SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: IAS PART 89

-- X

730 EQUITY CORP.,
(BLOCK 1120, LOT 35)

Index No. 1689/2012

Claimant,

DECISION

-against-

NEW YORK STATE URBAN DEVELOPMENT CORPORATION, D/B/A EMPIRE STATE DEVELOPMENT CORPORATION,

Condemnor.

-- X

At issue in this condemnation proceeding is the just compensation to be awarded to Claimant 730 EQUITY CORP, for the taking of the subject property, located at 730-740 Atlantic Avenue, Brooklyn New York (Block 1120 Lot 35). The Condemnor, EMPIRE STATE DEVELOPMENT CORP., (hereinafter "ESDC"), took title on March 1, 2010, (the vesting date), in connection with the Atlantic Yards project. The court viewed the property on September 8, 2011, and a non jury trial was held on January 7, 8, 9, 11, 15, and 16, and February 4, and 5, 2013.

The property is an irregularly shaped lot of 20,738 square feet. It has a 275 foot frontage on Atlantic Avenue, and its rear lot line adjoins LIRR railroad tracks, which are some 14-20 feet below grade. The west lot line is irregular and approximately 114 feet and the lot line along Carlton Avenue is only .69 feet. At the time of vesting the property was zoned as Mi-i.

On the date of vesting the property was vacant. There had been a gas station on the site which was demolished in 2001.(T 11) In June of 2001 claimant entered into a 15

year lease with Amoco Oil Company to operate a gas station on the site. The lease had an option for a 5 year extension. (T 12-13)

Claimant contends that the highest and best use of the property would have been to be developed as a 12 story budget hotel. Claimant contends that there is a reasonable probability that the subject property would have been rezoned from Mi-i to C6-2A absent the project.

An Mi-i zone is an industrial use zone that allows automotive uses, as well as hotels, and has a Floor Area Ratio (FAR) of 1. A C6-2A district is a mixed commercial residential zone that allows and residential FAR of 6.02. Claimant's appraiser values the property rezoned to C6-2A, at $ 20,650,000.

Condemnor, contends that there is no reasonable probability that the property would be rezoned to C6-2A, and that the highest and best use of the property is an auto related use such as a gas station, parking lot, or garage. (T 497-8) Condemnor's appraiser, Doris Silber, values the property, used as a gas station or other automotive use, at $2,075,000.

Even though Silber contends that the highest and best use of the property was for an auto related use, the three sales she used as comparable to the subject property were purchased, not for auto related uses, but to develop as hotels.

Her comparable sale I was a two story factory/garage which was demolished by the purchaser to develop a five story hotel . (ex K, p33) Although by the time of trial, the hotel had not yet been built. (T 502-3)

Her comparable sale 2 was a one story auto-repair garage that was demolished by the purchaser who filed plans to develop a hotel on the site. (ex K, p 35) The site was later condemned by the School Construction Authority to construct a school. (T 505)

Her comparable sale 3 was a one story auto-repair garage which was demolished by the purchaser who filed plans to develop a hotel on the site. (ex K, p 37) While development had started, the hotel had not been completed on the site by the time of trial. (T 512) While Silber's data on sales 2 and 3 did not indicate how many stories they were planned for the lots, both lots were slightly larger than sale 1 and had the same allowable FAR of 2 as did sale 1. (T 531, ex K, p 31) One can infer from the similar lot size and FAR that a 5 story hotel could be built on sales 2 and 3 as well.

The fact that in all three comparable sales the purchasers bought the properties to demolish the existing auto related uses in order to build hotels undermines Silber's conclusion that the highest and best use of the property was an automotive use.

Also, the fact that the properties were purchased for hotel development renders them inappropriate as comparisons to determine the value of the subject property if its highest and best use is an automotive use.

Lastly, because Silber valued the property based on its existing Mi-i zoning, with an FAR of 1, her valuation would not be valid if there was a reasonable possibility that the property would have been rezoned to a higher commercial or residential district.

Claimant's appraisal states that it is based on the extraordinary assumption that as of the vesting date there was a reasonable probability that the subject property would have been rezoned C6-2A. The appraiser, Daniel Sciannameo, made that assumption based on the report of Claimant's zoning consultant Richard Bass, MCP, PP.

An extraordinary assumption assumes as fact, uncertain information that if found to be false could alter the appraiser's valuation. It is the Claimant's burden to show that the assumption is justified, in this case, that there is a reasonable probability that the property would be rezoned to C6-2A. *Rodman v State of New York,* 109 AD2d 737, 485 NYS2d 842 (2nd Dept. 1985); *Rebrug v. State of New York,* 42 A.D.2d 8oi, 346 NYS2d 452 (3rd Dept 1973); *Maloney* v. *State of New York,* 48 A.D.2d 755, 368 NYS2d 338 (3rd Dept 1975),

Thus, the first question to consider is whether it is reasonably probable that the subject property would have been rezoned to C6-2A.

The M1-1 district covers the three blocks between Atlantic and Pacific Streets, running from Fifth Avenue to Vanderbilt Avenue. It also covers most of the 2 blocks between Pacific and Bergen Streets, from Carlton Avenue to Vanderbilt Avenue. This district includes the block directly south of the block of the subject property. The zoning also continues east of Vanderbilt Avenue, along Atlantic Avenue.

South of the Mi-i district are the residential blocks of Prospect Heights which are generally zoned R6B. To the north, across Atlantic Avenue, is the residential neighborhood of Fort Greene, which is generally zoned R6 or R6B. To the west of Flatbush Avenue, south of Atlantic Avenue, is the northern portion of Park Slope which is residential R6B. To the west, north of Atlantic Avenue, is the Downtown Brooklyn Central Business District which is zoned for high density commercial development.

