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<b>Forest Enters. Mgt., Inc. v County of Warren</b>
2018 NY Slip Op 51208(U) [60 Misc 3d 1222(A)]
Decided on August 16, 2018
Supreme Court, Warren County
Muller, J.
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Decided on August 16, 2018

Supreme Court, Warren County

<b>Forest Enterprises Management, Inc., Claimant,</b>
<b>against</b>
<b>The County of Warren, Condemnor/Defendant.</b>

61956

E. Stewart Jones Hacker Murphy, LLP, Troy (Patrick L. Seely, Jr., of counsel), for claimant.

The Vincelette Law Firm, Albany (Daniel G. Vincelette, of counsel), for condemnor/defendant.

Robert J. Muller, J.

This is a de jure condemnation proceeding pursuant to EDPL article 4 with the issues of this action having thus duly come on for a hearing before me as one of the Justices of this Court on April 11 and 12, 2018. "The well-established law of this state has consistently pointed out that what may be normal in litigation between private parties does not apply in a condemnation proceeding which involves a claim protected by our constitutions. The condemnor has an independent obligation to pay just compensation and, in connection therewith, present its own appraisal of the property's highest use and value" (Michael Rikon, *Careful, That Eminent Domain Claim Is Constitutionally Protected*, NYLJ, June 26, 2018 at 3, col 1; see EDPL 303, 508; [\*Matter of Mazur Bros. Realty, LLC v State of New York\*, 117 AD3d 949, 952 \[2014\]](#); *Chase Manhattan Bank v State of New York*, 103 AD2d 211, 221 [1984]).

Therefore, having heard the allegations and proofs of the respective parties, and having carefully reviewed claimant's Exhibits "1" through "4" and condemnor defendant's Exhibits "A", "B" and "S," all of which were received into evidence and the Court also having had an opportunity to observe the demeanor of the witnesses called to testify and having made determinations on issues of credibility with respect to these witnesses and due deliberation having been had thereon;

NOW, after reviewing the submissions; and the claimant having appeared in person and by and through their attorneys, E. Stewart Jones Hacker Murphy, LLP (Patrick L. Seely, Jr., of counsel), and the defendant having appeared by and through its attorneys, The Vincelette Law Firm (Daniel G. Vincelette, of counsel), I do hereby make the following findings of essential facts which I deem established by clear and convincing evidence and reach the following conclusions of law.

1. Claimant presented testimony by Victor Macri, Jr. ("Macri"); Brian Osterhout ("Osterhout"); and Kenneth Gardner ("Gardner") of Northeast Appraisals & Management Co., Inc. Condemnor ("Defendant") presented testimony by Todd Thurston ("Thurston") of Thurston Casale & Ryan Appraisals.

2. The parties have stipulated that claimant's appraisal report marked Exhibit 4 and defendant's appraisal report marked Exhibit A and rebuttal report marked Exhibit B are received in evidence subject to cross-examination and any motions either party may choose to make with respect thereto (*see* Uniform Rules for Trial Cts [22 NYCRR] § 22 202.61). R. 93, 183.

3. Claimant is a development company which owns parcels of land in the Town of Queensbury, New York. R. 15-18, 52; Exhibit 4, p. 14.

4. The subject property is located at the intersection of Quaker Road and Quaker Ridge Boulevard in the Town of Queensbury, Warren County and sits south of the Floyd Bennett Memorial Airport. Exhibit 4, p. 7.

5. The property sits immediately to the north and west of lands owned by the Wal Mart Real Estate Business Trust, which parcel was itself once part of the subject property, before a subdivision process that began in 2006. R. 18; Exhibit 4, p. 11.

6. The subject property, bisected by a power line owned in fee by National Grid (formerly "Niagara Mohawk"), is itself divided into several tax parcels — six of which, totaling 12.9 acres, are south of the power line (the "south parcels") and one of which, totaling 84.58 acres before the taking, is north of the power line (the "north parcel"). R. 26, 142; Exhibit 4, p. 16.

7. The southern boundary of the subject property is separated from other properties owned by claimant by a right of way owned by Niagara Mohawk Power Corp. that contains 60-foot high power lines. R. 26.

8. Claimant holds 200 feet of rights of way below the National Grid power line that connects the north and south parcels. R. 100, 102-03, 141-42, 176, 190, 207-08, 216, 295-99, 301-02, 319-20, 339; Exhibit 4, p. 9.

9. This condemnation concerns an avigation easement depicted in claimant's Exhibit 1 entitled "Map of Forest Enterprises Avigation Easement Limit" which, from the surface, proceeds with an imaginary plane extending upward and outward from at

or beyond the end of the runway at a specified angle south of the Floyd Bennett Memorial Airport located in Queensbury.

10. In 2012, defendant used its power of eminent domain to acquire 3.86 acres of the subject property in fee and to impose an avigation easement over the remaining 80.72 acres of the north parcel. Exhibit 4, p. 1.

11. The appropriation was necessary for the County to mitigate obstructions and to preserve and protect runway protection zones at the Floyd Bennett Memorial Airport. See Exhibit A.

12. Pursuant to a Stipulation and Order dated April 20, 2015, the County paid claimant \$327,200 as just compensation for the property acquired. See Exhibit A.

