SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND: IAS PART 74

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In the Matter of THE CITY OF NEW YORK Relative to Acquiring Title in Fee Simple absolute in certain Real Property, where not heretofore acquired, for **Index No. 4018/07**

NEW CREEK BLUEBELT, PHASE 4

DECISION

Within an area generally bounded by Hylan Boulevard on the West, Slater Boulevard on the North, Olympia Boulevard on the East, and Hunter Avenue on the South, in the Borough of Staten Island, City and State of New York.

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196 SLATER BLVD BUILDING CORP.,
(Fee Claimant for Damage Parcel 8, & 8A)
(Block 3658 Lot 61)

Claimant,

-against-

THE CITY OF NEW YORK

Condemnor.

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At issue in this condemnation proceeding is the just compensation to be awarded to Claimant, 196 SLATER BLVD BUILDING CORP., for the taking of the subject property, located on Staten Island (Block 3658, Lot 61). The Condemnor, THE CITY OF NEW YORK, took title on June 11, 2007 (the vesting date). The court viewed the property on May 21, 2014, and a non jury trial was held on, May 27, 28, and September 18, 2014.

FACTS

The City acquired the subject property for use as part of the CITY's New Creek Bluebelt Phase 4 project. The subject property is a 6,000 square feet vacant lot (Block 3658, lot 61) fronting 6o feet on Filbert Avenue, a mapped but unbuilt street.

The subject property was regulated as wetlands on the vesting date.

The Claimant 196 SLATER BLVD BUILDING CORP purchased the property in 1980 prior to the enactment of the wetland regulations and was the owner of the subject property on the vesting date.

In addition to the subject property, Claimant also owned a contiguous property located on Block 3658, lot 26. Claimant purchased lot 26 in 1980 and owned it, as of the date lot 61 was vested. Lot 26 is 60 feet wide by 100 feet deep and fronts on Seaver Avenue, an opened and paved City street.

Both parties agree that the two contiguous lots should be valued as one lot. Thus this case must be treated as a partial condemnation.

To value property taken in a partial taking, one must determine the value of the whole parcel before the taking, and then subtract the value of the remainder of the parcel retained by the Claimant after the taking. *Chester Industrial Park Associate. LLP v. State of New York,* 65 A.D.3d 513, (2d Dep't 2009). This method incorporates both the direct damages of the part of the parcel taken and the consequential and severance damages to the remainder parcel. Although, in this case both sides agree that there are no severance or consequential damages to lot 26 as the remainder parcel.

Both parties also agree that because of the wetlands regulations, the owners of the property would not be able to obtain a permit to develop either lot, and the highest and best use of the combined lots, as regulated, is vacant. The parties disagree however, as to whether the restrictions on the lots imposed by the State's wetlands regulations constituted a regulatory taking.

Therefore, the Court must conduct both a wetlands analysis and the partial taking analysis.

The Court must first determine whether there was a reasonable probability that the wetland regulations would be found to be a taking. If the wetlands regulations are found not to be a taking then the partial taking analysis is done based on the property's value as regulated. However, if it is determined that there is a reasonable probability that the wetlands regulations would be found to be a regulatory taking, then the property must be valued as regulated, plus an increment to reflect the added amount an investor would pay on the expectation that the regulations would be found to be a taking.

Once it is determined whether to value the property as regulated or as regulated plus an increment, then the second step is to determine the value of the parcel taken (lot 61) by taking the difference of the value of the combined parcel (lots 61 & 26) before the taking, and the value of the remainder (lot 26) after the taking. To do so the Court must calculate the difference between the value of the combined parcel (lots 61 and 26) before the taking, and the value of the remainder (lot 26) after the taking, both as regulated and unregulated.

If its determined that the property must be valued as regulated with an increment, then the Court must then take a third step of calculating an increment to be added to the value of the parcel taken (lot 61) as regulated.

