2015 NY Slip Op 50934(U)

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

v.

NEW CREEK BLUEBELT, PHASE 3 WITHIN AN AREA GENERALLY BOUNDED BY ZOE STREET, DONGAN HILLS AVENUE, HYLAN BOULEVARD and STOBE AVENUE IN THE BOROUGH OF STATEN ISLAND, CITY and STATE OF NEW YORK.

STATEN ISLAND LAND CORP. (FEE CLAIMANT FOR DAMAGE PARCEL 23, 23A, 23B, 24, 24A, 25, 25A, 26, 27, 29, & 30) (BLOCK 3551 LOTS 8, 14, 53, 56, 112, 113, & 115) Claimant,

THE CITY OF NEW YORK, Condemnor.

4013/06.

Supreme Court, Richmond County.

Decided June 17, 2015.

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Jonathan Houghton, Esq., Goldstein Rikon & Rikon and Houghton, LLP, 381 Park Avenue, Suite 901, New York, New York 10016, (212) 422-4000, Claimants Attorney.

WAYNE SAITTA, J.

At issue in this condemnation proceeding is the just compensation to be awarded to Claimant, STATEN ISLAND LAND CORP., for the taking of the subject property, located on Staten Island (Block 3551 Lots 8, 14, 53, 56, 112, 113, and 115). The Condemnor THE CITY OF NEW YORK, took title on November 3, 2006 (the vesting date). The Court viewed the property on June 16, 2014, and a non-jury trial was held on June 23, 2014.

FACTS

The CITY acquired the subject property for use as part of the CITY's New Creek Bluebelt Phase 3 project. The total size of the property taken was 45,208 square feet, which includes a non-contiguous lot (lot 14) of approximately 5,203 square feet. The property is located roughly between Hylan Boulevard, and Joyce Street, and between Stobe Avenue and New Creek, with lot 14 running partially in the bed of an unbuilt portion of Joyce Street and fronting Stobe Avenue for 30 feet. Virtually the entire site consists of wetlands. The subject property was regulated as wetlands on the vesting date.

It was also stipulated that the Claimant purchased the property prior to the enactment of the wetland regulations and that it was the owner of the subject property on the vesting date.

Both parties agreed that because of the wetlands regulations, the owners of the property would not be able to obtain a permit to develop it and its highest and best use, as regulated, is vacant.

The parties also stipulated that on the date of vesting, the value of the property as regulated was $248,600, and the value of the property as unregulated, and after deducting extraordinary costs, was $4,552,000.

The CITY had instructed its appraiser in preparing his appraisal to assume that there was a reasonable likelihood that a regulatory takings challenge to the wetland regulations would succeed. The Court denied a motion by the CITY to put in evidence, not included in the appraisals exchanged, that there was no regulatory taking because the subject property

was part of a larger parcel owned by Claimant which Claimant to sold off to a buyer who developed the Hylan-Seaver Mall on it.

The parties agreed that the wetlands regulations would prohibit any productive use of the property. The stipulation as to the regulated and unregulated values of the property indicates that the wetland regulations have eliminated almost 95% of the value of the property. Further, as the property was purchased by Claimant for investment purposes before the wetlands regulations were imposed on the property, the Claimant had reasonable expectations to develop the property. Based on the foregoing, and the reports of the appraisers, the Court finds that it is reasonably probable that a regulatory challenge to the wetlands regulations, as applied to the subject property, would have succeeded.

The parties disagree as to what increment, if any, should be added to the regulated value of the property to determine its value at the time of vesting.

The CITY argues that no increment should be added because investors do not purchase wetlands on Staten Island with the intention of challenging the wetland regulations in order to develop the property. The CITY argues in the alternative, that if an increment is to be added, the best market based evidence available indicates that a buyer would pay 32% of the unregulated value of the property.

The Claimant asserts that the increment should be 75% of the difference between the unregulated and regulated value of the property.