Bass testified that the property absolutely would have been rezoned as of March 2010. (T 27) He testified that the district was not an appropriate zoning district for

the property and that C6-2A was the correct zoning for the property. (T23) He testified that he based his opinion on the built condition of the area, the zoning in the surrounding areas, the City's industrial policies, and the availability of mass transit near the site. (T25) He testified that there was no evidence of light industry in the area surrounding the property. (T28-9)

Bass testified that not only the subject property but the area surrounding the property would be rezoned. He described the surrounding area as the Mi.--x district on the footprint of Atlantic Yards, (T 24-5) but stated that the boundaries of any rezoning would be determined in consultation with the City Planning Commission. (T 134)

He testified that the City has rezoned large parts of the City and has enacted 125 area wide rezonings. (T 32) He also stated in his report that the City's policy has been to rezone underutilized, industrial areas to higher commercial and/or residential use. (ex 1 p.6) He believed that the subject property was not rezoned when the properties surrounding the site were rezoned because of the announcement of the Atlantic Yards project in 2003. (T38)

In his report, Bass refers to seven neighborhood rezonings and three private rezonings that occurred from 1992 through 2oo9.(ex 1 tab 7)Bass testified that these rezonings demonstrated that the subject property was located in a small donut hole of obsolete, low density manufacturing zoning in a sea of residential and commercial districts. (T 36)

Most of these neighborhood rezonings were in fact down zonings to bring the allowable building size in line with the size of the existing brownstones in those neighborhoods. Three of the rezoning he cited were upzonings, including the block

bounded by Fulton Street, Vanderbilt Avenue, Atlantic Avenue, and Clermont Avenue, known as 47o Vanderbilt Avenue. In 2009, that block was rezoned to C6-3A, which allows slightly greater bulk than does the C6-2A district. (T 40, ex 1 tab 7)

He also cited the upzoning, in 2006, of an area fronting the north side of Atlantic Avenue from So. Portland Avenue to So. Oxford Street to C6-2, (T 40, ex 1 tab 7), as well as the 2004 upzoning of the Special Downtown Brooklyn District. (ex 1, p 8)

Bass also relied on the findings in an Environmental Impact Statement that had been submitted in connection with the Atlantic Yards project, as evidence that a density as high as an FAR of 8.6 would be appropriate on the site.

Bass also stated that area's location near the largest transit hub in New York City as a major reason the area would be rezoned to C6-2A (T 31, ex 1 p.6)

Bass stated that the rezoning process would have taken two and half to three years, but also that absent to Atlantic Yards project that property would have been already rezoned C6-2A as of the date of the taking. (T 98)

Condemnor's zoning consultant, Michael Kwartler, FAIA, testified that it is unlikely that the site would have been rezoned to C6-2A and that such zoning would not be appropriate for the site because the property is not in a central business district, (T 652-3) and would result in several existing uses becoming non conforming. (T560-1) Kwartler stated that he was unclear as to what area Bass was contending would have been rezoned, but that any rezoning would at a minimum have to include the three blocks of the LIRR rail yards. (T 657-8) Kwartler did not give an opinion as to whether the existing Mi-1 zoning was appropriate, but limited his study to whether the C6-2A zoning proposed by Bass was appropriate. (T 865)

Kwartler testified that there is no precedent for C6-2A zoning at the location. (T 663) He also noted that although there were many rezonings in the surrounding neighborhoods, the subject property was never rezoned, and the Mi-i blocks adjacent to it were never rezoned. (ex 0, p 32-33) He stated that the fact the property was not included in either the 2001, or 2004 amendments of the Special Downtown Brooklyn District, and the fact that the special district was not extended eastward along Atlantic Avenue indicates that the City did not consider the C6 zoning of the Special Downtown Brooklyn District to be appropriate for the subject property. (ex 0 p 26-7)

He pointed out that most of the rezonings cited by Bass were in fact down zonings of brownstone neighborhoods, such as Park Slope, Prospect Heights, Fort Greene and Carroll Gardens, which decreased allowable density, and thus do not support the probability the City would have upzoned the subject property. (ex 0, p 18-19)

Kwartler also notes that Flatbush Avenue immediately south of Atlantic Terminal and Atlantic Avenue immediately west of Atlantic Terminal were rezoned to RSA (FAR 4) and R6A (FAR 3) respectively, which is lower than the FAR of 6 allowed in a C6-2A district. (ex 0, p 20)

Kwartler cited a 2001 rezoning of the north side of Atlantic Avenue, between South Oxford Street and Clermont Avenue from C6 -1 to R7-2. He stated that this rezoning which had the effect of eliminating the possibility of commercial development of the site, demonstrates that the City was not interested in upzoning the area around the subject property. (T 682)

Kwartler noted that portions of two blocks on the south side of Pacific Street, from Flatbush to Carlton, which are closer to Atlantic Terminal than the subject property, were rezoned to C4-4A, not C6. (ex 0, p 27)

Weighing the opinions of both zoning experts, the evidence presented demonstrates that there is a reasonable probability that absent the project, the subject property would have been upzoned from Mi-x to C6-2A.

Although there remained some industrial uses such as storage facilities, gas stations, and auto repair shops, the area no longer contains significant manufacturing uses. The Environmental Impact Statement submitted as part of the Atlantic Yards project describes the site as containing "long blocks that contain mainly underutilized industrial buildings". (ex x tab 4, p 3-7)

Though the 1V11-1 district was once predominately industrial, many of the buildings have been converted to commercial and residential use. It is an area of underutilized industrial sites surrounded by the residential neighborhoods of Prospect Heights, Fort Greene and Park Slope, that has become more residential over time.