A property restricted by wetlands regulations is valued as restricted unless the Claimant can demonstrate that there is a reasonable probability that the wetlands

regulations would be held to be a regulatory taking. If so, Claimant is entitled to an increment above the regulated value, representing an additional amount a reasonable buyer would pay for the probability of a successful judicial determination that the regulations were confiscatory. *Chase Manhattan Bank v State of New York,* **103 AD2d 211, 479 NYS2d 983 (2nd Dept. 1984);** *Berwick v State of New York,* 107 **AD2d 79, 486 NYS2d 260, (2nd Dept. 1985);** *Matter of City of New York, Staten Island Bluebelt Phase 2 (Fink)* **Index 4012/04 (Su. Ct. Kings 2007).**

It is the Claimant's burden to establish that there is a reasonable probability that the regulations would be found to constitute a taking. *de St. Aubin v Flacke,* **68 NY2d 66 (1986);** *Adrian u Town of Yorktown,* **83 AD3d 746, 92o NYS2d 411, (2nd Dept. 2011).**

To show a reasonable probability that a constitutional challenge to the wetland regulations would succeed, a claimant must demonstrate that the regulations render their property unsuitable for any economic or private use, and destroy all but a bare residue of its value. *Spears v Bearle* **48 NY2d 254 (1979),** *de St. Aubin v Flacke,* **68 NY2d 66 (1986);** *Chase Manhattan Bank v State of New York,* **103 AD2d 211, 479 NYS 983 (2nd Dept. 1984).**

In the present case, it is agreed that the wetland regulations preclude any development of the property or any use other than leaving it vacant. The question remains, however, whether the regulations have destroyed all but a bare residue of the value of the property.

While the fact that the wetland regulations may prohibit all development or economic use of a property may most frequently mean that the regulations have

destroyed all or all but a residue of the property's economic value, such is not always the case.

The value of a property as a speculative investment is properly considered in valuing a property in a condemnation proceeding. ***Florida Rock Industries Inc., v US,*** **18 F3d 1560, (Ct of App, Fed Cir, 1994);** ***Matter of City of New York (Grantwood Retention Basin),*** **33 Misc3d 586, 929 NYS2d 478 (Su. Richmond Co. 2011). There is a history on Staten Island of sales of wetlands properties which cannot be developed, either on the expectation that the restrictions may eventually be waived or modified,** or **simply on the expectation that the buyer may be able sell the property at a profit.**

In this case, both parties have presented comparable sales of Staten Island wetland properties that were similarly restricted so as to prohibit any development. The CITY's appraiser valued the combined parcel (lots 61 and 26), as restricted, at $13.50 a square foot or $162,000 in total. Claimant's appraiser valued the subject lots, as restricted, at $7 a square foot although he applied that value only to the 6,000 square feet of lot 61 and a 2,000 square foot strip of lot 26 for a total of $56,000. Claimant did not calculate the value of both parcel (lots 61 and 26) combined.

However, the fact that the property has value as a speculative investment does not mean that the regulations do not constitute a regulatory taking. The question remains whether the speculative value of the property, as regulated, is more than a bare residue of the property's value as unregulated.

A regulation constitutes a taking per se only in the extraordinary circumstance where no productive or economically beneficial use of land is permitted. ***Lucas v South***

Car. Coastal Council, 505 U.S. *at* 1014, 112 S.Ct. 2886 (1992) ; *Tahoe—Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency,* 535 U.S. 302, 122 S.Ct. 1465, (2002).

However, even if the regulations do not eliminate all of the economic value of a property, they may constitute a taking under the doctrine set forth by the United States Supreme Court in *Penn Central Transp. Co. v. City of New York,* 438 U.S. 104, 98 S.Ct. 2646 (1978).

This analysis is an "essentially ad hoc, factual inquiry," in which the court considers three factors: (1) "[t]he economic impact of the regulation on the claimant," (2) "the extent to which the regulation has interfered with distinct investment-backed expectations," and (3) "the character of the governmental action." *Id* at, [12]4.

As the first factor is the most involved, the Court will consider the second and third factors first.

The second factor in the *Penn Central* analysis, is whether the property owner had investment backed expectations that were blocked by the regulations. In this case, Robert McErlean, Vice President of Claimant, testified that Claimant owned both lots (61 and 26) since 1980, that his father owned lot 61 prior to that, and that Claimant had developed many houses in Staten Island in the past. McErlean also testified that Claimant became owner of the two lots before they were designated wetlands and the Claimant intended to develop garden apartment on the properties. The City presented no evidence to contest McErlean's testimony. McErlean's testimony, that Claimant purchased the property, to develop as garden apartments, before it was regulated, was

sufficient to establish that Claimant had reasonable investment backed expectations to develop the property, which were prevented by the wetland regulations.

The third factor discussed in *Penn Central* is the character of the governmental action. The inquiry into the character of the regulation looks to whether it amounts to a physical invasion, or instead, merely affects property interests. *Lingle v Chevron USA Inc.*, 544 US 528, 125 S.Ct. 2074 (2005).