13. At the time of the taking, the subject parcel was in the Commercial Light Industrial District. Exhibit A, p. 36.

14. The parcel that was subject to the appropriation (Parcel No. 303.11-1-4) has no road frontage. Exhibit A, p. 34.

15. Approximately 19 acres, or 23 percent, of the subject property consists of wetlands. Exhibit A, p. 34.

16. From April 26, 2011 to September 2012, the owner of the property sought subdivision approval. Exhibit 6 of Exhibit A, pp. 38-45.

17. As of the date of the taking, the subject property lacked subdivision approval from the Town of Queensbury Planning Board, which would allow claimant to develop its property. See Exhibit 6 of Exhibit A, p. 34.

18. The Town of Queensbury subdivision regulations preclude dead-end streets more than 1000 feet in length; the proposal submitted by the owner included a road that was three times that length. Exhibit 6, p. 77 of Exhibit A, p. 44.

19. The development of the subject property, known as the Quaker Ridge Tech

Park, required a full access two way road from Queensbury Avenue. Exhibit A, pp. 39-40.

20. No ingress/egress easement or agreement for access with the County existed at the subject property. Exhibit A, pp. 39-45.

21. As the cost to install the roadway would be borne solely by the owner, the costs were reported to be uneconomic, with the claimant's principal Macri testifying that if the road was required, "the project fails." Exhibit A, p. 43.

### ***THE EASEMENT***

22. The avigation easement encumbers the remaining 80.72 acres of the subject parcel that were not subject to the fee acquisition by the County. Exhibit A, p. 58.

23. The maximum building height allowed by the Town of Queensbury zoning code is 60 feet. Exhibit A, p. 59 and Exhibit 3-3.

24. Avigation easements do not preclude development, but provide the ability to prevent, remove or mark obstructions. Exhibit A, p. 59.

25. Approximately half of the easement covering the subject property has an elevation of 80 feet from the ground. This area is located in the "transitional surface." R. 198-200; Exhibit A, pp. 58-59.

26. The portion of the easement with the 80-foot elevation over the subject property does not prohibit the ability to construct buildings under the Town zoning code. See Exhibit A, Exhibit 3-3.

27. Similarly, the avigation easement has no effect on trees or vegetation on an industrial property, as claimant had proposed that he would clear cut the 61.5 acres of the subject property that were not wetlands. R. 198.

28. The most "restrictive" portions of the avigation easement are within the "approach surface." R. 200.

29. According to the easement: "The actual aircraft flight path ranges from 130' to 232' above the Forest Enterprises property based on the highest ground elevation of 370'. Much of the property is lower than 370', allowing even greater clearance." Exhibit 2 of Exhibit A , pp. 12,13.

30. The following table sets forth the values of the subject property before and after the taking, as determined by the respective experts:

	Claimant	County	Difference
<b>BEFORE</b>			
Site Value (including Peripheral parcels)	\$3,217,000	NA	
&nbsp; Per Acre	\$33,000	NA	
Sit Value (Subject only; Allocated)	\$2,791,000	\$846,000	\$1,945,000
&nbsp; Per Acre	\$33,000	\$10,000	\$23,000
<b>AFTER</b>			
Site Value (including peripheral parcels)	\$693,000	NA	
&nbsp; Per Acre	\$7,400	NA	
Site Value (Subject only; Allocated)	\$266,000	\$597,000	(\$331,000)
&nbsp; Per Acre	\$3,300	\$7,400	&nbsp; (\$4,100)
<b>DAMAGES</b>			
Direct			
&nbsp; Peripheral Parcels	\$0	\$0	&nbsp; \$0
&nbsp; Subject	\$2,525,000	\$249,000	&nbsp; \$2,276,000
Indirect	\$0	\$0	&nbsp; \$0
<b>TOTAL</b>	\$2,525,000	\$249,000	&nbsp; \$2,276,000

***CLAIMANT'S VALUATION***

31. Valuation testimony was presented by Kenneth Gardner of Northeast Appraisals of Ithaca, New York.

32. Gardner is a licensed, general certified real estate appraiser. R. 87.

33. Gardner had previously appraised avigation easements at Albany County Airport; Saratoga County Airport; Ithaca Tompkins Airport; Oswego County Airport and Jefferson County Airport. R. 88.

34. Gardner was retained by claimant in late 2012. R. 97.

35. When Gardner was first retained in 2012, there was limited market data or sales for commercial or industrial properties in the area. R. 97.

36. Gardner observed an increased amount of sales in May 2015 when the appropriation actually occurred. R. 98.

37. In initially valuing the subject property, Gardner focused on the 84 acres north of the Niagara Mohawk power transmission lines. R. 99.

38. In valuing the property that was subject to the fee acquisition and the avigation easement, Gardner valued "the larger parcel" which also included all of claimant's lands south of the transmission lines, which included a parcel that was developed into a Wal-Mart retail store and other vacant land. R. 101-102.

39. Gardner justified his inclusion of the adjoining properties in his valuation by referencing the Uniform Standards For Federal Land Acquisitions, commonly referred to as "The Yellow Book." R. 102; 105.

40. Gardner admitted in response to questions by this Court that the inclusion of the adjoining lands was not mandatory, as those are federal guidelines and his client is not a federal agency. R. 105.

41. Gardner admitted that the actual parcel that was subject to the taking would be considered landlocked if he did not consider claimant's adjoining lands to the south. R. 103. ("And, in fact, it would be landlocked if you didn't consider the southern parcel and the ownership rights that the owner has to get access from the southern parcel.") R. 103.

