

2013 NY Slip Op 33963(U)

LEHN COMPANY, Claimant,
v.
THE STATE OF NEW YORK, Defendant.

Docket No. 118095.

Court of Claims.

May 8, 2013.

Filed June 19, 2013.

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

Hon. Eric T. Schneiderman, Attorney General, By: Michael A. Sims, Assistant Attorney General, For Defendant.

DECISION

GINA M. LOPEZ-SUMMA, Judge.

This is a timely filed claim for the partial appropriation (taking) of property, as well as a temporary easement on the property, owned by claimant, Lehn Co., brought against defendant, the State of New York, pursuant to the Eminent Domain Procedure Law and §30 of the Highway Law.

The subject property, prior to the taking, was an L-shaped parcel situated on the west side of Route 112 in the Township of Brookhaven, County of Suffolk, with frontage on New York State Route 112 of approximately 149 feet and an additional frontage of approximately 292 feet along the south side of County Road 83 without access. At all times relevant to this claim the subject property was a vacant unimproved lot.

During the trial of this matter the parties agreed that the title vesting date was August 29, 2008 and that title to the subject property on the vesting date was in the name of claimant (see Ct Exh 1).

The Notice of Claim was filed with the Court on March 4, 2010¹n. The appropriation maps and descriptions contained therein are adopted by the Court and incorporated herein by reference. The aforesaid maps and descriptions were filed in the Office of the County Clerk of Suffolk County. Pursuant to the requirements of Court of Claims Act § 12(4) and EDPL § 510(A), the Court has made the required viewing of the property which is the subject of this claim. The claim has not been assigned or submitted to any other Court or tribunal for audit or determination.

The subject property is identified on the 2003 Suffolk County Tax Map as District 200, Section 396, Block 3, Lot 12.003. The taking and the temporary easement were associated with a construction project to expand New York State Route 112.

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

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

Elinor Brunswick, a real estate appraiser, prepared claimant's appraisal in this matter and testified on claimant's behalf at trial. The subject property lies within the J Business 2 zoning district of the Town of Brookhaven which she explained

was a commercial zoning district. She stated that the main use for a J Business 2 zoning district is for a neighborhood business set on a minimum plot size of 15,000 square feet. Permitted uses include banks, commercial centers, stores, pharmacy, personal service shops and offices.

She described the subject property as containing 2.33 acres or 101,652 square feet of land area prior to the taking. There is no access permitted from the subject property to County Road 83. Along the State Route 112 frontage there are concrete curbs and a portion of the frontage that has no curb.

The subject property has a perpetual easement and a perpetual cross-access agreement. The easement dated March 15, 2002 is made between Amerada Hess Corporation, the tenant at the adjacent parcel to the east and north of the subject and Richard Nelin, the owner. Nelin grants Hess the perpetual easement over and across the easement area to construct, connect, replace and maintain a sanitary force-main and appurtenances so that Hess may connect to the sanitary line. Nelin reserves the right to use the easement area (excluding the placement of permanent structures on the easement, but including the right to pave or otherwise make use of the surface of the easement). Should Nelin develop the subject property, Hess is responsible to relocate the improvements at its sole cost should the development of the property so require such relocation. Hess's obligation will cease upon termination of its lease with the property owner.

The cross-access agreement, dated April 22, 2002 is between Richard Nelin and Lehn Company. The cross-access agreement is for the purpose of permitting ingress and egress for traffic flow to and from each parcel of land. The access agreement is perpetual and runs with the land.

Ms. Brunswick considered what was physically possible, legally permissible, financially feasible and maximally productive for the property in determining its highest and best use. She determined that the highest and best use of the subject site, as if vacant, is to be developed with a commercial use, such as a retail structure, in conformance with applicable regulations and used under the existing zoning classification. She found that same highest and best use for the property after the taking.