Also considered as part of the character of the regulation, is the concept of "reciprocity of advantage" that is, whether the regulation is part of a more general regulatory scheme that provides some benefit to the restricted property owner, such as in the case of a comprehensive zoning plan. While the benefits to the property owner do not have to equal the benefits gained by other property owners, where a regulation singles out a particular property with a disproportionate burden, there is no reciprocity of advantage, which is indicative of a taking. *Penn Central* at 438 US at 133-135.

The wetland regulations herein are not part of a comprehensive plan that affects all property owners. While the regulations do provide a general public benefit, their burden falls on a limited group of property owners: the owners of wetlands. Further, the burden falls disproportionately on owners of properties such as Claimants' which are largely wetlands, as opposed to wetland adjacent properties.

Significantly, in terms of evaluating the character of the regulations, the regulations as they affect the property in this case prohibit all development. They do not allow the Claimants any alternative uses that would provide an economic return.

Returning to the first factor in the *Penn Central* analysis, in evaluating the

economic impact of a regulation in a takings case, the court must compare the value that has been taken from the property with the value that remains in the property." *Keystone Bituminous v DeBenedictis, 480 U.S.* 470 at 497, 107 S.Ct. 1232 (1978).

However, the Supreme Court has consistently declined to set forth a mathematical formula or specific percentage of loss of value that, by itself, would constitute a taking under *Penn Central. See Kaiser Aetna v. United States,* 444 U.S. 164, 174 175, 100 S.Ct. 383, 389-390 (1979). "[T]here simply is no bright line dividing compensable from noncompensable exercises of the Government's power when a regulatory imposition causes a partial loss to the property owner. What is necessary is a classic exercise of judicial balancing of competing values." *Florida Rock industries Inc., v US, 18 F3d* 1560 at 1570 (1994).

The Appellate Division Second Department held in *Chase Manhattan Bank u State of New York,* 103 AD2d 211, 479 NYS2d 983 (2nd Dept. 1984), that where wetland regulations deprived the claimant of all financially rewarding uses of the property and also, reduced the property's value by 86%, there is a reasonable probability that the regulations could be successfully challenged as a regulatory taking.

The Second Department recently held that while an 82% diminution in value standing alone is generally within the range found to be insufficient to constitute a regulatory taking, when the regulations also prohibited any development on any part of the wetlands property, there was a reasonable probability of a taking. *Matter of New Cr. Bluebelt, Phase 4 (Paolella), 2014 NY* Slip Op 08029 (2nd Dept. 2014).

In *Friedenburg v State of New York,* 3 AD3d 86, 767 NYS2d 451 (2nd Dept. 2003), the Second Department held that while a diminution of 95% of the value of a property would not qualify as a per se regulatory taking, a 92.5% -95% loss of value, together with an inability to use the property for any economic or even recreational purposes, constituted a regulatory taking under a *Penn Central* analysis.

In *Adrian v Town of Yorktown,* 83 AD3d 746, 92o NYS2d 411, (2nd Dept. 2011), the Second Department found no regulatory taking where regulations reduced the value of a 15 acre parcel by 64%. In that case the claimant sold the parcel for $3,600,000 and contended that it was worth $10,000,000 as unregulated.

In *Putnam County Nat. Bank v City of New York,* 37 AD3d 575, 829 NYS2d 661 (2nd Dept. 2007), the Second Department found that watershed regulations which reduced the value of a parcel by 8o% did not constitute a regulatory taking. In that case the plaintiff was denied a permit to develop a 36 lot subdivision because a sewer permit for a development that size could not be built under the watershed regulations. Subsequently, the plaintiff was given approval for an alternate plan to develop a 17 lot subdivision. After obtaining approval, the plaintiff sold the property for $1.4 million dollars which it claimed was 20% of what the property would have been worth had they been allowed to develop the 36 lot subdivision. The Court held that plaintiff realized a "reasonable return" upon its sale of the property and the economic impact of the regulations was insufficient to constitute a regulatory taking. *Id* at 577.

In the present case, the Claimant calculated the value of the 6,000 square feet of lot 61 together with 2000 square feet of lot 26, rather than the entire 12,000 square feet

of the two lots combined. Claimant valued this partial parcel, as unregulated, at $70 a square foot, and at $7 a square foot as regulated. However, the Court cannot use this valuation because it does not represent the entire combined parcel (lots 61 and 26).

The Court cannot simply apply the $70, value per square foot to the entire parcel, because the two lots combined (61 and 26) have a larger frontage on Seaver Avenue, a finished street, than the twenty foot frontage of Claimant's proposal. The combined parcel (lots 61 and 26) would have a higher value per square foot than the partial parcel used in Claimant's valuation.