42. By including claimant's adjoining southern properties that were not subject to the easement Gardner considered the subject property to have access to Quaker Road and Quaker Ridge Boulevard. R. 104.

43. In valuing the subject property, Gardner considered the subject property to have a light industrial use north of the transmission line and a retail use south of the transmission line. R. 17.

44. The inclusion of the five additional parcels is improper, as the properties are separated from the parcel that was subject to the easement by a fee-owned transmission line, and are thus not contiguous; the properties are zoned differently (Commercial Intensive versus Commercial/Light Industrial) and thus have different highest and best uses (i.e. retail development versus light industrial); no marketing proposal included the other five parcels; and the Town's mandate for a connector road only affected the subject parcel. Exhibit B, p. 2.

45. By including the other five parcels, Gardner mis-characterized (1) the actual road frontage of the subject parcel (the subject has no road frontage; by including the five parcels, the valued property has 1,147 feet); (2) access (the subject only has access over a right of way; including the five parcels gives the appearance of direct road access); (3) location (the subject is a rear parcel; by including the five parcels no location adjustment is necessary); and (4) zoning (Commercial /Light Industrial precludes retail use in excess of 40,000 square feet; whereas Commercial Intensive has no such restriction). Exhibit B, pp. 2, 3.

46. Gardner failed to consider the Planning Board's requirement of a connector road to the subject property and the effect that it had upon the development of the

parcel. As noted the August 12, 2012 Planning Board meeting, Macri told the Board that if a connector road was required "the project fails." Exhibit B, pp. 6, 7.

47. For his valuation of the subject property, Gardner chose five sales that he believed to be representative of the market value of the subject property. R. 109.

48. Gardner chose the five sales because they were "exposed to the same market factors" as the subject property, including his belief that they were "exposed to the same traffic on Quaker Road." R. 110.

49. Gardner analyzed his sales in terms of "overall development potential" compared to the subject. R. 111.

50. The fives sales consisted of:

a) 7.78 acre parcel on Silver Circle in the Town of Queensbury with 100 feet of road frontage to which Gardner applied a negative 50 percent adjustment for size and no adjustments for differences in road frontage or access. Exhibit 4, p. 28.

b) 13.35 acre parcel on Dix Avenue in the Town of Queensbury with 397 feet of road frontage. Gardner made a negative 10 percent adjustment for differences in road frontage [\*2]or access between the sale and the subject. Exhibit 4, p. 28.

c) 16.38 acre parcel on Corinth Road in the Town of Queensbury with 419 feet of road frontage. Gardner made no adjustments for differences in road frontage or access between the sale and the subject. Exhibit 4, p. 28.

d) 21.61 acre parcel on Quaker Road in the Town of Queensbury with 489 feet of road frontage. Gardner made no adjustments for differences in road frontage or access between the sale and the subject. Exhibit 4, p. 28. The property is one half mile west of the subject property and was subsequently developed into an auto dealership. R. 115; Exhibit 4, p. 26.

e) 33.265 acre parcel on Quaker Road in the Town of Queensbury with 1,048 feet of road frontage. Gardner made no adjustments for differences in road frontage or access between the sale and the subject ("the building is

evidence of a commercial use on a back piece of land, it's not a frontage parcel."). The property was subsequently developed into a Wal-Mart retail store. Exhibit 4, p. 28; R. 120.

51. Gardner placed most weight on his fifth comparable sale (Sale No. 18, the Wal-Mart parcel), and concluded a final value of the subject parcel of \$33,000 per acre prior to the taking. R. 120.

52. In verifying his sales, Gardner did not inquire as to the motivation or conditions affecting the sale. R. 165.

53. Gardner testified that he has "not found sales that demonstrate the impact of these avigation easements" and that he could not rely upon information provided by brokers involved in such sales. R. 132.

54. Gardner stated that he ignored market data related to avigation easements and relied solely upon his interpretation of court decisions in which he was involved. R. 132.

55. Gardner adjusted his sales for the status of approvals — and he conceded that the issues related to the emergency access road and the connector road affected the status and market value of the property — although he did not review the Town of Queensbury Planning Board Minutes. R. 168-170.

56. In adjusting his comparable sale properties, Gardner adjusted them to account for differences between the 94.48 acre property that included the subject and the five other parcels owned by claimant. Exhibit 4, p. 28.

57. Gardner's comparable sales analysis, and his resulting value, have limited probative value, as they conclude a market value based upon a property that was not subject to the easement, but is an amalgamation of the actual parcel affected (Parcel No. 303.11-1-4) and five other parcels. The combined parcel possesses different attributes than Parcel No. 303.11-1-4.

58. When analyzing an avigation easement, Gardner stated that "you do have to

pay attention to every word" of the easement. R. 124.

59. Gardner's analysis of the effect of the easement, however, dismisses the actual effect of the easement on the property.

60. Gardner maintained that "in a large percentage of the property" industrial buildings or warehouses that are "typically 40 feet tall" could not be built as "[t]hey would be an obstruction and the airport would have the right to remove that obstruction." R. 127.

61. Gardner opined that while buildings could be constructed on "other portions of the [\*3]property," there was "no restriction" as to the access the County would have to enter and remain on the property. R. 127.

62. Gardner interpreted the easement language at the subject property based upon what he believed to be "how the courts have interpreted the easement language for other cases." R. 128.

