

<b>MNS Holding, LLC v State of New York</b>
2017 NY Slip Op 32904(U)
August 9, 2017
Court of Claims
Docket Number: 127332
Judge: Gina M. Lopez-Summa
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**STATE OF NEW YORK COURT OF CLAIMS**

**MNS HOLDING, LLC,**

**Claimant,**

**DECISION**

**-v-**

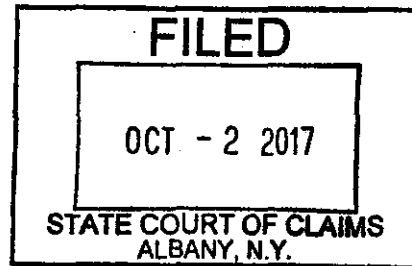
**THE STATE OF NEW YORK,**

**Claim No. 127332**

**Defendant.**

**BEFORE:**

**HON. GINA M. LOPEZ-SUMMA**  
**Judge of the Court of Claims**



**APPEARANCES:**

**For Claimant:**  
**Flower, Medalie & Markowitz**  
**By: Edward Flower, Esq.**

**For Defendant:**  
**Hon. Eric T. Schneiderman, Attorney General**  
**By: Christopher M. Gatto, Assistant Attorney General**

This is a timely filed claim for the partial appropriation (taking) of property owned by claimant, MNS Holding, LLC (MNS), brought against defendant, the State of New York, pursuant to the Eminent Domain Procedure Law and § 30 of the Highway Law.

The subject property, consists of one rectangular parcel of land improved with a one story retail building currently occupied by Cancos Tile. The parcel is located at 761 Smithtown Bypass approximately 675 feet west of Southern Boulevard. Smithtown Bypass is also commonly referred to as Route 347. The property is located in the Town of Smithtown, County of Suffolk.

The State appropriated 1,907 square feet of the property across the entire Route 347 frontage, approximately 11 feet in depth. Prior to the taking, both parties set forth that the property was .71 acres. The size of the building on the property did not change after the taking.

The taking also included 2 temporary easements to be used as work areas. Parcel 1394 contains 98 square feet and Parcel 1395 contains 632 square feet for a total area of 730 square feet. The experts agreed on the 730 square feet measurement.

Prior to the trial of this matter, the parties agreed that the title vesting date was September 23, 2015 and title to the subject property on the vesting date was in the name of claimant.

The Notice of Claim was filed with the Court on January 7, 2016. The appropriation maps and descriptions contained therein are adopted by the Court and incorporated herein by reference. The aforesaid maps and descriptions were filed in the Office of the County Clerk of Suffolk County. Pursuant to the requirements of Court of Claims Act § 12 (4) and EDPL § 510 (A), the Court has made the required viewing of the property which is the subject of this claim. The claim has not been assigned or submitted to any other Court or tribunal for audit or determination.

The subject property is identified on the Suffolk County Tax Map as District 800, Section 107, Block 2, Lot 7.001. The taking was associated with a construction project to expand New York State Route 347.

Pursuant to CPLR 3025, the Court deems that the pleadings are conformed to the proof presented at trial.

The subject property is zoned WSI, Wholesale and Service Industry. Its purpose is to provide adequate land along arterial highways for automotive related non-retail needs and uses

which require extensive land for outdoor storage and for uses that do not generate large traffic volumes. There are various zoning requirements and notably the property was in compliance with all except for the rear yard setback and parking. At the time of the taking, the property was legally non-conforming to zoning as a result of the 1967 Board of Zoning Appeals approval for a zero rear yard setback with the provision that the second story cannot exceed 2,000 square feet. The 1997 Board of Zoning Appeals granted a Certificate of Existing Use for a non-conformity of use to continue as a retail business in the WSI zoning district to the extent that structure currently exists and in accordance with the provisions of the Building Zone Ordinance.