Similarly, it is not be appropriate to apply the$7 per square foot value to either lot 61 alone or lot 26 alone as Claimant has done. Lot 26 clearly has a higher value per square foot than lot 61 because lot 26 fronts an open street.

The Court must then look to the City's valuation. In valuing the combined lots as unregulated, the City's appraiser, Robert Sterling MAI, accepted the proposed development of Claimant's engineer Todd Ettlinger as the highest and best use of the lots. Sterling also accepted Ettlinger's estimate of extraordinary costs of $53,810.00. Ettlinger proposed two semi-detached single family homes on lot 26 and one single family home on lot 61, with a 20 foot wide driveway through lot 26 to access Seaver Avenue.

Sterling valued the regulated value of the combined parcel (lots 61 and 26) at $13.50 per square foot based on four comparable sales. However, Sterling also made a 10% upward adjustment to all four comparable sales to adjust for the fact that New Creek runs through an adjacent and unbuilt street at the rear of lot 61. He stated that

access to New Creek and the views it afforded was an attractive amenity. The attractiveness of New Creek was not immediately apparent during the Court's viewing of the subject property. More significantly, Sterling made only a 5% upward adjustment for New Creek's attractiveness to the comparable sales he used to value the combined parcel as unregulated. The same upward adjustment for the Creek should be used for both set of comparable sales. If one applies a 5% upward adjustment for New Creek to the regulated comparable sales, then the regulated value would $12.80 per square foot for the 1,200 square feet of the combined parcel (lots 61 and 26), which would total $153,600 or $154,000 rounded.

Sterling valued the combined parcel (lots 61 and 26), as unregulated, at $137 per buildable square foot based on four comparable sales located in the same Midland Beach neighborhood as the subject property. The use of buildable square feet to calculate the value of the combined parcel (lots 61 and 26) is a more appropriate measure than price per square foot of land, because Ettlinger's proposed development does not utilize the full FAR of the combined parcel (lots 61 and 26). Ettlinger's proposed development contains 5,92o square feet of floor area, while the combined lots can be developed up to'a floor area of 7,200 square feet.

Applying the value of $137 a square foot to the 5,920 developable square feet of Ettlinger's proposal and subtracting Ettlinger's $53,810 of extraordinary costs, results in an unregulated value of $757,230.

As part of his valuation of the lots as unregulated, Sterling applied a 5% downward adjustment to account for the possibility that pilings might be necessary.

However, Ettlinger's estimate of extraordinary costs, which Sterling, accepted for the purposes of his evaluation, did not include pilings. Further, there is no evidence in the record that pilings would be necessary. When one removes the 5% adjustment for the possibility of pilings, Sterling's estimate of the unregulated value becomes $144 per buildable square foot, or $852,480 for the 5,92o buildable square feet of Ettlinger's proposed development. After deducting the extraordinary costs of $53,810, the resulting value of the combined parcel (lots 61 and 26), as unregulated is $798,670, or $799,000 rounded.

Comparing the regulated value of $154,000 to the unregulated value of $799,000 indicates an 80.8% diminution in value.

This situation is almost identical to that in *Matter of New Creek Bluebelt Phase 4 (Paolella),* 2014 NY Slip Op 08029 (2nd Dept. 2014) where the wetland regulations prevented any development on the property, interfered with investment backed expectations to develop the property, and resulted in an 82% diminution of value. The Second Department affirmed the finding that those facts evidenced a reasonable probability that a challenge to the wetland regulations as applied to that property, would be successful. *Id*

While an 80.8% diminution of value by itself may not establish a regulatory taking, the fact that the wetland regulations also prohibited any productive or recreational use of the property, that they prevented the Claimant's reasonable expectations to develop the property, and that they posed a special burden on wetlands owners without a commensurate reciprocal advantage, is sufficient to establish that the

was a probability that the regulations would be found to constitute a taking. Therefore the property must be valued at its regulated value plus an increment to reflect the probability the regulations could be successfully challenged as a regulatory taking.

The Court must next calculate the difference of the value of the combined parcel (lots 61 and 26) as unregulated, from the value of the remainder (lot 26), as unregulated, which represents the value of the portion of the parcel taken (lot 61), as unregulated. The Court must then calculate the difference of the value of the combined parcel (lots 61 and 26), as regulated, from the value of the remainder (lot 26), as regulated, which represents the value of the portion of the parcel taken (lot 61), as regulated. The Court must then use these two differences to calculate the increment to be added to the value of the portion of the parcel taken (lot 61), as regulated.