63. Gardner's conclusion as to damages is based, in part, upon his own interpretation of court decisions related to easement litigation in which he was involved. R. 154.

64. The decisions relied upon by Gardner included:

a) *County of Cortland v Fish* (Sup Ct, Cortland County, 2015, Rumsey, J., index No. 12-274);

b) *Albany County Airport Auth. v Buhrmaster* (Sup Ct, Albany County, 1998, Battisti, J., index No. 5543-95);

c) *Albany County Airport Auth. v Bet-Lou Inc.* (Sup Ct, Albany County, 1999, Keegan, J., index No. 5540-95).

R. 145-146; Exhibit 4, pp. 127-164.

65. On cross-examination, however, Gardner agreed that every avigation case is different, and that easements on properties vary in each case:

"Every — you know, every avigation easement case is different, because the language varies somewhat. Sometimes it's identical, sometimes it's not. The properties are different. The area around the properties are different. And the airports are different. You know, where the property is located in reference to the runway, that makes a difference. So, you know, depending on the property, you can have a variation. I mean, as the Courts have shown, there's a variation in the damages that result from these avigation easements based on all of those factors and the — the anticipation of how those rights would be affected — ownership rights would be affected by the absolute meaning of what rights they have taken. And that's what the Courts have said." R. 159.

66. Gardner interpreted the effect of the easement without any reference to the effect of other easements on affected properties, or the actual effect of the avigation on the subject property.

67. Gardner testified that he could not find sales that demonstrate the impact of avigation easements. R. 132.

68. In contrast the County's appraiser presented multiple sales with avigation easements, including sales subsequent to such takings, that provided market data that disproved Gardner's premise and supported the County's calculation of damages from the effect of the easement.

69. In evaluating the impact of an avigation easement on the market value of real property Gardner testified that he discounted information provided by property owners and brokers and instead relied solely on his interpretation of court rulings. R. 133.

70. In determining the effect of avigation easements Gardner declined to consider the height of the avigation easements because "the Courts have not accepted that." R. 133.

71. According to Gardner, "the Courts have been almost silent on the impact of

these easements from the standpoint of the elevation of the avigation easement." R. 134-135.

72. In valuing the subject property after the taking, Gardner admitted the southern portion of the property he valued — that portion south of the transmission lines that did not include Parcel No. 303.11-1-4 — was not affected by the taking. R. 137.

73. Gardner determined that the land north of the transmission line (Parcel No. 303.11-1-4) was impacted "90 percent of the before-value, using other court decisions and other avigation easements as a guide." R. 137.

74. Despite his acknowledgment that "every easement is different" and dependent upon the individual facts of each case, Gardner did not include any of the easement agreements that were the subject of the trial decisions in his appraisal report. R. 159-160.

75. In his calculation of damages Gardner considered the right of the County to light the property as necessary. R. 161; Exhibit 4, p. 34.

76. Gardner's previous consideration of damages based upon a County's right to mark or light objects below the easement plane, however, was rejected by Cortland County Supreme Court in the *Fish* decision, *supra*. R.160; Exhibit 4, p. 128.

77. Gardner's discussion of the subject avigation easement mis-characterized several important characteristics of the easement, which included:

- interpreting the terms of the avigation easement as giving the County sole discretion as to the removal of vegetation and structures while the easement only allows the County to enter the property if vegetation or a structure is in the vertical space above the easement. Exhibit 4, p. 31; Exhibit B, p. 11.
- opining that the County's unrestricted right of ingress and egress is a significant cause of damages although this easement only has the right of ingress/egress to enforce the easement when there is an obstruction. Exhibit 4, p. 31; Exhibit B, p. 12.

- stating that there is a right of flight for aircraft at or above the minimum elevation of the avigation easement although the actual easement language is that "[t]he actual aircraft flight path ranges from 130' to 232' above the Forest Enterprises property based on the highest ground elevation of 370'. Much of the property is lower than 370', allowing even greater clearance." Exhibit 2, pp. 12, 13 and Exhibit 1, p. 46.
- stating that properties within an avigation easement cannot obtain mortgage financing, insurance and local government approvals, Exhibit 4, p. 34, although Exhibit 1 includes multiple sales of properties within avigation easements that had such financing.
- opining that properties subject to avigation easements are so severely restricted that they do not transfer as arm's length market sales Exhibit 4, p. 35, although Exhibit 7 of Exhibit A, Exhibit B, Exhibits 2, 3 and 4 provide sales of properties subject to avigation easements that were arm's length market transactions.
- opining that no "knowledgeable and reasonable developer, investor or business owner would construct a building in an area encumbered with an avigation easement." Exhibit 4, pp. 36, 37. This is contradicted wherein the owner of an 8.5 acre parcel on Queensbury Avenue near the subject had proposed and received approval from the FAA for the construction of a 40 foot building. Exhibit B, p. 19.

78. The County has also provided examples of projects that have been constructed despite the presence of an avigation easement. In addition to the project proposed for the 8.5 acre parcel [\*4]near the subject, the County has provided examples of two other projects at Saratoga County Airport. Exhibit B, p. 19.

79. These Saratoga projects include an 8,000 square foot expansion by Hannaford Bros. in 2014 on property that bounded the Runway Protection Zone; and an 11,000 square foot medical office building at 510 Geyser Road. The latter property, which features 28 to 30 foot building heights, was constructed within a flight path, occupied by a tenant, and mortgaged by a lender. Exhibit B, pp. 20, 21.