In analyzing the site value of the subject property, Ms. Brunswick utilized the sales comparison or market data approach which reflects an estimate of value as indicated by the actual sales market. She selected five different sales of vacant commercial land within the Town of Brookhaven in valuing the subject property. After making certain adjustments to the sales which she determined were appropriate she found a before taking per square foot value of the subject property of \$21.00. She then multiplied \$21.00 by 101,652 (the total before taking square footage of the property) and found a before taking value of the property of \$2,135,000¹⁴. Ms. Brunswick used the same sales in her after taking analysis of the subject property. After applying certain adjustments to the properties she found an after taking square foot value of \$19.00 for the subject property. She then multiplied \$19.00 by 99,533 (the total square footage of the property after taking) and found an after taking property value of \$1,890,000. She also found a direct taking value of \$44,499 by multiplying 2,119 (the taking area) by \$21 a square foot. She also found severance damages of \$200,501. She calculated severance damages by first subtracting \$1,890,000 from \$2,135,000 and getting \$245,000. She then subtracted direct damages of \$44,499 from \$245,000 and was left with severance damages of \$200,501.

William L. Jaeger, an engineer and land surveyor submitted a report as an addendum to Ms. Brunswick's report. In his report Mr. Jaeger stated that, based on a pre-taking title survey of the property by Lee Lutz and a computational analysis based on the taking maps, he found a pre-taking lot area of 101,652 square feet and a post-taking lot area of approximately 99,533 square feet. Consequently he found a taking area 2,119 square feet or 2.1 % of the original property area. He set forth the zoning and suite development requirements for J-2 Business as follows:

Minimum lot area	15,000 square feet
Minimum lot width	100 feet
Front yard setback	25 feet

Side yard setback	10 feet
Rear yard setback	25 feet
Maximum floor area ratio	35%
Landscaped area	20% min. (with 50% in front yard)
Parking	1 stall per 150 square feet of building area
Loading	2 stalls for a building over 8,000 square feet
Parking lot landscaping	400 square feet for each 25 stalls

Additionally, Mr. Jaeger found an applicable 40 foot setback for 50 feet for buildings or parking from the terminus of Wyandanch Trail. Mr. Jaeger attached conceptual plans for retail development of the subject property to his report. The pre-taking plan provides for a 16,350 square foot retail building with 109 parking stalls and two loading stalls. The post-taking site plan yields a 15,150 square foot retail building with the same amount of parking and loading stalls. This resulted in a 1,200 square foot or 7.3% reduction in potential building area. Mr. Jaeger's conclusion was that the acquisition of 2.1% of the original property resulted in a 7.3% reduction in the potential maximum building area.

Mr. Jaeger testified that he included a 50 foot buffer on the westerly or rear portion of the building since it was his experience that the Town of Brookhaven would require such a buffer even though the actual code requirement was 25 feet. Mr. Jaeger applied a 25 foot buffer on the side or southerly yard as well as a 25 foot setback against both County Road 83 and Route 112.

Mr. Jaeger admitted at trial that he made two errors in developing his site plan. First he failed to incorporate the required handicap parking stalls and second the loading stalls he used were 2 feet shorter than required. He stated that 5 handicap stalls would result in a loss of 3 parking stalls. The lengthening of the loading stalls would result in the loss of one more parking stall so there would be a total loss of 4 parking stalls. He explained that the loss of 4 parking stalls would reduce the size of the pre-taking building to 15,750 square feet and the post-taking building to 14,550 square feet. The total loss of building size would still be 1,200 square feet or in this case 7.62% loss of potential development.

Mr. Jaeger also testified that the taking map provides an approximate area of 2,146 square feet for the area taken by defendant. He explained that this was an approximate area and differs from his estimate of 2,119 square feet by 1.3%.

In valuing the temporary easement Ms. Brunswick found that during the indeterminate period of the temporary easement development was impossible or at least highly improbable. As a result she took the after taking value of the property of \$1,890,000 at 12% return and found yearly damages of \$226,800 or damages of \$18,900 per month. She testified that the temporary easement was tantamount to the taking of the entirety of the remainder of the property, not just the strip of land described as the metes and bounds in the temporary easement. She believed that the easement rendered the property almost impossible to be sold since it could not be accessed and used for its highest and best use.