The appropriate measure of damages for a partial taking of real property is the difference between the value of the whole property before the taking and the value of the remainder after the taking (*Chester Indus. Park Assoc., L.P. v State of New York*, 103 AD3d 827 [2d Dept 2013]). The measure of damages must reflect the fair market value of the property in its highest and best use on the date of the taking, whether or not the property is being put to such use at that time (*Gyrodyne Co. of Am., Inc. v State of New York*, 89 AD3d 988 [2d Dept 2011]).

Both parties appraisers, Elinor Brunswick for the claimant and Richard Marchitelli for the defendant, agree that both prior to and after the taking the highest and best use of the subject property was as retail use as currently improved, consistent with WSI zoning.

Consequently, the Court finds that the highest and best use of the subject property is its current use consistent with WSI zoning.

Elinor Brunswick, a real estate appraiser, prepared claimant's appraisal in this matter and testified on claimant's behalf at trial. In analyzing the value of land before the taking, Ms. Brunswick utilized the vacant land valuation approach, the sales comparison approach and the

income approach. She prepared a vacant land valuation by comparing the subject property with four different sales of vacant property. After making certain adjustments for each individual property she found a range of values from \$25.00 to \$31.00 for the before taking per square foot value of the subject property. She testified that she made the adjustments based upon her understanding of the market and her experience in analyzing the market in this specific region. She explained that in 2011 the region was coming out of a recession and property values decreased but then started to stabilize and increase until the 2015 valuation date. She also made adjustments based upon location and travel count, explaining that a suburban environment traffic count has a significant effect upon value. She reconciled that number to \$28.00 per square foot, a number in the middle of the range. She then multiplied \$28.00 by 30,928 square feet and found a vacant land valuation of \$865,000.00.

She next utilized the sales comparison approach to value the subject property before the taking. She compared the subject property with four improved properties. After making adjustments for conditions of sale; location; land to building ratio; age/condition; zoning and parking, which she deemed appropriate, she found a before taking square foot value of the subject property of \$220.00 per square foot. She then multiplied \$220.00 by 9,480 square feet (the gross building area) and found an appraised value for the subject property before the taking of \$2,100,000.00.

Ms. Brunswick also utilized the income approach to value the subject property before the taking. She looked at four comparable leases and made necessary adjustments for time, size, condition and location which she explained in detail in her report. The adjusted rents ranged from \$15.53 per square foot to \$21.26 per square foot, and she selected \$18.00 per square foot as

the reasonable rent. Ms. Brunswick calculated the net income to be \$144,663.00. In determining the capitalization rate, she looked to PWC and Realty Rates investor surveys which averaged capitalization rates from 6.38% to 10.63%. She also factored in the mortgage equity analysis and reached a final capitalization rate of 6.5% which she rounded to 7%. Dividing the capitalization rate by the net income, she reached a before taking value of the subject property using the income approach of \$2,100,000.00.

The sales comparison and the income approach both yielded a before taking value of the subject property of \$2,100,000.00.

Ms. Brunswick performed the same analysis using the sales comparison approach to value the property as improved after the taking. She made an adjustment for zoning to reflect the fact that the subject property was legally non-conforming prior to the taking but after the taking it was rendered non-complying to the previously approved 1997 site plan due to the reduced set back. In 1997 the site plan had a 109 foot set back which was approved while after the taking there is a 98 foot setback. She explained that an adjustment was necessary to reflect the cost and risk associated with the fact that zoning board approval would be necessary for any additional changes. After applying the zoning adjustment she found that the adjusted unit prices range from \$149.00 to \$244.00 per square foot inclusive of land. She reconciled the unit value at \$200.00 per square foot inclusive of land. She then multiplied 9,480 square feet by \$200.00 for a total of \$1,900,000.00.