The City's policy under the Bloomberg administration was to rezone underutilized industrial sites to allow for commercial or residential development. There is little reason to keep this underutilized district zoned for manufacturing when its it has been becoming more residential and commercial on its own.

The fact that the railroad yards would become a non-conforming use if the area were rezoned C6-2A is not a material impediment to rezoning. The non-conforming status would not negatively impact on their operation and it is inconceivable that the City would preclude a zoning change that would allow development of the surrounding

underutilized sites simply to keep the yards from becoming a non-conforming use. Further, the yards could be left out of any rezoning of the area surrounding yards, with the yards remaining Mi-i and the other lots on those blocks rezoned to C6-2A.

Most probably, the entire Mi-i district in the Atlantic Yards footprint would have been upzoned, although a few particular lots that had active industrial uses might have been left out of a rezoning.

However, the fact that the exact boundaries of the area that would ultimately have been rezoned is not certain does not materially affect the probability that the subject property would probably have been rezoned, absent the project.

The C6-2A zoning proposed by Bass would have been appropriate for this property.

The C6-2A is a General Central Commercial Contextual District, which is designed to provide for retail, office and custom manufacturing, and related uses normally found in central business districts or regional commercial centers. NYC *Zoning Resolution* 31-16.

The C6-2A district permits an FAR of 6.02 for residential use and an FAR of 6 for commercial use. It requires a minimum base height of 65 feet and a maximum base height of 85 feet with a total maximum building height of 120 feet. (ex 1 p 5, ex 0 p 8)

The subject property borders Prospect Heights, but is functionally part of the Atlantic Avenue corridor, it is separated from Prospect Heights because of the rail yards. (T 68o) The block of the subject property is in Community Board District 2 rather than Community Board District 8, which covers Prospect Heights. (ex 9, p 13-4)

Several properties near the subject property, along the Atlantic Avenue corridor from Fourth Avenue to Vanderbilt Avenue, were rezoned to C6. The block bounded by Atlantic Avenue, Flatbush Avenue, Pacific Street and Fourth Avenue was rezoned C6-2. The Atlantic Terminal site on the north side of Atlantic Avenue from Flatbush Avenue to South Portland Street is zoned C6-4. The north side of Atlantic Avenue from South Portland Street to South Oxford Street was rezoned to C6-2, and 470 Vanderbilt on the north side of Atlantic Avenue between Clermont and Vanderbilt Avenues was rezoned to C6-3A.

While it is true that the three most western of these blocks are within the Special Downtown Brooklyn District, they are also within two blocks of the subject property and make up part of the immediate surroundings of the subject property. Also, while the rezoning of 470 Vanderbilt Avenue was done to accommodate an existing building, the existing building makes up part of the character of the subject property's immediate surroundings.

Thus, a C6-2A district with an FAR of 6 would not have been out of scale for this portion of Atlantic Avenue.

These rezonings around the Atlantic Avenue corridor occurred after the announcement of the Atlantic Yards project, which offers an explanation as to why the subject property and its adjoining Mi-i blocks on the footprint of Atlantic Yards were not included in these rezonings.

It is true that blocks of Flatbush Avenue, south of Pacific Street, and of Atlantic Avenue, west of Fourth Avenue, were not rezoned to C6 even though they were not in the Atlantic Yards footprint. However, both Flatbush Avenue, south of Dean Street, and

Atlantic Avenue, west of Fourth Avenue, differ in character from Atlantic Avenue immediately east of Flatbush Avenue. Both streets have continuous street walls of mostly of three to four story buildings with small ground floor local retail uses. These existing buildings are entirely consistent with both area's R7A and R6A zoning.

Atlantic Avenue, from Fifth Avenue to Vanderbilt Avenue, has no retail uses other than the Atlantic Terminal Shopping mall. A more apt comparison to this portion of Atlantic Avenue would be Fourth Avenue, south of Atlantic Avenue, which was upzoned to R8A with C2-4 overlay. That district allows for an FAR of 6, similar to the C6-2A district.

In an earlier decision in *PJK Realty Corp., v New York State Urban Dev Corp.* Index No. 1688/2012, this Court found that there was no reasonable probability that a property near the subject property would be rezoned to C6 -2A. That case involved a property located at 802-808 Pacific Street, located between Vanderbilt Avenue and Carlton Street, roughly a block and a half from the subject property herein.

In that case, the claimant contended that the Pacific Street property, which was also zoned M1-1, would probably have been rezoned to C6-2A. The contention was based on a report by Bass, similar to his report in this case. In that case the Court found that the Pacific Street property would have probably be rezoned from M1-1 to C4-4A

However, while the two properties are close in proximity, the blocks on which they are located are sufficiently different to justify the finding that they would be rezoned differently.

The block on which the Pacific Street property is located is more integrally a part of Prospect Heights than Atlantic Avenue. Atlantic Avenue as noted above acts as a

corridor that separates Prospect Heights from Fort Greene and Downtown Brooklyn. The Pacific Street property is a mid-block parcel on a narrow street off of Vanderbilt Avenue, a local retail street.

Given that the Pacific Street property is located between an C4-4A district to its west and the RSA zoning of Vanderbilt Avenue, both of which permit an FAR of 4, it was unlikely that the City would have rezoned the Pacific Street property to an FAR of 6 and allowed taller buildings mid-block on Pacific Street than existed on Vanderbilt Avenue.