Ms. Brunswick stated that to her knowledge claimant had not submitted any site development plans to The Town of Brookhaven for the subject site between 1985 and the vesting date. She also did not believe that there were any inquiries regarding leasing the property during the pendency of the temporary easement. She stated that based on the cross-access agreement a vehicle would be allowed to enter the subject property from the Hess property if it was physically able to do so.

Andrew Albro, a real estate appraiser, testified on behalf of defendant and prepared an appraisal and rebuttal report in this matter. Mr. Albro found that the subject property before taking was 101,263 square feet or 2.32 acres and was a

commercially zoned, J Business 2, parcel. The site has 149 feet of frontage along the west side of State Route 112 and 292 feet of frontage along the south side of County Road 83. The site is a vacant wooded parcel with signage along its Route 112 frontage. Chain link fencing is situated along the subject's County Road 83 frontage. He stated that the partial fee taking involved the acquisition of a 2,146 square foot (2% of the total site area) rectangular parcel along the property's Route 112 frontage. The taking was 14 feet in depth and extended the entire length of the Route 112 frontage. After the taking the subject property was reduced to 99,117 square feet. Defendant also exercised a temporary easement for a work area over that section of the remainder parcel fronting Route 112. The temporary easement was designated on Map 402 as parcel 412. Parcel 412 is rectangular with 6 feet of depth along the northern and southern property lines and extends the entire 149 feet of the subject's Route 112 frontage. Mr. Albro found that the temporary easement contains approximately 932 square feet of land.

In determining the highest and best use of the subject property Mr. Albro considered what was physically possible, legally permissible, economically feasible and maximally productive for the property. He determined that the highest and best use for the site both before and after the taking is as a retail service based development. He explained that after the taking there would be a proportionate reduction in ultimate development potential of the subject property. Mr. Albro testified that in his opinion the loss of 600 square feet of building potential would not result in any severance damages to the property. He did not believe the market would react to such a loss and that the property would still be developed to its highest and best use. Mr. Albro envisioned a single use building such as a bank or pharmacy on the site as the highest and best use which would not be affected by the 600 square foot loss of building development.

Mr. Albro also used the sales comparison approach in order to value the site. Mr. Albro chose four comparable land sales in his analysis. After making adjustments to the comparable sales data Mr. Albro found a before taking square foot value of the site as vacant of \$22. He then multiplied \$22 by 101,263 square feet (the before taking size of the property) and found a before taking market value of the property of \$2,230,000. After making adjustments to the comparable sales data Mr. Albro found an after taking square foot value of \$22 for the subject property. He then multiplied \$22 by 99,117 (the after taking size of the property) and found an after taking market value of \$2,180,000 for the subject property. After subtracting the after taking value of \$2,180,000 from the before taking value of \$2,230,000, Mr. Albro calculated direct damages of \$50,000 to the subject property.

Mr. Albro explained at trial that there were a few typographical errors in his report which affected the gross adjustment figures in both the before and after adjustment grid of his comparable sales. He stated that the gross adjustments did not capture the adjustment figures for sewer accessibility but that the errors were not carried through the report or the evaluation in any way.

Mr. Albro also conceded at trial that Bruce Savik's computations were more accurate in regard to the size of the subject property. Thus, Mr. Albro would increase his size of the subject property in both the before and after scenario by 400 feet. Using Mr. Savik's figures Mr. Albro found a before taking market value of the subject property of \$2,240,000 by multiplying \$22 by 101,663 (the before taking size of the property). He then calculated the after taking market value of the subject property as \$2,190,000 by multiplying \$22 by 99,517 (the after taking size of the property). Direct damages would remain at \$50,000 in this scenario.

Mr. Albro found that the temporary easement was required by defendant to allow for the construction of the widening of Route 112. He concluded that the temporary easement will not materially affect the utility of the property. He determined that there were no indirect or severance damages resulting from the temporary easement. He stated that the temporary loss of the use of the temporary easement area is best reflected in the value of the land and an appropriate rate of return to determine a fair rental for that land.

