick)*, 25 NY2d 146, 149 [1969]). In fact, Ginsberg started to see “cracks” in the housing market either at the time of or shortly after the taking, the City abandoned their redevelopment of the area, and Ginsberg pulled out of the entire project as a result of the housing market “tailspin” that started at the end of 2007 (Testimony of Christopher Lynch, Tr. 206-208).

Claimant’s argument that Mr. Golub’s highest and best use as “light industrial” was not allowed in the WF-2 zoning designation for the property was merely one of semantics. Certainly, many of the businesses allowed in that district—such as furniture fabrication, arts and crafts studios, and job printing—could be considered “industrial”. Given the location of the viaduct and 15-foot easement cutting through the property, this non-residential use is logical and well-supported by Mr. Golub’s appraisal and testimony.

Conclusion

The claimant in this case is only entitled to direct damages due to the taking of the property shown on the aforementioned appropriation maps. The Court accepts the value of \$418,693 submitted by Mr. Golub, rounded to \$419,000 as the total damages attributable to the taking. Claimant is entitled to prejudgment interest at the statutory rate of 9% per year running from the date of the taking, July 2, 2007 (vesting date) through January 17, 2008 (six months from date of personal service on July 17, 2007). Interest is then suspended until the date the claim was filed on July 6, 2010, at which point interest resumes to the date of the decision and

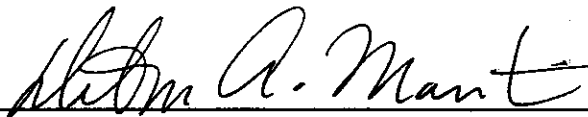
thereafter to the date of entry of judgment⁸. Finally, pursuant to Court of Claims Act §11-a (2), claimant shall recover the initial filing fee.

The award to the claimant herein is exclusive of the claims, if any, of persons other than owners of the appropriated properties, their tenants, mortgagees or lienors having any right or interest in any stream, lake, drainage, irrigation ditch or channel, street, road, highway or public or private right of way or the bed thereof within the limits of the appropriated properties or contiguous thereto; and is exclusive also of claims, if any, for the value of or damage to easements or appurtenant facilities for the construction, operation or maintenance of publicly owned or public service electric, telephone, telegraph, pipe, water, sewer or railroad lines.

All motions and cross-motions, if any, upon which the Court previously reserved decision are hereby denied. All objections, if any, upon which the Court reserved determination during trial are now overruled.

The Chief Clerk is directed to enter judgment accordingly.

Rochester, New York
February 24, 2017



HON. DEBRA A. MARTIN
Judge of the Court of Claims

⁸ Pursuant to Court of Claims Act § 19 (1) and EDPL 514 (B).