On the other hand, there were several blocks of Atlantic Avenue between Fourth Avenue and Vanderbilt Avenue that have been rezoned C6. These include the triangular lot bounded by Flatbush, Atlantic, and Fifth Avenues which is zoned C6-1; the Atlantic Terminal Mall on the north side of Atlantic Avenue between Flatbush Avenue and So. Portland Street which is zoned C6-4; the north side of Atlantic Avenue between So. Portland and So. Oxford Streets which is zoned C6-2; and 470 Vanderbilt Avenue which is zoned C6-3A.

The subject property in this case is separated from Prospect Heights and Pacific Street by the rail yards, and functions as part of the Atlantic Avenue corridor.

Also, while the subject property is 1/3 of a mile from the Atlantic Terminal transit hub, the Pacific Street property is almost $^{1}/2$ mile away, the outer distance of what is considered among transit planners to be a walkable distance.

Atlantic Avenue is a very wide street, more comparable to Fourth Avenue than to Vanderbilt Avenue. Further, the fact that the subject property has a 275 foot frontage on Atlantic Avenue and faces the open space of the rail yards on its rear and east side creates a situation that can support a larger development than the Pacific Street site.

These differences between the subject property and the Pacific Street property provide an adequate basis for finding a probable rezoning to an FAR of 6 on Atlantic Avenue and an FAR of only 4 on Pacific Street.

The Court finds that absent the project, the property would have most probably been rezoned to C6-2A, although not as of the vesting date. While this finding compels the rejection of Condemnor's valuation, the Court must also consider the question of whether the highest and best use for the property is a hotel, as contended by Claimants.

When, as in this case, the expert opinion of one of the parties is rejected as inadequate to support the Court's finding, then no range of testimony exists and consequently the award made by the trial court and every element thereof, if at variance with the remaining expert opinion, must be supported by other evidence and a sufficient explanation provided by the Court. *(Matter of City of New York [A. & W. Realty Corp.],* 1 N.Y.2d 428 154 NYS2d 1 (1956); *Evans v. State of New York,* 31 AD 2d 565, 294 NYS2d 349 (3d Dept 1968); *Fredenburgh v. State of New York,* 26 A.D.2d 966, 274 NYS2d 708 (3r[d] Dept. 1966) ; *Spyros v. State of NY,* 25 A.D.2d 696, 268 NYS2d 283 (3rd Dept 1966).

Highest and best use is defined as the use that is legally permissible, physically possible, financially feasible that results in the highest value or highest net return.

The proposed use of a hotel is legally permissible on the site under either the Ml-1 zoning or the C6-2A zoning. The construction of a hotel with an FAR of 6 would be legally permissible in a C6-2A zoning district.

Condemnor contends however, that such a use would be prohibited by the lease that was in effect on the date of the taking. A lease was entered into on June 13, 2001

between Claimant and Amoco Oil Company which ran until 2016 with an option to extend for an additional 5 years. (Ex A) The lease was assigned to AY 740 Atlantic LLC, a company related to Condemnor in 2005.

The lease permits the lessee to use the property for any lawful purpose including a retail gas station. Section 19 of the lease states that the lessor shall not "in any way do or fail to do (sic) any act which may frustrate Lessee's intents and purposes in entering into and performing under the lease".

Condemnor argues that seeking a change of zoning to C6-2A would violate section 19 of the lease because a gas station is not a permitted use in a C6-2A district.

Claimant argues that as matter of law a property must be valued for condemnation purposes free and clear of all leases, although the cases cited in its brief do not articulate such a principle. In this case neither Claimant's nor Condemnor's appraiser took the lease into account in valuing the property, or found that it would restrict rezoning of the subject property.

Condemnor's appraiser Doris Silber testified that she ignored the lease in valuing the property. (T 499) Also, she stated in her appraisal that although she included the lease for informational purposes, it "is given little weight in our valuation since it commenced eight (8) years ago, and Sales Comparison is the most applicable approach to value vacant land such as the subject." (ex K, p i) Further, in her analysis of highest and best use Silber states, "Legal Restrictions, as they apply to the site, are private restrictions; zoning is a public restriction. We are not aware of any private restrictions affecting use . . .". (ex K, p 25) Significantly, Silber did not raise the lease as a bar to rezoning to C6-2A in her rebuttal report.

Condemnor's counsel can not argue a restriction of use that is not asserted by its appraiser in her report.

Further, the lease in this case was assigned to a company related to the Condemnor years before the vesting date. Any efforts to restrict rezoning of the property based on the lease, by an assignee related to the Condemnor, would have to be factored out of any valuation of the property, pursuant to the project influence rule.

Condemnor also argues that the building proposed by Claimant is not physically feasible, specifically that it would violate the street wall and set back requirements of a C6-2A district, and that the loading docks and access to parking is impractical.

Ronald Ogur P.E. prepared a report for Claimant in which he analyzed what could be developed on the subject property, if it were rezoned to C6-2A. The report included drawings for a twelve story 124,000 square foot building. (ex 9 A-4 -A-12)

The report and drawings are not plans a for a specific building but a massing study to show the largest building that could be built in a C6-2A district. (T 143) The drawings do not show the layout of rooms on the individual floors. As Ogur explained at trial, he designed that exterior of the building not the interior. (T 161) The Claimants contend the highest and best use is a hotel and the Ogur drawings are of a general commercial building, which could be used as a hotel. (T 165)

It is generally not necessary to include detailed drawings and engineering specifications to establish highest and best use. It is the land that is valued not a specific yet to be constructed building. However, where a site presents extraordinary engineering or architectural problems, that might preclude the proposed use or bulk, the appraisal must account for those difficulties.