Ms. Brunswick performed the same analysis using the income capitalization approach to value the property as improved after the taking. As she did in the sales comparison approach Ms. Brunswick applied certain adjustments based upon the zoning becoming compromised as a result

of the taking. She reflected the zoning impact by adding 50 basis points to the capitalization rate. She testified that due to these adjustments the after taking capitalization rate increased from 7 to 7.5%. No changes to the rental rates or the net income were made. Dividing the capitalization rate by the net income of \$144,663.00, she reached an after taking value of the subject property using the income approach of \$1,900,000.00.

Ms. Brunswick attributed strong weight to both the sales comparison and income approaches and thus concluded the estimated market value of the subject property prior to the taking was \$2,100,000.00 and the estimated market value of the subject property after the taking was \$1,900,000.00.

Ms. Brunswick subtracted \$2,100,000.00 from \$1,900,000.00 to find total direct and indirect damages of \$200,000.00. She subtracted direct damages of \$53,396.00 from \$200,000.00 to find severance damages in the amount of \$146,604.00.

She calculated damages to the site improvements as \$5,830.00 in which she added \$2,500.00 for sprinkler repair and \$3,330.00 for direct damages.

Thus, Ms. Brunswick concluded that the total damages from the taking was \$205,830.00 which was the aggregate of direct damages for the fee taking, \$200,000.00 and damages to the site improvements of \$5,830.00.

Ms. Brunswick calculated the temporary easement area of 730 square feet. She multiplied 730 by \$28.00, the before taking square foot value as vacant to arrive at \$20,440.00. She found that a return of 12% inclusive of real estate taxes was considered a reasonable return for vacant property. She then multiplied \$20,440.00 by 12% to arrive at an annual rental rate of \$2,453.00 or approximately \$200.00 per month.

Daniel Falasco, an engineer submitted a report and testified on behalf of defendant. In his report Mr. Falasco stated that subject property is zoned WSI and under the Town of Smithtown's Table of Use Regulations, the use is as of 2012, considered a Contractor's Showroom which is a permitted use under the WSI. However, in 1997, the subject property needed to get approval to operate as a retail establishment, which it obtained in 1997 and has a Certificate of Existing Use to operate as a retail establishment.

Mr. Falasco testified that the site plan approved in 1968 set forth two conditions: that the elevations were to be brick and that the primary purpose for the structure would be wholesale sales in accordance with the building ordinance. He explained that a building owner would need to submit a new site plan if the owner wanted to make a change to the site or the structure.

Mr. Falasco set forth in his report that the building has approximately 9,430 square feet without explaining how he arrived at that figure. He also set forth that the area of the property is 30,808 square feet which he obtained by plotting the metes and bounds contained in the deed for the subject property. Mr. Falasco testified that before the taking the subject property was not in compliance with the minimum side yard width on the east side, the rear yard depth and the number of parking spaces.

After the taking, Mr. Falasco concluded that the subject property complied with all of the existing conditions to the WSI zoning. He set forth that the minimum front yard depth is 50 feet which the subject property meets after the taking. He explained that minimum side yard width on the east side, the rear yard depth and the number of parking spaces did not comply with WSI zoning requirements prior to the taking and that none of these areas were affected by the taking. Mr. Falasco determined that after the taking the ground sign on the subject property will be set

back approximately 1.5 feet where a 5 foot set back is required. He testified that other than the set back for the sign, no other zoning non-conformities were created by the State's taking.

He opined that a variance for the sign will be required and would cost approximately \$3,500.00. He also concluded the taking impacted the following improvements; asphalt curbing valued at \$920.00; asphalt paving at \$2,300.00; grass area at \$1,500.00; and irrigation at \$2,500.00 for a total of \$7,220.00 exclusive of the variance.

Richard Marchitelli, a real estate appraiser, prepared defendant's appraisal in this matter and testified on defendant's behalf at trial. In analyzing the value of land before the taking, Mr. Marchitelli utilized the vacant land valuation approach, the sales comparison approach and the income approach. He prepared a vacant land valuation by comparing the subject property with three different sales of vacant property. After making certain adjustments for each individual property he found a range of values from \$24.87 to \$29.27 for the before taking per square foot value of the subject property. He testified that he chose \$25.00 per square foot which is in between the adjusted range. He then multiplied \$25.00 by 30,808 square feet and found a vacant land valuation of \$770,200.00.