Both sides agree that value of the remainder (lot 26) was not reduced by the taking, and thus there are no consequential or severance damages. Claimant argues that because the value of the remainder (lot 26), was unchanged by the taking, lot 61 can be valued without reference to the value of the remainder (lot 26), and that comparing the value of the combined parcel (lots 61 and 26) before the taking, need not be compared to the value of the remainder (lot 26) after the taking. This argument is mistaken. An analysis comparing the combined parcel (lots 61 and 26), before taking, to the remainder (lot 26) after taking, is not done only to measure any severance damages to the remainder (lot 26) as a result of the taking, but also in order to measure the value of the portion of the property that was taken. *McDonald v State,* 42 NY2d 900 (1977); *Lerner Pavlick Realty v State,* 98 AD3d 567 (2nd Dept. 2012).

In this case, the value of the lot taken, (61) is increased by its being valued together with lot 26. Specifically, by being valued with lot 26, lot 61 can be developed without the considerable extraordinary costs of developing Filbert Avenue. It would be incorrect to apply the same price per square foot applicable to the combined parcel, that have access to Seaver Avenue, to lot 61 alone, which would not have access to Seaver Avenue.

It is true that if the value of lot 61 by itself was higher than its value as a portion of the combined parcel (lots 61 and 26), then Claimant would be entitled to that higher value. However, in this case the value of lot 61 standing alone would be significantly less than its value as part of the combined parcel (lots 61 and 26) because of the extraordinary costs of developing Filbert Avenue. The Claimant produced no valuation of lot 61 standing alone and in fact, Ettlinger stated on page 4 of his development analysis, "Filbert Avenue cannot be improved due to the location of New Creek. The cost to construct a culvert to contain New Creek and access the property from Meadow Place is prohibitive." These prohibitive costs were the reason Ettlinger only proposed a development for lot 61 together with lot 26.

Further, Claimant never presented a valuation of the remainder (lot 26), as unregulated. Lally also never calculated a value for lot 61, but only for lot 61 plus 2,000 square feet of lot 26. This is improper because no part of lot 26 was taken. The proper method is to calculate difference between the value of the combined parcel (lots 61 and 26) before the taking, and the value of the remainder (lot 26) after the taking.

Similarly, Sterling's valuation of lot 61 as regulated, at $48,000 must be rejected because it was based on valuing lot 61 standing alone rather than on the difference between value of the combined parcel (lots 61 and 26) before taking, and the remainder (lot 26) after taking. Sterling testified that the regulated value of the combined parcel (lots 61 and 26) was $13.50, as opposed to his value $8 a square foot for lot 61 alone, because access to lot 61 through lot 26 from an open and improved street, was important and made lot 61 more valuable even if it could not be developed. Even as regulated, lot 61 must be valued as part of the combined parcel (lots 61 and 26), rather than its value standing alone.

Calculating the differences between the before taking and after taking values is further complicated by the fact that Ettlinger's proposed development includes a driveway on the remainder (lot 26) that would not be necessary in order to develop the remainder (lot 26), after the taking.

The remainder was the entire 6,0o0 square feet of lot 26, no part of which was taken by the City. Sterling concluded that two single family homes of 1,80o square feet each could be built on the remainder. Sterling relied on Ettlinger's proposal, which was a proposal for the combined parcel (lots 61 and 26). Neither, party presented a proposal to develop lot 26 alone as the remainder parcel. Nonetheless, Sterling derived a highest and best use for lot 26 based on the facts contained in Ettlinger's proposal.

Sterling proposed two semi-detached single family homes as Ettlinger did, but posited they could each be 1,800 square feet as opposed to 1,200 as in Ettlinger's proposal. Two 1,80o square feet houses are possible because as a remainder lot, it is no

longer necessary to put a 20 feet wide a driveway on lot 26, and therefore its full 6,0oo square feet can be used for two semi-detached houses. The remainder (lot 26) is zoned as R3-1, which permits a floor area ratio (FAR) of .6. As the lot is 6,000 square feet, it can be developed up to a floor area of 3,600 square feet. Two houses at 1,80o square feet each, total 3,600 square feet of floor area and are within the allowable FAR. Also, each 1,8o0 square foot house could be 5o feet long and 18 feet wide and still have room for the 8 foot side yards and 35 foot rear yard required in a R3-1 district. Thus as unregulated, the remainder (lot 26) has a highest and best use of being developed with two 1,800 square foot semi-detached single family homes.