80. Gardner's opinion as to the effect of the easement on the development of the subject property — specifically his claim that "buildings cannot be constructed on a

substantial portion of the property effectively destroying any plans for development of the property" — is not convincing. Exhibit 4, p. 34.

81. Notably this is contradicted by evidence of claimant's proposal to develop the Quaker Ridge Tech Park having advanced with the Planning Board during the County's avigation easement negotiations and two of the claimant's engineers stating to the Board that the easement would not impact development of the park. Exhibit A, p. 43; Exhibit B; Exhibit 1-1, 1-2.

82. Gardner claims in his report that the owner of the property invested \$750,000 to develop the subject property and that the proposal to develop the subject property as Quaker Ridge Tech Park was terminated when Warren County announced it intended to acquire an avigation easement over the subject property. Exhibit 4, p.16.

83. This statement that the development proposal was terminated by the avigation easement is a mis-statement of fact, as the owner of the property only sought subdivision approval prior to January 2013. There is no evidence to support the representation that \$750,000 was invested in the development of the parcel. That project failed, not because of the avigation easement, but because of the Planning Board's requirement for a connector road. Exhibit B, p. 6.

84. Using a weighted average of all of the property he valued, Gardner concluded that the market value of the subject property was diminished 78 percent by the taking and the avigation easement concluding that the total damages from the taking was \$2,524,000. R. pp. 138, 139.

***COUNTY'S VALUATION***

85. The County presented testimony, an appraisal report and a rebuttal report prepared by Todd P. Thurston, ("Thurston") a licensed New York State General Appraiser. Since 2005, Thurston has performed valuations of avigation easements at airports in Chenango County; St. Lawrence County; Columbia County; Warren

County; Orange County; Wyoming County; Oswego County and Genesee County. R. 187.

86. For the valuation of the subject property Thurston only included Parcel No. 303.11-1-4, as it is its own tax parcel and the 84 acre parcel was the only property that was subject to proposals made to the Town Planning Board. R. 188.

87. Thurston treated the subject property (Parcel No. 303.11-1-4) as an independent parcel, as its development did not require the development of claimant's property south of the transmission line, and its potential commercial/light industrial use is different than the retail use of the property to the south. R. 189.

88. Thurston's highest and best use analysis of the subject property, Parcel No. 303.11-1-4 is as an independent economic unit. R. 189.

89. Thurston carefully examined the Town of Queensbury Planning Board minutes with [\*5]respect to the applications of the subject property. R. 190; Exhibit 6 of Exhibit A, pp. 38-45.

90. In January 2011, claimant presented plans to develop the subject property to the Town Planning Board. R. 192; Exhibit A, p. 38.

91. Between May, 2011 and January of 2012 the Planning Board reviewed development plans for Parcel No. 303.11-1-4 known as the "Quaker Ridge Tech Park." R 193; Exhibit A, p. 39.

92. Because the Town Zoning Code prohibited the development of a subdivision at the end of a dead-end road, the Planning Board advised claimant that there would have to be a secondary access road to the subject property. R 194; Exhibit A, p. 39.

93. The Planning Board's requirement of a secondary means of access to the subject parcel was a significant factor in the County's valuation of the subject parcel for this proceeding, as any intensive use of the parcel would require such approvals. R. 196.

94. To value the site before acquisition Thurston utilized five comparable sales, two of which were also utilized by Gardner. Exhibit A, pp. 48-57.

95. The five sales included:

- a) 21.71 acre site on Quaker Road in the Town of Queensbury (Gardner's Sale 15);
- b) 25.17 acre site on Glenwood Avenue in the Town of Queensbury;
- c) 33.26 acre site on Quaker Road in the Town of Queensbury (Gardner Sale 18);
- d) 25.02 acre site on Queensbury Avenue in the Town of Queensbury; and
- e) 14.2 acre site off Queensbury Avenue in the Town of Queensbury;

Exhibit A, p. 51 and Exhibit 2.

96. Each of these five sales were adjusted for location; for the presence of road frontage; for site size; and engineering. Exhibit A, p. 51 and Exhibit 2.

97. These comparable sales were adjusted to the 84-acre parcel that was subject to the avigation easement, Parcel No. 303.11-1-4, and thus considered the lack of road frontage, the parcel's location as a rear parcel, the applicable zoning, and the status of approvals.

98. Thayer's adjusted sales indicated a per acre value of \$10,000 per acre, or \$846,000 for the site prior to the acquisition. Exhibit A, p. 57.

99. Thurston's analysis included a detailed review of the avigation easement at the subject property. His appraisal report included a glossary of relevant terms, and his valuation considered the relevant elevations of the transitional surface. R. 198; Exhibit A, p. 8, p. 59.

100. The area of the avigation easement with 70 to 80 foot heights has minimal

effect on the damage to the property, as it did not affect the development potential on that portion of the parcel:

"[W]hen I'm looking at the valuation of this area of where you've got significant avigation easement heights, that in terms of damage to the property is much, much less. The only time that — and the reason is that you certainly can build any zoning of 60 feet, so there's not even any — any issues or conflicts with a 70- or 80-foot or 100-foot avigation easement in terms of development."