The increment is 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 wetlands permit and challenging a denial of the permit as confiscatory. A buyer would pay only the value of the property as restricted, plus an increment representing its enhanced value at such future time if and when he successfully in nullifies the wetlands restrictions in court. *Berwick v State of New York,* 107 AD2d 79 at 84 (2nd Dept 1985).

In his testimony the CITY's appraiser, Bob Sterling, MAI, stated that he does not believe that an investor on Staten Island would pay an increment over the regulated value of a wetland property, even where it is probable that a challenge to the regulations would be successful.

In its post-trial brief the CITY argues explicitly what was implicit in Sterling's testimony, that no increment should be added to the regulated price of the subject property, because a buyer of Staten Island wetlands would not in fact pay an increment.

Sterling bases this belief on the fact 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.

However, the longstanding rule in New York is that the realities of the market are that an investor would pay an increment to the regulated value of a property where there is a probability that the wetland regulations could be successfully challenged, is long standing. *Chase Manhattan v State,* 103 AD2d 211, 479 NYS2d 983 (2nd Dept. 1984); *Berwick v State (Berwick 0,* 107 AD2d 79, 485 NYS2d 260, (2nd Dept. 1985); *Matter of City of New York, Staten Island Bluebelt Phase 2 (Fink)* Index 4012/2004 (Su. Ct. Kings 2007); *In the Matter of New Creek Bluebelt, Phase 4 (Paolella),* 122 AD3d 859, 997 N.Y.S.2d 447, 2014 NY Slip Op. 08029.

Demonstrating that such a long standing rule is not applicable to the subject property because it does not reflect the realities of the market for wetlands property in Staten Island, requires more evidence than testimony by the CITY's appraiser that he was unable to locate any sales where a buyer subsequently challenged wetland regulations.

Sterling did not detail the nature and scope of his search for such properties. Both appraisers have stated that properties which are entirely, or almost entirely wetlands, are bought and sold on Staten Island. While the market for such properties may not be particularly active, the number of comparable sales of regulated wetland properties presented to this Court, in various cases before it, indicates there is a sufficient number of sales to analyze meaningfully. These

various sales of wetland properties reveal a wide range of prices that has not been adequately addressed.

There are no doubt several approaches to analyzing the existing sales of wetland properties that could provide a reasonable basis for determining whether an increment added to the regulated value would be based on market realities. An analysis of Staten Island of the range of wetland prices over time may prove enlightening. However, one cannot demonstrate that the rule that an investor would pay an increment is inappropriate in Staten Island, without evaluating, on a systemic basis, the actual sales of wetlands on Staten Island.

The CITY notes in its brief that this Court rejected an increment based deducting the time and cost it would take to challenge the wetland regulations, in *In the Matter of New Creek Bluebelt, Phase 4 (Paolella),* 122 AD3d 859, 997 N.Y.S.2d 447, 2014 NY Slip Op. 08029, but accepted an increment based on that method in *Matter of City of New York (196 Slater Blvd Building Corp.),* Index No. 4018/07. However, in Paolella, the Court did not hold that the time and cost discount method was an invalid method to calculate an increment. As stated in the Paolella decision, the Court rejected an increment based on a particular time and cost discount method proposed by the CITY's appraiser, because the appraiser proposing it testified that he did not believe it reflected the realities of the marketplace, and that a buyer would not go through the process of calculating an increment based on the time and cost of challenging the wetland regulations. *In the Matter of New Creek Bluebelt, Phase 4 (Paolella),* 122 AD3d 859, 997 N.Y.S.2d 447, 2014 NY Slip Op. 08029.

Determining an increment based on the costs involved in pursuing a challenge to wetland regulations, and discounting the increment to account for the time it would take to complete a challenge, is a valid methodology, provided the inputs used in the calculation for costs and time reflect the realities of the market.

In his rebuttal report and at the trial, Sterling was asked to assume a buyer would pay an increment over the regulated value of the property on account of the reasonable probability that the wetlands regulations would be found to be a taking, and develop an increment based on that assumption.

In his rebuttal report Sterling stated that because of the lack of sale of wetlands where the buyer subsequently applied for a wetlands permit, he could not develop the increment that an investor would pay for wetlands over its regulated value from actual sales of wetland properties. Instead, he looked at sales of undersized properties, lots that were too small to develop residentially 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 which could be developed 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.