Mr. Albro explained that the fair rental value of the land temporarily encumbered by the work easement is estimated by using the formula $V \times R = I$ where V is the estimated value of the property encumbered, R is the estimated fair rate of return (overall capitalization rate) and I is the indicated fair market rent (net income).

Mr. Albro multiplied 932 (the temporary easement area) by \$22 (the as vacant land value) and found \$20,504 as the estimated value of the property encumbered. He determined that 12% was the appropriate rate of return for the subject

property. He then multiplied \$20,504 by 12% and found a fair market rent per annum of \$2,460 or \$205 per month.

Bruce Savik, a professional engineer, testified on behalf of defendant and prepared a rebuttal engineering report in this matter. In the rebuttal report Mr. Savik challenges various portions of Mr. Jaeger's report. Mr. Savik determined that the pre-taking size of the subject property was 101,663 square feet as based on a survey received from defendant's appraiser and the deed to the subject property. He also determined that the post-taking area was 99,517 square feet and that the taking area was 2,146 square feet or 2.1% of the original property. He calculated the post-taking area by examining the taking map and converting the square meter measurement of the taking area that was on the map and subtracting that from the pre-taking area.

Mr. Savik points out a number of town building code provisions that apply to the subject property. He explains that § 85-10, Transition between districts, requires a yard equal in width or depth to that required in the residential district, in this case 50 feet as opposed to the 25 feet provided by Mr. Jaeger in his conceptual site plans. Mr. Savik testified that since the property to the south of the subject property was improved with a house, the subject property would require a 50 foot setback along that portion of the southerly property line. Mr. Savik continues in his report that Mr. Jaeger was incorrect when he stated that there was a requirement of a 40 foot setback for 50 feet for buildings or parking from the terminus of Wyandanch Trail. Mr. Savik states that this section of the code does not apply to the Wyandanch Trail portion of the subject property. He finds that 1,915 square feet of Mr. Jaeger's pre-taking retail building is not in compliance with the town code requirements. Thus Mr. Jaeger's pre-taking retail building would have to be reduced from 16,350 square feet to 14,435 square feet.

Mr. Savik also states that Mr. Jaeger's original pre-taking conceptual plan does not provide for handicapped parking as required by the Americans with Disabilities Act (ADA) Accessible Guidelines which requires 5 handicapped parking spaces when the total amount of parking is between 101 and 150. In order to provide the required 5 handicapped parking spaces 3 parking stalls would have to be eliminated from the 109 parking stalls included in Mr. Jaeger's pre-taking conceptual plan. Additionally, the two loading zones in the plan do not conform to town code requirements. In all, Mr. Savik states that 4 parking spaces would be eliminated from the plan.

Applying the same analysis to Mr. Jaeger's original post-taking conceptual site plan, Mr. Savik finds that 1,732 square feet of the post-taking retail building is not in compliance with the town code and the building size must be reduced to 13,418 square feet. Also 2 parking stalls would need to be eliminated leaving 99 parking spaces.

Thus after the taking Mr. Savik finds that there is a 600 square foot or 3.8% reduction in potential building area. Mr. Savik testified that the 2% loss of land in this case resulted in a more than 2% loss of building area. Mr. Savik also explained that while there could be no building in the 50 most westerly feet of the property there could be parking according to the code. Mr. Jaeger found that as a matter of policy there could be neither building nor parking in that area of the property.

Mr. Shaik Saad, a manager in the traffic and safety group in the New York State Department of Transportation (DOT), testified that he specifically managed the DOT permit section. His responsibilities included managing the permit review process along state highways which required him to review the permit application and respond to the applicant in a letter based on the concerns of the DOT. He was responsible for making sure that the concerns were addressed before approving the chance of a permit. He was also responsible for keeping the DOT records for any permits for access to the state highway system for a period of 20 years. Mr. Saad searched DOT records but did not find any work permit applications received by DOT for a curb cut affording access between claimant's property and Route 112. Mr. Saad continued that he did not find a highway work permit application of any kind filed with DOT regarding claimant's property.