The requirement of a continuous street wall is one such difficulty. Ogur's drawing shows a building the extends only 1803 feet of the 275 street line along Atlantic Avenue.

Ogur testified that because of the irregular shape of the lot he concentrated the majority of the building on the widest part of the lot. (T 144-145) He admitted that it did not meet the street wall requirements but said that the owner could get a modification of or variance from that requirement.

Kwartler countered that it was unlikely that the City would approve a zoning change where the building planned would not conform to the requirements of the new zoning requested.

However, in explaining why he felt the owner would not get a variance from the street wall requirement, Kwartler also stated that it would be possible to construct a building on the site the meets the street wall requirements of a C6-2A district. (T 704) He stated that pursuant to the regulations, one could chamfer the corner for the last 15 feet. (T 704) He stated that it would also be reasonable to build a small portion of the rear of the building with a wall that had an arc or was stepped. (T 705)

Ogur stated that there were many different shapes that could be put on the lot and that he did not seek to shoe horn a building into the narrow portion of the lot because he felt it was not really developable. (T 147)

Similarly, the problems raised by the Ogur's placement of the loading docks do not present an insurmountable problem. The loading docks could be located in the rear of the building at the western end. As Kwartler pointed out, the rear portion of the property could be accessed through a drive through going through the building. (T 710)

Also, the building could be brought into compliance with the 85 maximum street wall height by lowering the ceiling height on the first floor to 13 feet and the second through ninth floors to 9 feet.

Thus even though Ogur's drawings did not meet the requirement of a C6-2A district, it is clear from the testimony that it is physically possible to construct a 12 story, 124,200 square foot building that met the requirements of the district, although it might be irregularly shaped at its eastern portion, which might affect its value.

However, even though a 124,000 square foot hotel is physically possible on the site, the Court must also consider whether such a hotel is financially feasible.

Claimant's appraiser, Daniel Sciannameo, used a land residual technique to demonstrate the financial feasibility of a hotel on the site.

Sciannameo concluded a residual land value of $21,850,000, which while not a valid measure of the property's value, was offered to demonstrate that the hotel would be financially feasible.

Condemnor produced an expert in hotel development, Cheryl Boyer, and a cost estimator, Girish Mehta, both of whom raised numerous objections to the assumptions Sciannameo used in projecting both the income and expenses of the proposed hotel.

Boyer found that the hotel proposed by Claimants had a value of $24,257,000 but that the construction costs, as estimated by Mehta, would actually be $50,130,104 rather Claimant's estimate of $30,716, 604. (ex Q, p 2) Boyer concluded that the property has a negative residual land value of $25, 951,126 and thus, would not be financially feasible. (ex Q, p2)

A major difference in Sciannameo's and Boyer's revenue analysis was the stabilized at an occupancy rate. Sciannameo estimated that the occupancy rate would stabilize after five years at 85% while Boyer concluded a 75% rate was supported by the market data.

A problem inherent in using the land residual technique, even to test the financial feasibility of a proposed use, is that it is highly speculative when applied to a building that has not yet been built. This is reflected in the almost $50 million difference between Sciannameo's and Boyer's residual land value.

In this case, one is dealing with a building that will never be built it and has not even been designed, which makes the projections even more speculative. Due to the very preliminary nature of Ogur's drawings, the experts doing the cost estimating are forced to make numerous assumptions as to the details of the hypothetical hotel. The proposed hotel has not been worked out to greater detail than a 12 story 124,000 square foot budget hotel. This can range anywhere from a Fairfield Inn or Holiday Inn Express, to a Super Eight or Comfort Inn budget hotel. (ex T tab 9) To some extent Sciannameo on the one hand and Boyer and Mehta on the other were comparing different possible hotels. Sciannameo envisioned a much more bare bones operation than Boyer and Mehta did. Sciannameo assumed a budget hotel with no meeting rooms and a minimal lobby. He also assumed that the hotel would lease out space to a restaurant rather than providing a breakfast room because budget hotels in New York City usually have no food service. (T 368, 459) Boyer assumed a more elaborate lobby, a breakfast room, meetings rooms and an exercise room.

While Boyer pointed out several disadvantages of the site as a location of a hotel, such as the rail yards, and its irregular shape, the fact that it may be an inferior site compared to others, this does not mean that a hotel is not financially feasible on the site. It simply means that an investor would pay less for the site compared to other sites.

In fact as Boyer testified, Brooklyn is a secondary market for hotels compared to Manhattan, and that is it is a inferior location to Manhattan. While Boyer testified that the hotel occupancy rate was increasing by the end of 2009 (T 1084-5), she appears to have underestimated the increase in tourism to Brooklyn.

Sciannameo testified that by March 1, 2010 the hotel market and tourism had found Brooklyn (T 458-9) , that in the past few years many budget hotels have opened in various neighborhoods in Brooklyn such as Williamsburg, Gowanus and Sunset Park. (T 458-9)

The empirical evidence supports Sciannameo's opinion that at the time of vesting, there was sufficient demand for hotels in Brooklyn, and that the proposed hotel was financially feasible.

There are at least 40 hotels in Brooklyn, approximately a dozen of which opened in 2010, and 2011. (ex T tab 9) Many of these hotels are in locations such as along Third Avenue and in Sunset Park, that are substantially inferior to subject property. The NU hotel was built at 85 Smith Street across the street from the Brooklyn House of Detention (ex 9, p A-35).