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 method 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. *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).

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 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. Therefore, the Court declines to accept Sterling's proposed increment.

The Claimants contend that the increment to be added to the regulated value should be 75% of the difference between unregulated value and the regulated value, citing *Berwick v State of New York,* 159 AD2d 544, 552 NYS2d 409 (2nd Dept 1990), and *Matter of New Creek Bluebelt, Phase 4 (Paolella),* 122 AD3d 859, 997 N.Y.S.2d 447, 2014 NY Slip Op. 08029.

In *Berwick* the Court applied an increment of 75% of the difference between the unrestricted value and restricted value of three properties. This 75% increment was then added to the restricted value of the properties.

The CITY argues that the 75% increment in Berwick was based on the market for residential waterfront property in the Town of Southampton, on Long Island in 1979, and there is no evidence that an increment reflective of the market for waterfront property in Southampton in 1979 is applicable to freshwater wetlands on Staten Island in 2006.

When adding an increment to the value of vacant land to reflect its development potential, the specific increment which is selected and applied must be based on sufficient evidence and be satisfactorily explained. Matter of County of Suffolk Wiresterl, 37 NY2d 649, 653, 376 N.Y.S.2d 458, 339 N.E.2d 154; Matter of Village of Haverstraw [AAA Electricians, Inc.], 114 AD3d 955, 956, 981 N.Y.S.2d 436); *In the Matter of New Creek Bluebelt, Phase 4 (Paolella),* 122 AD3d 859, 997 N.Y.S.2d 447, 2014 NY Slip Op. 08029.

While the 75% increment set forth in *Berwick* may not be applicable to all wetlands properties, it is an appropriate increment to apply in this case.

In this case Henry Salmon CREA, the Claimant's appraiser, based his estimate of a 75% increment in part on instructions from Claimant's counsel and partially on the property's commercial zoning and its location on Hylan Boulevard. He testified that Hylan Boulevard is the major commercial corridor of Staten Island and connects Staten Island's north and south shore communities.

The subject property, with the exception of lot 14, is zoned R5 with a C1-2 overlay. Permitted development in a C1-2 overlay include offices, hotels, restaurants, grocery stores and beauty parlors.

In his appraisal, Salmon described the portion of Hylan Boulevard where the subject property is located by stating, "[c]ommercial activity is good, particularly in the southeasterly section of the neighborhood along Hylan Boulevard, a major traffic artery on Staten Island that offers a wide variety of commercial uses."

Sterling's assessment of the location was similar. In describing the location of the subject property in his appraisal, he stated that "it fronts on a busy commercial corridor (Hylan Boulevard) lined with a multitude of store, restaurant bank and other commercial-type properties."

Although the property is part of a larger wetlands, that wetlands crosses Hyland Boulevard roughly perpendicularly. The block between Stobe Ave and Seaver Ave is the only gap in development on Hylan Boulevard in the area. Several blocks to both the north and south of the subject property are solidly developed commercially. The subject property is one of the few remaining undeveloped commercially zoned parcels on Hylan Boulevard. Also, both appraisers agreed that the extraordinary costs involved in developing the subject property are not significant in comparison to the value of the property and do not preclude development.

There is no question that if the property were not subject to wetlands restrictions, there would be no shortage of developers interested in purchasing the property to develop commercially.

Given the commercial zoning of the subject property and its unique location in the midst of a solidly developed major commercial artery, the Court finds that, in this case, an increment of 75% of the difference between the adjusted unregulated value of the property and the regulated value is appropriate.

The difference between the unregulated of $4,552,000 and regulated values of $248,600 is 4,303400 and 75% of that difference is $3,227,550. When that increment of $3,227,550 is added to the regulated value of the property of $248,600 the total is $3,476,150, or $3,500,000 rounded.

Wherefore, the Court finds that the value of the property for condemnation purposes on the date of taking was $3,500,000. Settle judgment and order on notice.