Mr. Gary Moller, the DOT engineer in charge of the subject construction project, testified that to his knowledge claimant never asked for access to Route 112 during the term of the project. Mr. Moller stated that during the project defendant would provide access to the subject property if it was requested. Mr. Moller estimated that the construction work in front of the subject property lasted approximately six months. Mr. Moller stated that the easement permitted the contractor to go on the easement area to do work or store materials and equipment at any time during the life of the easement.

Incredibly, the sides could not agree to the exact measurements of the size of the subject property or the size of the area

taken by defendant in this matter. Defendant's appraiser, Mr. Albro, had to revise his initial land measurements after being presented with Mr. Savik's rebuttal engineering report. Mr. Savik based his measurements on a survey received from defendant's appraiser (see Exh E) as well as measurements on the taking maps and the property deed. Mr. Jaeger, a licensed land surveyor, conceded at trial that there is some level of inaccuracy in both his and defendant's calculations and that the 1.3% difference in the calculations is "pretty close." (Tr Transcript P136 line 6). He also based his figures partially on a survey conducted by Lee Lutz which was not in evidence. Both appraisers conceded that the most accurate method to calculate the measurements of the subject property is to conduct a survey. When asked to calculate the taking area based on the figures contained in the taking map, Mr. Jaeger found a taking area of 2,146 square feet, the same area found by defendant.

Thus, based on the totality of the reports in evidence and after evaluating the credibility of the witnesses the Court accepts defendant's calculations as being the accurate measurements for the size of the property in both the before and after taking scenario as well as its measurement for the taking area.

As previously stated the appropriate measure of damages for a partial taking of real property is the difference between the value of the whole property before the taking and the value of the remainder after the taking (Chester Indus. Park Assoc., L.P. v State of New York, 103 AD3d 827 [2d Dept 2013]). The measure of damages must reflect the fair market value of the property in its highest and best use on the date of the taking, whether or not the property is being put to such use at that time (Gyrodyn Co. of Am., Inc. v State of New York, 89 AD3d 988 [2d Dept 2011]). Consequential or severance damages may also occur if there is a diminution in value of the remaining property as a result of the taking (Murphy v State of New York, 14 AD3d 127 [2d Dept 2004]).

The Court adopts defendant's methodology and calculations in awarding \$50,000 as the accurate valuation of direct damages to the subject property as a result of the taking.

There was a dispute between the experts as to whether severance damages were appropriate in this matter. However, defendant's expert did concede that there would be a 600 square foot loss in potential building area as a result of the taking. Claimant argues that the loss in potential building area results in severance damages to the remainder of the property. After reviewing the evidence and weighing the credibility of the experts, the Court finds it appropriate to award severance damages in this matter.

In regard to the total building area the Court found that Mr. Savik's calculations more accurately reflect the town code requirements. Mr. Savik's attention to detail in regard to the ADA guidelines was also noteworthy. Consequently, the Court accepted Mr. Savik's pre-taking potential building development calculation of 15,600 square feet and post-taking potential building development calculation of 15,000 square feet. The loss of 600 square feet or 3.8% reduction in potential building area was roughly half of claimant's calculated loss of 1,200 square foot or 7.3% reduction in potential building area. Thus, the Court finds it appropriate to reduce claimant's after taking adjustments for loss of marketability from minus 10% to minus 5%. The effect of this adjustment results in an after taking market value of \$20 a square foot rounded off. Multiplying \$20 by 99,517 square feet the Court calculated \$1,990,000 as the after taking market value of the property. Subtracting \$1,990,000 from \$2,240,000 (before taking market value) the Court finds total damages, direct and severance, of \$250,000. Subtracting \$50,000 (direct damages) from \$250,000 (total damages) the Court finds and awards severance damages of \$200,000.

In regard to the temporary easement the Court of Appeals has held that:

"the rental value of the land encompassed within the temporary easement for so long as the easement is in effect plus, as consequential damages, the rental value of the parcel's unencumbered interior acreage for any period of time when highway access was not possible by virtue of the easement's use. A condemnee is entitled to consequential damages comprising the rental value of the parcel's unencumbered interior acreage for the easement's duration only if the condemnor does not meet its burden of proving the interval of actual obstruction, or the condemnee establishes that the mere existence of the temporary easement did, in fact, impede sale or development of the property for its highest and best use" (McCurdy v State of New York, 10 NY3d 234 (2008)).