Several planned hotels were put on hold in 2009 following the Lehman Brothers collapse. (ex U p 1). However a closer look at the data in exhibit U shows that three hotels were cancelled in the first quarter of 2009, four were cancelled in the second

quarter of 2009, but only one was cancelled in the third quarter of 2009 and by the fourth quarter of 2009, none were cancelled. (ex U p2) This corroborates that by the vesting date, in March 2010, the chill in hotel development in Brooklyn caused by the post Lehman financial situation had eased.

The Condemnor's critique of Sciannameo's land residual analysis is far outweighed by the reality of the large number of hotels developed in Brooklyn in recent years, including 2010 and 2011. Condemnor's contention that a hotel would not have been financially feasible on the site is not supported by the evidence of increased hotel development and tourism in Brooklyn by the date of vesting.

Andrew Singer, a real estate financing expert, testified on behalf of the Condemnor that financing for the proposed hotel would not have been available on the date of vesting. He testified that in March of 2010, as a result of the commercial backed mortgage securities collapse, institutional lenders were only lending to the best developers for development of the best properties and would not have lent to build on the subject property, which he described as marginal. (ex M, p2)

However, Singer had given opinions in two rent arbitrations, in which he stated that by 2009 the crisis in the financial system had abated and financing would have been available to develop the properties involved on those arbitrations. (ex 20, 21) Singer explained that those two properties were not comparable to the subject property because the former were existing quality buildings in Manhattan and they did not involve hotel development.

He testified that it "would have been a l00% pioneering to build a hotel at this location". (T 554-5) He further stated that certain non-institutional lenders would have

considered providing financing for development on the subject property, but not for a hotel because the rate of return would have been too low for such investors. (ex M, p3)

However, Singer admitted that he did not research whether any other hotels in Brooklyn were being financed at the time of vesting, and that he based his opinion on his experience. (T 561-2) He also admitted that he had arranged financing for only one hotel in Brooklyn in his 44 years of experience. (T 562) On cross examination, Singer was unable to reconcile his opinion with the recent history of development of numerous hotels in Brooklyn.

In light of, the significant number of budget hotels developed in Brooklyn, Singer's failure to have conducted any research in to the financing of budget hotels in Brooklyn at the time of vesting, and his limited experience with hotels in Brooklyn, his opinion has an insufficient basis to conclude there would be no financing for the proposed hotel.

Claimant has met its burden of demonstrating the a twelve story budget hotel is the highest and best use of the property. The Court must next consider Sciannameo's sale comparison valuation.

Sciannameo used 15 comparable sales of properties in his analysis from which he concluded an average adjusted sales price of $175 per buildable square foot.

Condemnor's appraiser, Silber, argued that all of Sciannameo's comparables sales except sales 1, 2 and 5 should be disregarded because they are too old and predate the Lehman Brothers collapse.

Three other of the comparables sales, 61-63 Flatbush Ave Extension 125 Flatbush Avenue Extension , and 53-55 Flatbush Avenue Extension, are located in an area that is

not truly comparable to the subject property. Despite the superior location of these sales, Sciannameo made no adjustment for location. These three sales had adjusted sales prices of $302, $300, and $247 per buildable square feet, far in excess of the other comparables. The disparity between the value of these three properties from the rest of the comparables indicates that they are not suitable comparisons to the subject property.

Sciannameo's comparable sales 7, 11, 12, and 14, in addition to being well before the Lehman collapse, were purchased for residential development, not to develop a hotel and are not suitable comparisons.

Comparable sale 6, located at 611 Degraw Street, is a small lot off of Fourth Avenue in Park Slope in an M1-2 zoning district is too dissimilar to be comparable to the subject.

However, sale 13, located at 75 Schermerhorn Street, should be considered as comparable in addition to sales 1,2, and 5. Aside from the fact that the contract date was April 2007, sale 13 is the most similar to the subject property. Its buildable land area of 120,646 square feet is closest to the subject property's buildable area of 124,200 square feet and the lot sizes are similar. Additionally, it is partially in a C6-2A district and was developed as a 12 story hotel, as was proposed for the subject property.

The subject property should be valued based on Sciannameo's comparable sales 1, 2, and 5 , and 13, as they are the most comparable.

Silber argued that Sciannameo should not have made positive corner adjustments to the comparable sales because the subject property is not really a corner location, as the Carlton street side was only .69 feet.

Although the property comes almost to a point at the corner of Atlantic and Carlton Street, it functions as a corner lot. As Silber testified, an investor wanting a corner site would want it for several reasons, "for light and air, visibility, and for retail purposes as a show window." (T 1284)

There is no access to the lot from Carlton Street, and the retail space will not have two sides on windows. However for the proposed use of a hotel and ground floor restaurant, the lack of windows on Carlton Street is not significant, particularly given the long 275 frontage on Atlantic Avenue. On the other hand the rail yards occupy remainder of the Carlton Street side of the block so that there will be no building on the remainder of the block fronting Carlton Street and the air and views of Carlton Street would not be obstructed. Also, the rail yards will most likely prevent development adjoining the south wall of the hotel. Thus, a corner adjustment is justified.

Silber also stated in her rebuttal that there should be a downward adjustment to account for the subject location's inferior configuration, but did not state how much of an adjustment she believed was appropriate. The irregular shape of the subject property does impose constraints on the building footprint and rear yard space. Therefore, a downward adjustment of 10% to account for the configuration of the subject lot is appropriate.