Sterling valued the remainder (lot 26) at $145 per buildable square foot based on four comparable sales. The value of a buildable square foot of lot 26 would be higher than that of the combined parcel (lots 61 and 26) because it would not contain a house of lot 61 that would have to access Seaver Avenue through lot 26.

Sterling did not deduct any extraordinary costs from the remainder (lot 26) because those costs were related to the construction on the rear lot (lot 61) and because the remainder (lot 26) fronts on an existing street.

The comparable sales and adjustments he made to those comparable sales were reasonable except for the downward adjustment of 5% for the possibility it might be necessary to install pilings in order to build on the lot. As discussed above, there was no evidence of a need for pilings. Just as the Court removed the adjustment for pilings, from the valuation of the combined parcel (lots 61 and 26) before taking, it should be removed from the valuation of the remainder (lot 26) after taking. When one removes

the adjustment for pilings, the value of the remainder (lot 26) becomes $152 per buildable square foot. Applying $152 to 3,600 buildable square feet results in a value of the remainder (lot 26), as unregulated, of $547,200.

As discussed above, the value of the combined parcel (lots 61 and 26), as unregulated, minus extraordinary costs and before the taking, was $798,670. The value of the remainder (lot 26) after the taking, as unregulated, was $547,200. The difference is $251,470 or $251,000 rounded which represents the value of the portion of the parcel taken (lot 61), as unregulated.

As discussed above, the value of the combined parcel (lots 61 and 26) as regulated would be $12.80 a square foot. While the regulated value of the remainder (lot 26) should be somewhat higher than this because of its smaller unit size, there is no evidence in the record to establish how much higher it should be. Therefore the Court will value remainder (lot 26), as regulated at the same $12.80 a square foot as the combined parcel (lots 61 and 26). Applying this $12.80 a square foot to 6,00o square feet of the remainder (lot 26) results in a regulated value of $76,800 or $77,000 rounded.

Taking the difference between the value of the combined parcel (lots 61 and 26) as regulated of $154,000, and the value of the remainder as regulated of $77,000, results in a regulated value of the portion taken (lot 61) of $77,000.

The last analysis the Court must do is to determine the increment to be applied to the value of the portion taken (lot 61) as regulated. The parties disagree as to what increment should be added to the regulated value of the property taken.

The increment must be determined by the realities of the marketplace, which are that a knowledgeable buyer would not pay the full unregulated value of the property, but would adjust his purchase price to offset the cost in time and money of applying for a permit and challenging its denial in court as confiscatory. A investor would pay only the value of the property as so restricted, plus some increment representing its enhanced value at such future time if and when he is successful in nullifying the wetlands restrictions in court. ***Berwick v State of New York,*** **107 AD2d 79 at 84 (2nd Dept. 1985).**

Sterling, the City's appraiser, testified at trial that he knew of no sales of wetlands, on Staten Island, where a buyer purchased designated wetlands and subsequently challenged the regulations as a regulatory taking.

Sterling stated that due to the lack of sale of wetlands he could not develop the increment that an investor would pay for wetlands over its regulated value from actual sales of wetland properties. He testified that instead, he looked at sales of properties that were undersized, that is, lots that were too small or narrow to be able to build an economically viable house without a variance from the New York City Board of Standards and Appeals to allow development with reduced side or front yards. He compared such lots to similar lots that did not need a variance to develop a viable residence. From a sample of such sales of undersized properties, he calculated a ratio of the price an investor would pay for undersized lots, for which there was a reasonable probability that a variance would be granted, compared to the price of comparable lots that were developable without a variance.

He stated that there are investors in New York City that purchase lots, at a discount, that do not meet the minimum dimensions required of the zoning resolution, and then apply for a variance to develop the property from the New York City Board of Standards and Appeals (BSA).

Sterling believed that the ratio is a valid measure of the increment an investor would pay for wetland property because it reflects the difference between what a buyer would pay for a property on Staten Island which can be developed as of right and a property which can only be developed after an administrative or judicial process.

The undersized lots used as comparable sales by Sterling were developed as single family homes, which is the use he believes is the highest and best use of the subject property as unregulated.

Sterling stated that based on these comparable sales, he found that the amount buyers paid per developable square foot for undersized lots was 37% of the amount that they paid for standard sized lots. He also adjusted this percentage downward to 32% to account for the additional time he believed it would take to challenge wetlands regulations in court as compared to obtaining a variance from the BSA.