Here, the Court finds that the temporary easement lasted from the vesting date, August 29, 2008 until the official date of the termination of the temporary easement, August 10, 2011 (Exh F).

The Court also finds that there was highway access to claimant's property during the pendency of the temporary easement. The point of access between the parcels of land for the cross-access agreement was the common southerly boundary line, located 80 feet west of its point of intersection at Route 112, with said access driveway having a width of 24 feet. The access point was not infringed by either the taking area or the temporary easement area.

Claimant's appraiser conceded that the cross-access agreement would allow vehicles to enter the subject property from the Hess property during the construction project.

Mr. Moller testified that he never received a request for Route 112 access from claimant during the term of the project. He explained that defendant would have provided access to Route 112 from claimant's property if it was requested.

Further, the specific language of the temporary easement reserves to the owner of the subject property and such owner's successors or assigns the right of access and the right of using said property and such shall not be further limited or restricted under the easement beyond that which is necessary to effectuate its purposes for the construction or reconstruction of the project.

While the Court is mindful that the uncertainty of a temporary easement can affect business and financial decisions which could result in compensable damages (*Village of Highland Falls v State of New York*, 44 NY2d 505 [1978]), claimant has failed to show that the temporary easement interfered with the parcel's marketability or development in more than a conjectural sense (*McCurdy v State of New York*, 10 NY3d 23412008D).

Claimant's appraiser was unaware of any site development plans submitted to the Town of Brookhaven for the subject property prior to the vesting date. She also did not believe there were any inquiries regarding leasing the property during the pendency of the temporary easement.

Mr. Saad testified that there were no work permit applications ever received by DOT for claimant's property.

Thus, the Court finds that the appropriate measure of damages in this case is the rental value of the land encompassed within the temporary easement for so long as the easement was in effect without additional consequential damages.

Both appraisers agreed that 12% was the appropriate rate of return for the subject property. Consequently, the Court adopts defendant's methodology and calculations and finds \$205 as an accurate per month rental rate of return for the land encumbered by the temporary easement. Multiplying \$205 by 36^{1A} months the Court finds and awards \$7,500 as total compensation for damages related to the temporary easement.

Therefore, based on the foregoing, claimant is awarded a total of \$257,500 in damages. This amount was calculated by adding total damages from the taking (direct and severance) of \$250,000 to \$7,500 in damages related to the temporary easement. Accordingly, claimant is entitled to an award of \$257,500 with statutory interest from the vesting date of August 29, 2008 to the date of decision and thereafter to date of entry of judgment (see CPLR §§ 5001 and 5002). Suspension of interest is not warranted since the notice of acquisition was served by certified mail, return receipt requested and not by personal service (*Sokol v State of New York*, 272 AD2d 604 [2000]; see also EDPL 514[B]).

The award to claimant herein is exclusive of the claims, if any, of persons other than the owners of the appropriated property, their tenants, mortgagees or lienors having any right or interest in any stream, lake, drainage, irrigation ditch or channel, street, road, highway or public or private right-of way or the bed thereof within the limits of the appropriated property or contiguous thereto; and is exclusive also of claims, if any, for the value of or damage to easements or appurtenant facilities for the construction, operation or maintenance of publicly owned or public service electric, telephone, telegraph, pipe, water, sewer or railroad lines. To the extent the claimant has paid a filing fee, it may be recovered pursuant to Court of Claims Act section 11-a(2).

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

denied.

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

L11 The parties stipulated that the Notice of Claim was served upon defendant within three years from the vesting date (see Ct Exh 1).

EI Unless otherwise noted all calculations are rounded off.

Lal A page of the report was inadvertently omitted from the originally filed report. By letter dated February 24, 2012, Mr. Jaeger's entire report was filed with the Court on February 27, 2012.

al The exact time period for the temporary easement was 36 months and 12 days. The Court rounded up the final figure to compensate for the extra 12 days.

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