R. 198.

101. When determining damages, Thurston analyzed his sales and the market [\*6]requirements for development and utilized a 35 foot height threshold in his calculation of damages:

"So, I use 35 feet as my threshold. And that 35 feet is not . . . informed by building height, the 35 feet is max building height per zoning. The 35 feet is based upon what the market is suggesting. You know, the market is typically — again, as I outlined in the discussion of the industrial parks, the market is one-story structures, 20-foot ceiling heights. And so, you might have a two-story structure which might be 25 feet or 30 feet, all told. So, 35 feet is usually a good place to be for suburban development in looking at what effect the avigation easement heights affect that 35-foot threshold."

R. 219; Exhibit A, pp. 58-59.

102. Thurston's analysis of damages was dependent upon the actual effect the height limitations have upon the market value of the property. Maximum building heights generally revolve around 35 feet for most zoning districts statewide. Exhibit A, p. 59.

103. The vast majority of rural/suburban developments, including those within office/light industrial parks near the subject, involve one to two-story buildings. As a

practical matter, the ability to construct improvements above 35 feet is insignificant. Exhibit A, p. 59.

104. Under the County's valuation, easement heights below 35 feet can impact prospective developments, particularly when the heights are below 15 feet. Exhibit A, p. 59.

105. Avigation easements, however, are not written to preclude development, and this is supported in the County's appraisal report with multiple examples of buildings located within sub-35 foot avigation heights. Exhibit A, p. 59.

106. Thurston reviewed sales of properties affected by avigation easements with analysis of sale prices; the language of the avigation easements, and the percentage of damages attributable to the various avigation ceiling heights. The supporting data for these sales are included in Thurston's appraisal and were all verified with a party to the transaction or their agent. Exhibit 7 of Exhibit A, pp. 58-71.

107. The sales properties affected by avigation easements included four properties at Lt. Warren Eaton Airport in Chenango County (Exhibit A, pp. 60,61); one property at Buffalo Niagara International Airport in Erie County (Exhibit A, pp. 61, 62); one property at Dansville Municipal Airport in Livingston County (Exhibit A, pp. 62, 64); Genesee County Airport (Exhibit A, pp. 64-66); and a property at Albany International Airport in Albany County (Exhibit A, pp. 66, 67).

108. The sales data that Thurston analyzed supports his conclusions as to the effect of avigation easements on market value.

109. Thurston provided the court with well-researched data and well-reasoned analysis of these sales, which included:

- a) The 2014 sale of property off Meads Pond Road and the 2016 sale of 137 Campbell Road next to Lieutenant Warren Eaton Airport in Chenango County. Thurston interviewed the buyers of the properties, who told him they were aware of the avigation easement and it had no effect on the purchase. R. 224; Exhibit A, pp. 60, 61.

- b) The 2014 sale of a flex building at Buffalo Niagara International Airport in Erie [\*7]County that was fully occupied and mortgaged. The agent that listed the property told Thurston that the buyer considered the property a good investment. R. 225; Exhibit A, pp. 61, 62.
- c) The 2016 sale of 9429 Meter Road near Dansville Municipal Airport in Livingston County. The buyer told Thurston that the easement had no effect on the sale. R. 227; Exhibit A, pp. 62-64.
- d) Three 2009 sales of properties near Genesee County Airport. One of the sales had an avigation easement *below the subject easement height* and a structure was built on the parcel after the sale. R. 227-228; Exhibit A, pp. 64, 65. Here, Thurston provided a matched pair analysis that shows the avigation easement had no effect on the sales. Exhibit A, p. 65.
- e) The 2015 sale of a 38.46 acre parcel for \$5,750,000 at Albany County International Airport. The listing broker told Thurston that the avigation easement had no effect on the sale. R. 230; Exhibit A, pp. 66, 67.

110. Based upon the market data and his interviews with parties to these transactions Thurston concluded that damages attributed to avigation easements below 35 feet range from 60 to 75 percent even though there are multiple examples of improvements that exist in runway protection zones below 35 feet in height. Exhibit A, p. 68.

111. As a result of the acquisition of the avigation easement at the subject property, 24.04 acres of the site is encumbered with an avigation easement with a height of 35 feet or below; 6.05 acres of that affected portion of the site has heights between 0 and 15 feet. Exhibit A, p. 71.

112. In Thurston's analysis he assigned a percentage of damages to the site based upon his analysis of sales affected by avigation easements. The damage percentages, based upon that analysis were:

A	B	C	D
Avigation easement height	Percent of site	Damage amount	Weighted Average (B x C)

0-15 feet 15-35 feet	7.5% 22.3%	75% 60%	5.63% 13.38% 7.02%
35-80 feet	70.20%	10%	
Adjustment for Damage			26.03%

113. Applying this 26 percent adjustment for damages to his before acquisition value of \$10,000 per acre results in a \$7,400 per acre value for the subject property or \$597,000, or \$297,000 in damages. Exhibit A, pp. 71-73.