He next utilized the sales comparison approach to value the subject property before the taking. He compared the subject property with five improved properties. After making adjustments for market conditions; location and marketability, which he deemed appropriate, he found a before taking square foot value of the subject property of \$175.00 per square foot. He arrived at this figure from a range of values between \$127.11 and \$178.86 per square foot. He then multiplied \$175.00 by 9,430 square feet (the gross building area) and found an appraised value for the subject property before the taking of \$1,650,000.00.

Mr. Marchitelli also utilized the income approach to value the subject property before the taking. He looked at three comparable leases with rents of \$15.00; \$24.00 and \$24.24 and made necessary adjustments for market conditions; location and features. He testified that the comparable rentals were all smaller than the subject property. Mr. Marchitelli did not provide the figures for the adjusted rents. However he selected \$13.50 per square foot as the reasonable rent without any further explanation as to how he reached that figure. Mr. Marchitelli calculated the net income to be \$109,693.00. In determining the capitalization rate, he looked at mortgage position and equity positions which resulted in a 5.9% and 8% rate of return respectively which he weighted to reach a final capitalization rate of 6.5%. Dividing the capitalization rate by the net income, he reached a before taking value of the subject property using the income approach of \$1,690,000.00.

Mr. Marchitelli adopted the sales comparison approach which yielded a before taking value of the subject property of \$1,650,000.00.

Mr. Marchitelli performed the same analysis using the sales comparison approach to value the property as improved after the taking. He made the same adjustments as in the before the taking analysis. He testified that the market value of the property did not change as a result of the taking. He concluded \$175.00 per square foot to be appropriate. He then multiplied 9,430 square feet by \$175.00 for a total of \$1,650,000.00.

Mr. Marchitelli performed the same analysis using the income capitalization approach to value the property as improved after the taking. As he did in the sales comparison approach Mr. Marchitelli applied the same adjustments as in the before taking analysis. Thus there were no changes to the capitalization rate, the rental rates or the net income. Dividing the capitalization

rate by the net income of \$109,693.00, he reached an after taking value of the subject property using the income approach of \$1,690,000.00.

Mr. Marchitelli adopted the sales comparison approach which yielded an after taking value of the subject property of \$1,650,000.00.

Mr. Marchitelli found direct damages by multiplying \$25.00 per square foot by 1,907 (the amount of land taken) and arrived at \$47,675.00. He adopted Mr. Falasco's damages of \$10,720.00.

Mr. Marchitelli testified that he found no severance damages because it was his opinion that the taking had no material effect on the property. He opined that a buyer would pay the same amount of money for this property after the taking.

Thus, Mr. Marchitelli found that the total damages from the taking was \$58,395.00 which was the aggregate of direct damages for the fee taking and damages to the site improvements.

Mr. Marchitelli calculated the temporary easement area of 730 square feet. He multiplied 730 by \$25.00, the before taking square foot value as vacant to arrive at \$18,250.00. He found that a return of 8% was considered a reasonable return for vacant property. He then multiplied \$18,250.00 by 8% to arrive at a rental rate of \$122.00 per month or \$4,392.00 for the 36 months of the temporary easement.

As previously stated the appropriate measure of damages for a partial taking of real property is the difference between the value of the whole property before the taking and the value of the remainder after the taking (*Chester Indus. Park Assoc., L.P. v State of New York*, 103 AD3d 827 [2d Dept 2013]). The measure of damages must reflect the fair market value of the property in its highest and best use on the date of the taking, whether or not the property is being

put to such use at that time (*Gyrodyne Co. of Am., Inc. v State of New York*, 89 AD3d 988 [2d Dept 2011]). Consequential or severance damages may also occur if there is a diminution in value of the remaining property as a result of the taking (*Murphy v State of New York*, 14 AD3d 127 [2d Dept 2004]).