One problem with Sterling's analysis is that it calculates a discount off the unregulated value rather than an increment added to the regulated value. Although he goes through the exercise of subtracting the regulated value of the property from 32% of the unregulated value and then adding the regulated value back in, this is not in conformity with the process articulated in *Berwick I, Berwick II and Fink supra.*

That process calls for the regulated value to be subtracted from unregulated value, then an increment to be calculated from the difference between the unregulated and regulated values, and then that increment added to the regulated value. This comports with the requirement that the property be valued as restricted with an increment added to reflect the possibility of a successful challenge to the regulations, rather than by taking a discount off the unregulated value to reflect the time, costs, and risks of such a challenge. ***Berwick v State of New York (Berwick II),*** **159 AD2d 544, 552 NYS2d 409 (2nd Dept. 1990);** ***Matter of City of New York, Staten Island Bluebelt Phase 2 (Fink)*** **Index 4012/2004 (Su. Ct. Kings 2007).**

The Court in ***Fink*** **explicitly rejected a valuation, done by adjusting the unregulated value of the property downward, rather than adding an increment to the regulated value.** ***Matter of City of New York, Staten Island Bluebelt Ph. 2 (Fink)*** **at p. 14.**

Here, Sterling calculates 32% of the unregulated value, and then subtracts the regulated value from 32% of the unregulated value. He labels the difference between 32% of the unregulated value and the regulated value as the increment. He then adds the regulated value back to that difference.

The problem is that this method impermissibly bases the value of a wetlands property on the unregulated value of the property rather than the regulated value.

Sterling's method results in the increment always being 32% of the unregulated value no matter what the size of the difference between the unregulated and regulated values are. Although, Sterling styles the 32% of the unregulated value as an increment to be added to the regulated value, it is in fact merely a discount off the unregulated value.

The problem with this approach is illustrated by its application in this case. As discussed above, the value of the portion of the parcel taken (lot 61) from the combined parcel (lots 61 and 26), as unregulated, is $251,000 and as regulated is $77,000. Using Sterling's methodology the increment would be calculated by taking 32% of the $251,000 unregulated value, which would be $80,320 and subtracting the regulated value of $77,000, resulting in an increment of $3,320. This is an increment of only 4.3% of the regulated value or 55 cents per square foot.

Therefore the Court rejects that part of Sterling's appraisal and testimony which calculates an increment at 32% of the property's unregulated value.

Claimant's appraiser, Brent Lally, calculated the increment based on values for lot 61 and 2,000 square feet of lot 26. Lally first deducted the value of that portion of the property as regulated from the value as unregulated. He then subtracted legal fees of $15,000, expert fees of $8,000, and one year of real estate taxes of $612 from that difference. Lally then adds this increment to his regulated value of the part of the parcel consisting of lot 61 and $2,000 square feet of lot 26, concluding a value of $400,000.

Although Lally's basic approach to calculating an increment is appropriate, the increment must be rejected because he based it on a value for lot 61 plus $2,000 square feet of lot 26, rather than the portion of the parcel taken (lot 61).

Sterling, in addition to his proposed increment based on sales of undersized lots discussed above, proposed an alternative using methodology similar to that used by Lally. Sterling did not adopt Lally's methodology because he does not believe that investors on Staten Island do not pay an increment over a wetlands' value as regulated

on the expectation that they could challenge a denial of a permit as a regulatory taking. However, Sterling offered an estimate of an increment that would be derived from a proper use of Lally's methodology, in the event the Court decided to adopt that methodology.

Sterling first deducts opportunity costs that would be incurred during the pendency of the legal challenge. He calculates that opportunity cost at 5% a year, which he states is the return on a safe investment that a buyer could have otherwise gotten on the money that would have been used to purchase the property. He calculates a 5% return on a regulated value of $48,000, over 5.5 years which totals $13,200. He then deducts real estate taxes for 5.5 years with a 3% annual growth rate. He calculates these real estate taxes at $2,760. He then further deducts $50,000 for legal fees and $io,000 for expert fees. These costs of deregulation total $75,960.

Sterling then deducts the $75,960 from the difference between the unregulated value and regulated value of the portion of the parcel taken (lot 61) to arrive at an increment. He then discounts that increment to present value to account for the fact that a buyer would not receive the benefit of the finding that the regulations constituted a taking for 5.5 years. He calculates this discount to present value by first adding 5% a year to account for a return on a safe investment, plus 3% a year for inflation. He then includes as part of the discount to present value, a 9% a year discount that he states a developer would demand for having to go through a court challenge to obtain permits. His total discount to present value is 17% a year over 5.5 years, which according to the standard present value tables, requires multiplying the increment by .4229.