114. In rebuttal to claimant's Report, and Gardner's statements that sales of properties encumbered by avigation easements could not be located, Thurston has presented additional sales of such properties which included:

- a) The sale and resale of a 2.47 acre parcel at Albany County International Airport encumbered by an avigation easement that is approved for development of a 40,000 square foot building by the Colonie Planning Board. Exhibit B, pp. 22, 23. The project was financed by First National Bank for \$1,815,000. Exhibit B, p. 23. The parties to the transaction advised that the avigation easement did not affect the market value of the property.
- b) The sale of two residential properties within the avigation easement at the Saratoga County Airport, in which the attorneys representing the parties advised that the parties were aware of the easement and that it had no effect on the market value. Exhibit B, pp. 24, 25.
- c) The 2016 sale of a 5.3 acre parcel at the Hancock Air Park in Syracuse purchased by an engineering firm. Exhibit B, p. 26.
- d) The 2015 sale of a 100,000 square foot facility at Elmira Corning Airport for \$3,000,000. Exhibit B, p. 27.
- e) The 2012 sale of .45 acre parcel at Buffalo Niagara International Airport. Exhibit B, p. 28.

115. These sales presented by the County demonstrate there is market data indicating that arm's length sales of properties subject to avigation easements occur, contrary to the claimant's valuation premise, and that they do serve as an indicator of

market value for such properties.

## CONCLUSIONS OF LAW

It is well settled that "[t]he constitutional requirement of just compensation requires that the property owner be indemnified so that he may be put in the same relative position, insofar as this is possible, as if the taking had not occurred" (*Wilmot v State of New York*, 32 NY2d 164, 169 [1973]; see *City of Buffalo v Clement Co.*, 28 NY2d 241, 258 [1971]). The measure of damages is fixed as of the date of the taking (see *Matter of Saratoga Water Servs. v Saratoga County Water Auth.*, 83 NY2d 205, 213-214 [1994]; *Matter of City of Newburgh v Kirchner*, 234 AD2d 364, 365 [1996]; *Gold-Mark 35 Assoc. v State of New York*, 210 AD2d 377, 378 [1994]).

It is equally well established that the measure of just compensation is the fair market value of the property taken (see *Matter of Town of Islip [Mascioli]*, 49 NY2d 354, 360 [1980]; *Matter of Rochester Urban Renewal Agency [Willsea Works]*, 48 NY2d 694, 696 [1979]; *Matter of Breitenstein v State of New York*, 245 AD2d 837, 839 [1997]), which is essentially a question of fact (see e.g. *W.T. Grant Co. v Srogi*, 52 NY2d 496, 510 [1981]). Generally, the "'market value of real property is the amount which one desiring but not compelled to purchase will pay under ordinary conditions to a seller who desires but is not compelled to sell'" (*id.* at 510, quoting *Heiman v Bishop*, 272 NY 83, 86 [1936]; see *Matter of Town of Islip [Mascioli]*, 49 NY2d at 360; *Matter of City of Newburgh v Kirchner*, 234 AD2d at 365; *Matter of Meditrust v Fahey*, 226 AD2d 999, 1000-1001 [1996]; *Gold-Mark 35 Assoc. v State of New York*, 210 AD2d at 378; *Matter of Long Is. Light. Co. v Assessor for Town of Brookhaven*, 202 AD2d 32, 36-37 [1994], *lv denied* 85 NY2d 809 [1995]). "In the determination of what is just compensation, there is no single element which is controlling, and it is proper to consider all factors indicative of the value of the property. The court must consider those things which will be present in the minds of a willing buyer and a willing seller" (*Matter of City of New York*, 69 AD2d 111, 114 [1979], *affd* [\*8]59 NY2d 57 [1983], quoting 19 NY Jur, Eminent Domain, § 140 at 353).

The County of Warren, having acquired 3.86 acres of vacant land in fee simple from claimant and an avigation easement over the remaining 80.72 acres of the subject property, must "compensate the owner so that he [or she] may be put in the same relative position, insofar as this is possible, as if the taking had not occurred" (*Matter of Eagle Cr. Land Resources, LLC [Woodstone Lake Dev., LLC]*, 149 AD3d 1324, 1325 [3d Dept. 2017], quoting *Matter of City of New York [Kaiser Woodcraft Corp.]*, 11 NY3d 353, 359 [2008] [internal quotation marks and citation omitted]; see US Const, 5th Amend; NY Const, art. I, § 7 [a]).

Where "there is a partial taking of real property, 'the measure of damages is the difference between the value of the whole before the taking and the value of the remainder after the taking'" (*Matter of County of Orange v Monroe Bakertown Rd. Realty, Inc.*, 130 AD3d 823, 825 [2016], quoting *Matter of Metropolitan Transp. Auth. [Washed Aggregate Resources, Inc.]*, 102 AD3d 787, 789 [2013]; accord *Matter of Eagle Cr. Land Resources, LLC [Woodstone Lake Dev., LLC]*, 149 AD3d at 1326).

For the reasons stated herein, claimant was fairly compensated for the acquisition of the fee interest and avigation easement, as the amount paid by the County of Warren actually exceeded the damages to the property, as is indicated by the market value of the property prior to the taking minus the market value of the property after the taking (see *Matter of Eagle Cr. Land Resources, LLC [Woodstone Lake Dev., LLC]*, 149 AD3d at 1325; *Matter of City of New York [Kaiser Woodcraft Corp.]*, 11 NY3d at 359).

Furthermore, the amount paid by the County of Warren reflects the fair market value of the property in its highest and best use on the date of the taking, "regardless of whether the property is being put to such use at the time" (*Matter of Eagle Cr. Land Resources, LLC [Woodstone Lake Dev., LLC]*, 149 AD3d at 1326, quoting *Matter of Queens W. Dev. Corp. [Nixbot Realty Assoc.]*, 139 AD3d 863, 865 [2016] [internal quotation marks and citation omitted], *lv denied* 28 NY3d 901 [2016]).