As to sale 1, located at 205 Water Street, Sciannameo took a 10% upward adjustment for location and a 7% upward corner adjustment. Silber agreed that no adjustment was warranted for the time of sale, but believed that Sciannameo's upward location adjustment of io% was not warranted and that there should be an downward adjustment to account for that sale's superior location. However, the location of sale 1

is not a superior location. While it is located in the Dumbo neighborhood, it is on a narrow street with several older industrial buildings, many of which have been converted to residential use. It is only served by one subway, the F train, which connects only with the A, C and G lines in Brooklyn. The locations are roughly equivalent and there is no basis to adjust either upward or downward for location.

When one eliminates Sciannameo's positive adjustment of 10% for location, and takes a negative io% configuration adjustment, the resulting adjusted value of sale 1 is reduced from $124 to $103.

No time adjustment is necessary for sales 2, and 5 which are adjacent properties at 229 and 231 Duffield Street, that appear to be part of the same development. The contract for Sale 2 was entered into February 2009 six months after the Lehman collapse. While the contract for Sale 5 was entered into before the Lehman collapse, its price per square foot was lower than Sale 2.

On the other hand Sciannameo's upward adjustment of 5% for location for sales 2 and 5 is not justified. Sales 2 and 5 are located in downtown Brooklyn which is a superior location to the subject. Instead of adjusting sales 2 and 5 upward by 5% those sales should be given a downward adjustment of 5% to account for their superior locations, and a negative 10% configuration adjustment should be taken as well. Therefore the adjusted value for sale 2 should be reduced from $140 per square foot to $117, and for sale 5, should be reduced from $131 per square foot to $110.

For sale 13, Sciannameo made no time adjustment. The only adjustment he made was a positive 7% corner adjustment. Silber contended that a downward adjustment of 25% for the time of sale for sale 13 was necessary. However, two of the three

comparables that Silber cited in her appraisal had sale dates in August of 2008, a month before the Lehman Brothers collapse, and she made a downward time of sale adjustment of only 15% for those two sales. In light of the time of sale adjustment Silber made for her comparable sales, and the fact that sale 13 was a year and third earlier than those sales, a downward adjustment of 15% for the time of sale should be taken for sale 13.

Also, an downward adjustment of 5% for location should be made because sale 13 is in downtown Brooklyn which is a superior location. Also, as discussed above, a io% negative configuration adjustment should be made to account for the irregular shape of the lot. This reduces the adjusted price per square foot for sale 13 from $202 to $132.

The average adjusted price of the above four comparable sales is $116 per square foot. When this is multiplied by 124,200 square feet of the projected hotel, the result is $14,407,200.

However, extraordinary development costs associated with the property must be deducted from that value. Condemnor presented an opinion from Harold Tepper PE as to the need for excavation of unsuitable soil and a deep foundation system of drilled in piles, and an opinion from Girish Mehta as to the costs of the excavation and piles. While these opinions were submitted as a critique of Sciannameo's land residual analysis, they constitute evidence of extraordinary costs associated with developing the proposed building on the subject property.

To begin with, Tepper testified that the soil in the property could not support a 12 story building with a shallow foundation system and that a deep foundation system was necessary. (T 892) He stated that at least 14 feet of soil underneath the footprint of the proposed building would have to be removed because it was fill. (ex S p 6)

Tepper based his opinion that the soil was unsuitable and piles were necessary, on a Geotechnical report by Mueser Rutledge Consulting Engineers which was done for Forest City Ratner. (ex A of ex S) Tepper relied on four borings contained in the Mueser report which showed that the uppermost 13 feet of the soil was fill. (ex S, p 6) The borings were identified as MR-175, MR 175A, which had 13 feet of fill, and MR 10 and MR loA which had 16 feet of fill. (T 970-1) It is unclear if MR-175 and MR-175A were separate borings or an instance where after meeting resistance the drill was backed up a tried again. (T 927-8) The same uncertainty surrounds borings MR-io and MR-ioA.

Borings MR 175 and MR-175A were along the southern lot line of the property, just behind the retaining wall. (T 933) Borings MR-io and MR-10A were just beyond the property line by the corner of Atlantic and Carlton Avenues. (T 931)

Tepper admitted that the area behind the retaining wall on the south property line was probably excavated when the retaining wall was built and then backfilled after it was completed. (T 935).

Tepper testified that nonetheless, these borings were representative of the soil on the lot because both the MR-175 and MR-10,were consistent and they were located at different areas of the lot,. (T 959-96o, 969- 971)

While Claimant's counsel asserted that the borings Tepper relied on were not representative because MR-175 was just behind the retaining wall and MR-10 was not on the property, Claimant produced no experts or other evidence to contradict Tepper's opinion. The Court finds that Tepper's opinions that the soil would not have supported the proposed building and would have had to be excavated, and that piles would be necessary, to be credible.

Tepper stated in his report that it would be necessary to use a system of drilled in piles rather than driven piles to avoid vibrations which could damage the brick walls of the Atlantic Avenue railroad tunnel and the retaining wall. (ex S, p 7-8) He also stated that it would be necessary to construct concrete walls along the north property line to protect the railroad tunnel during the excavation, (T 892, ex S, p7) and to underpin the adjoining building along the west lot line during the excavation (T 894-5, ex S, p 8) Lastly, Tepper stated that the LIRR would have to approve the construction plans and monitor the construction work (T 905-6 ex S, io-11) Claimant did not introduce any evidence to contest Tepper's opinion on these points.

The costs of excavating and filling of the lot, excavation protection, pile foundations, under pinning of the adjoining building, and LIRR approval and monitoring, are extraordinary costs that must be deducted from the value of the property.