To apply this method to the unregulated and regulated values of the portion of the parcel taken (lot 61), which the Court has determined, one would first subtract the regulated value of $77,000 from the unregulated value of $251,000 resulting in a difference of $174,000. One would then subtract opportunity costs of 5% of the regulated value of $77,000 over 5.5 years which would be $21,175, as well as $2,760 in real estate taxes, $50,000 in legal fees and $10,000 in expert fees, for total costs of deregulation of $83,935, which would leave $70,065. One would then find the present value by multiplying the $70,065 by .42498 which results in an increment of $29,770 or $30,000 rounded. When this increment is added to the value of the property taken (lot 61), as regulated, of $77,000, the result is $107,000.

There are, however, problems with the Sterling's calculation of the increment. First, his estimate that it would take 5.5 years to obtain a judicial determination was based on a single case, *Friedenburg v State of New York*, 3 AD3d 86, 767 NYS2d 451 (2nd Dept. 2003). Aside from the inadequacy of a sample size of one case, it appears that *Friedenburg*, was of atypical length.

Friedenburg **involved a situation where an amended Article 78 petition was filed to challenge a denial of a permit after the original proceeding sought to have the denial of a permit under the regulations be deemed a taking. The Supreme Court dealt with the amended petition and dismissed the original claim of a regulatory taking. The Appellate Division reversed and remanded for a decision of the regulatory taking claim. The Supreme Court on remand found it was a taking at which point DEC appealed again. The lower court finding of a taking was affirmed. A proceeding with a remand and two**

appeals is not a typical case. It is an inappropriate comparison to this case, where it is conceded that because the property is comprised entirely of wetlands, no permit would be granted for any development.

It would be unnecessary for a buyer of the subject property to first go through the process of applying for a permit and administratively challenging the denial.

The only issues to be litigated would be, first, how much residual value was left in the property as a speculative investment; and second, whether that residual value was so low as to constitute a taking when considered together with the character of the regulations.

This is a far simpler analysis than in *Friedenburg*, which involved an inquiry into whether any of the allowable uses under the regulations was feasible and whether the denial of a permit was arbitrary.

Given the limited issues in this case, 5.5 years would be an excessively long time frame for a buyer to obtain a determination in a declaratory judgment action. In light of the simpler issues that would b involved in a challenge to the regulations as applied to the subject property, a three year time frame for a judicial determination is more reasonable.

Also, Sterling counts opportunity costs of 5% a year twice. First, explicitly as part of the cost of obtaining deregulation and again as part of his present value calculation. His present value calculation contained four elements: 5% representing the rate of return on a safe investment, 3% for inflation, 4% to account for the lack of permits and a 5% adjustment for additional risk in this case, that the regulations would not be found to

be a taking. The inclusion of 5% a year for the return on a safe investment is essentially the same 5% a year opportunity cost based on the rate of return of a safe investment that Sterling included as part of the cost of deregulation. The 5% yearly opportunity cost is appropriate but should only be counted once.

The inflation rate of 3% per year used by Sterling is reasonable. The combined 4% and 5% to account for lack of permits and risk of an adverse court determination is similar to Lally's 10% reduction for risk.

The proper increment in this case should be calculated by first subtracting the $77,000 regulated value of the portion of the parcel taken (lot 61), from the $251,000 unregulated value of the portion taken (lot 61), which leaves $174,000. From this attorney fees of $25,000 and expert fees of $10,000 should be subtracted leaving $139,000. Then opportunity costs must be deducted for the loss of the use of the funds used to purchase the property at its regulated value of $77,000. At 5% a year for three years this totals, $11,550 which leaves $127,450. Then real estate taxes for 3 years, with an increase of 3% a year, which totals $1,440, should be subtracted leaving $126,010. This should then discounted to present value using a rate of discount of 12%, which includes Sterling's 3% for inflation costs, plus 9% for risk. Using the standard formula for computing present value of a fixed sum, over 3 years, with a discount rate of 12%, the $126,010 is multiplied by .71178, which results in an increment of $89,691 or $90,000 rounded.

Adding this increment of $90,000 to the regulated value of the portion of the parcel taken (lot 61) of $77,000, results in a final value of $167,000.

Wherefore, the court finds that the value for condemnation purposes of the portion of the parcel taken (lot 6i), on the date of taking, was $167,000. Settle judgment and order on notice.

Dated: Brooklyn New York
February 9, 2015

ENTER:

JSC
HON. WAYNE R SAITTA