In determining the proper amount of damages in the trial of this proceeding, "the trial court [has exercised its] broad discretion in that it can reject expert testimony and

arrive at a determination of value that is either within the range of expert testimony or supported by other evidence and adequately explained by the court" (*Matter of Albany County Airport Auth. [Buhrmaster]*, 265 AD2d 720, 722 [1999], *lv denied* 94 NY2d 758 [2000]; *see ARC Machining & Plating v Dimmick*, 238 AD2d 849, 850 [1997]).

In determining damages for the imposition of height restrictions imposed by avigation easements, the trial court is required to review and interpret the effects of those regulations (*3775 Genesee St. v State of New York*, 99 Misc 2d 59, 71 [Ct Cl, 1979]).

It is within the purview of the trial court to examine the unique features of the subject property and determine whether the actual avigation easement prevents further development of the parcel (*see 3775 Genesee St. v State of New York*, 99 Misc 2d at 72 ["The more important issue is whether the highest and best use was for a two story structure, and whether this use has been curtailed by the easement. As already indicated, a second floor would fit within the terms of the easement."]).

The claimant's valuation presented at trial is found unpersuasive, as it is based upon premises that are contradicted by the actual avigation easement documents and the market data of [\*9]similar properties subject to avigation easements presented by the County (*see Matter of Eagle Cr. Land Resources, LLC [Woodstone Lake Dev., LLC]*, 149 AD3d at 1330).

Claimant's conclusions of value are rejected by the Court, as they are based upon conclusory assumptions and premises contradicted by the actual record. As a matter of evidentiary law, the trier of fact must have a factual foundation presented to it upon which the expert bases their opinion in order to evaluate the worth of that opinion (*see Caton v Doug Urban Constr. Co.*, 65 NY2d 909, 911 [1985]; *Wiebert v Hanan*, 202 NY 328, 331 [1911]; *Jerome Prince, Richardson on Evidence* § 7-309 [Farrell 11th ed 1995]).

Claimant's appraisal testimony was not based upon sound hypothesis, and as such it lacks probative value and must be rejected (*see Matter of Snyder v Lawrence*

*Warehouse Co.*, 28 AD2d 589, 590 [1967]).

Claimant's expert did not include a detailed analysis of the zoning history of the subject parcel, and neglected significant developments and highly relevant statements before the Town Planning Board. The status of zoning and approvals affects the market value of this property and, where a report ignores such factors, it should be rejected (*cf. Matter of Town of Islip [Mascioli]*, 49 NY2d 354, 360 [1980]).

The Court's determination of damages is based solely upon the record before the Court, and the Court's determination as to the extent of the avigation easement's diminution in the market value of the land supports the within award of damages (*see 3775 Genesee St. v State of New York*, 99 Misc 2d at 72; , *Kupster Realty Corp. v State of New York*, 93 Misc 2d 843, 852 [Ct Cl 1978]), crediting Thurston's assessment of damages.

This Court's determination of damages is "based upon . . . the opinion of an experienced, knowledgeable expert [and] on actual market data showing a reduction in the value of the remainder as a result of the appropriation" (*Matter of Metropolitan Transp. Auth. [Washed Aggregate Resources, Inc.]*, 102 AD3d at 793 [internal quotation marks omitted]; [\*see Matter of Board of Commr. of Great Neck Park Dist. of Town of N. Hempstead v Kings Point Hgts., LLC\*, 74 AD3d 804](#), 805 [2010]; *Zappavigna v State of New York*, 186 AD2d 557, 560 [1992]). In the instant proceeding, the County has presented an experienced, knowledgeable expert with actual and more credible market data supporting his conclusions.

To the extent that any conclusions of either experts may have been withdrawn during the course of trial the same have not been relied upon in the Court's reaching of this decision.

The Court accepts the County's valuation as being reasonable and based upon a detailed, logical analysis of the market data derived from sales of similar properties subject to avigation easements, crediting Thurston's assessment of damages. The record before this Court supports the conclusion that the amount of damages from the

fee taking of claimant's parcel and the effect of the avigation easement results in damages in the amount of \$297,000.

Based upon the findings of fact and conclusions of law reached herein, it is hereby

**ORDERED AND ADJUDGED** that the verified claim of Forest Enterprises Management, Inc. dated September 2, 2015 is denied, and it is further,

**ORDERED AND ADJUDGED** that the fee taking of claimant's parcel and the effect of the avigation easement has resulted in damages in the amount of \$297,000, and it is further

**ORDERED** that Judgment shall be prepared and entered by the condemnor/defendant in accordance herewith, and it is further

**ORDERED** that any relief not specifically addressed herein has nonetheless been considered and is expressly denied and any pending motions are hereby resolved in a manner consistent with this Decision, Order and Judgment.

The original of this Decision, Order and Judgment has been filed by the Court. Counsel for condemnor/defendant is hereby directed to promptly obtain a filed copy of the Decision, Order and Judgment for service with notice of entry upon claimant in accordance with CPLR 5513.

ENTER:

Dated: August 16, 2018

Lake George, NY

*s/*\_\_\_\_\_

ROBERT J. MULLER, J.S.C.

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