Condemnor's cost estimator Mehta gave a report and testified at trial concerning the costs of constructing the proposed hotel. Mehta assumed a partial basement as proposed by Ogur, and estimated the costs of the excavation and fill to be $546,313, the costs of excavation support to be $202,930, the costs of the pile foundation to be $1,890,000, the cost of the underpinning of the adjoining building to be $53,333 and the LIRR related costs to be $100,0o0. (T 1163-1164, ex W p 22-24) These extraordinary costs total $2,792,576.

When these extraordinary costs are deducted from the adjusted value of the property of $14,4 o7,200 the result is $11,614,624.

There must be further a deduction to account for the fact that although it is highly probable that the property would have been rezoned absent the project, it had not in fact been rezoned as of the date of vesting.

A property is valued as of the date of taking. If the highest and best use is based on the reasonable probability of rezoning then some adjustment must be made to the value of the property as zoned, with an increment to reflect what an investor would pay in light of the probability it would be rezoned or alternatively to the property valued under the potential new zoning, with a discount for the costs of obtaining the rezoning and the risk that the rezoning application may be denied. *Public School Number 223 City of New York,* 71 AD2d 1020, 42o NYS2d 501 (2[11d] Dept 1979); *Speach v. Smith,* 53 A.D.2d 1024, 386 N.Y.S.2d 149 (4th Dept 1976); *Schwartz v State of New York* 72 AD2d 490,426 NYS2d 100 (3rd Dept 1980); *Yochmovitz v State ofNew York,* 25 AD2d 93o, 27o NYS2d 333 (3rd Dept 1966).

An exception would be where the condemning authority or project itself has prevented the property from being rezoned.

In the present case, while it is no doubt true that the announcement of the project in 2003 removed any incentive to rezone the property, Claimant has not shown that absent the project, it would have sought to have the property rezoned, or that any investor had expressed interest in rezoning the property to develop it.

Claimant in his testimony did not state that he had any plans to seek to have the property rezoned, and in fact the long term lease he signed with Amoco in 2001, while not relied on by the appraisers, is evidence that before the announcement of the project the Claimant did not have an intent to have the property rezoned.

A property is valued at its highest and best use whether the owner has put it to such use or even intends to put it to such use, *Matter of Town of Islip,* 49 NY2d 354 (1980). However, whether a property would have been rezoned as of the date of vesting is a different question. The owner's plans or attempts to obtain a rezoning while not dispositive, is relevant evidence as to whether it would have been rezoned as of the date of vesting.

In the present case not only did the Claimant have no plans to rezone the property, no evidence was presented that any other investor had expressed in interest in doing so, or the any application to rezone was blocked by the City because of the plans for the project. Thus, the property should not be valued as if the rezoning had already occurred as of the date of vesting. There must be an increment added to the value of the property under its existing zoning to account for the probability that the property would have been rezoned, or a discount taken from the value of the property as rezoned to account for the fact that it had not yet been rezoned. The discount should reflect the costs, delay and risk associated with the rezoning process.

Sciannameo in his appraisal took a 5% discount to reflect the risk in seeking the rezoning. (ex 9, p 89). In his testimony he stated that in calculating the 5% discount he did not take into consideration any delay in development for the time it would take to obtain the rezoning. (T 433-4) Although he later testified that the 5% included the costs and time it would take to obtain the rezoning, (T 435) he made no estimate as to how long after the vesting date it would take to obtain the rezoning. (T434)

Kwartler estimated a risk factor of 9o% because he believed was not reasonably probable.

Given that there is a very strong probability that the property would have been rezoned C6-2A, Kwartler's 9o% discount is not justified by the evidence. Sciannameo's estimate of a 5% discount for risk is reasonable as a discount, but only for the risk that the rezoning might not be approved.

This 5% discount for risk reduces the adjusted value of the property from $11,614,624 to $11,033,892

There must be an additional discount for the costs of the process and the delay inherent in the process.

Kwartler testified that to seek a rezoning one would need to hire attorneys, zoning experts, and at this location, a traffic consultant. (T 700) The costs for lawyers and other experts fees needed to process the rezoning would range from $300,000 to $500,000. (T 701) In addition to going through the New York City Uniform Land Use Procedure (ULURP) and producing detailed plans for the proposed hotel, the developer would also have to produce an Environmental Impact Statement for this project. Despite the high probability of success, fees and costs of $400,000 can reasonably be expected given the complex nature of the process of obtaining a rezoning of this type in New York City. Deducting $400,000 to account for these costs, reduces the value of the property to $10,633,892.

Finally, an additional discount must be taken to allow for the time it would take in obtaining the rezoning. This is different from the period of construction which is a normal part of development and is already reflected in the comparable sales. As discussed above, because the zoning had not occurred by the date of vesting one must take a discount for the opportunity costs of the time the rezoning would take. Both Bass

and Kwartler estimated that the rezoning process would take between two and a half to three years. (T 98, 698-9) Taking a discount for opportunity costs of 5% over three years and multiplying the adjusted value of $10,633,892 by a present value interest factor of .8638, the final adjusted value for the property becomes 9,185,556, or $9,186,000 rounded.

Wherefore, the court finds that the value of the subject property for condemnation purposes on the date of taking was $9,186,000. Settle judgment and order on notice.

Dated: Brooklyn, New York
May 7, 2014

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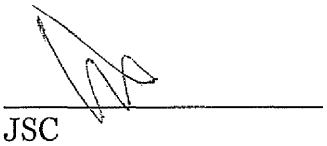

JSC

HON. WAYNE E SAITTA
J.S.C.