The Court adopts claimant's calculations of \$28.00 per square foot and multiplying that by 1,907 square feet awards \$53,396.00 as the accurate valuation of direct damages to the subject property as a result of the taking.

There was a dispute between the experts as to whether severance damages were appropriate in this matter. Claimant's expert found a difference in value after the taking because as a result of the taking, the property no longer complies with the Town's previous approvals and would require zoning board approval based upon more egregious non-conformities. Defendant's expert found no change in value of the property as a result of the taking. After reviewing the evidence and weighing the credibility of the experts, the Court finds that claimant's appraiser overstated the effect of the taking with regard to zoning. Claimant would need to file a new site plan and seek approval for any additional changes it would seek to make. The evidence does not support that this would be a more onerous process due to the taking, as the evidence demonstrates that even with the loss of land, the property remains in compliance with the zoning setbacks, other than the ones it has already received a variance for. Consequently, the Court finds that following the appropriation the property did not have a change in value and thus severance damages will not be awarded in this matter.

With respect to cost to cure damages the Court accepts defendant's calculations and awards \$10,720.00 in cost to cure damages.

The appraisers both agreed that the two temporary easements measured 730 square feet in total and there was evidence that the easements were still in effect as of the date of trial. The Court previously found claimant's appraisal to be more credible with regard to the value of the land prior to the taking at \$28.00 per square foot. Claimant's appraiser found that the reasonable rate of return was 12%, inclusive of taxes and defendant's appraiser found it to be 8%. The Court adopts claimant's methodology and calculations and finds \$200.00 per month as an accurate per month rental rate of return for the land encumbered by the temporary easement and that 12% is the appropriate rate of return. Multiplying \$200.00 by 22 months<sup>1</sup>, the Court finds and awards \$4,400.00 in damages to date related to the temporary easement.<sup>2</sup>

Therefore, claimant is awarded a total of \$68,516.00 in damages. This amount was calculated by adding the direct damages of \$53,396.00 and the cost to cure damages of \$10,720.00 with \$4,400.00 for the temporary easement.

Accordingly, claimant is entitled to an award of \$68,516.00 with statutory interest from the vesting date of September 23, 2015 to the date of decision and thereafter to date of entry of judgment (see CPLR §§ 5001 and 5002). Suspension of interest is not warranted since the notice of acquisition was served by certified mail, return receipt requested and not by personal service (*Sokol v State of New York*, 272 AD2d 604 [2d Dept 2000]; see also EDPL 514 [B]).

The award to claimant herein is exclusive of the claims, if any, of persons other than the owners of the appropriated property, their tenants, mortgagees or lienors having any right or

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<sup>1</sup> The Court calculated 22 months from the date of vesting, September 23, 2015 to July 23, 2017.

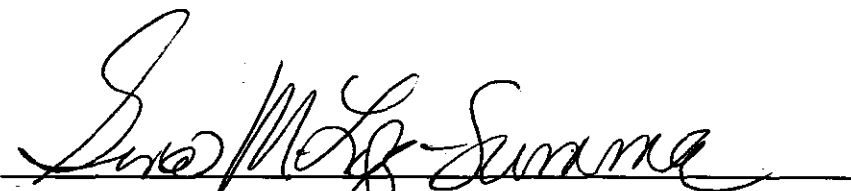
<sup>2</sup> In addition, as this is a design-build project and construction was on-going as of the date of the trial, the parties informed the Court that the State will pay rent or damages for the temporary easement for as long as it is in effect.

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 property 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. To the extent the claimant has paid a filing fee, it may be recovered pursuant to Court of Claims Act section 11-a (2).

All other motions on which the Court may have previously reserved or which were not previously determined, are hereby denied.

The Chief Clerk of the Court is hereby directed to enter said Judgment accordingly.

Hauppauge, New York  
August 9, 2017



GINA M. LOPEZ-SUMMA  
Judge of the Court of Claims