

MEMORANDUM

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE CARMEN R. VELASQUEZ IAS PART 38
Justice

-----x
In the Matter of the Application of the,
METROPOLITAN TRANSPORTATION
AUTHORITY relative to acquiring title in
fee simple absolute to certain real
property, required for the

FLUSHING MAIN STREET IMPROVEMENTS PROJECT
BLOCK 5037, LOT 57 (A/K/A 40-36 - 40-38

Index No. 910/15
DECISION AFTER
TRIAL

MAIN STREET) (FEE).

As said property is shown on the current
Tax Map of the Borough of Queens, City and
State of New York/

-----x
Following a non-jury trial held in this Part, based upon a
preponderance of the credible evidence, this court finds and
determines as follows:

The claimant, Aron Forem, commenced this proceeding pursuant
to the Eminent Domain Procedure Law to determine the amount of
compensation to be paid to him for property seized by the
condemnor, the Metropolitan Transportation Authority ("MTA").
Title to the subject property, located at 40-36/38 Main Street in
Flushing, Queens, vested in the MTA on June 12, 2015. The
property was a one-story retail building and was leased as a
Chinese supermarket, operated by Ou Jiang City Supermarket, Inc.,

for a period of ten years from April 15, 2013 through April 30, 2023. It has a land area of 2,601 square feet. The annual base rent for the first two years of the lease was \$540,000.00, or \$45,000.00 per month, which is the equivalent of \$227.37 per square foot. The rent increased 4% every two years. At the time of the taking, the monthly base rent was \$46,800.00, or \$561,600.99 annually, which is the equivalent of \$236.46 per square foot.

The property was acquired for the purpose of constructing improvements to the Long Island Rail Road station in Flushing, Queens as part of its Main Street Improvements Project. The project includes installation of one elevator to serve the eastbound platform of the station and one elevator to serve the westbound platform. The project also includes a new ticket office on Main Street, new canopies, new stairs and new platform improvements. The claimant seeks an award of \$15,430,000.00 for the taking of the property. The MTA argues that the property is valued at the amount of \$5,100,000.00.

At the beginning of the trial, the court ruled that the land residual approach was not an appropriate method to determine the value of the property, and those parts of the claimant's appraisal dealing with this approach were stricken.

It is well settled that an owner whose property has been taken in condemnation is entitled to just compensation. (U.S.

Const., 5th Amend; N.Y. Const., Art. I, § 7; *Matter of State of New York (KKS Props. LLC)*, 119 AD3d 1033 [3d Dept 2014].) The purpose is to put the property owner in the same relative position as if the taking had not occurred. (*Matter of Queens W. Dev. Corp. [Nixbot Realty Assocs.]*, 139 AD3d 863, 865 [2d Dept 2016].)

The measure of the compensation is generally the fair market value of the property at the time of the property's appropriation. (*County of Erie v Fridenberg*, 221 NY 389 [1917].) Fair market value has been interpreted to mean the price that a willing buyer would have paid a willing seller for the highest and best use of the property. (*City of New York v Mobil Oil Corp.*, 12 AD3d 77, 81 [2d Dept 2004].) Indeed, "an owner whose property is acquired by condemnation is not limited in compensation to the use which he made of his property but is entitled to receive its market value 'based on the most advantageous use.'" (*St. Agnes Cemetery v State of N.Y.*, 3 NY2d 37, 41 [1957].) To demonstrate highest and best use, it must be shown that the use of the property is legally permissible, that the use is physically possible, that the use is financially feasible and the use is maximally productive. (*Matter of Acquisition of Real Property by the Vil. of Marathon*, 174 Misc 2d 800, 804 [Sup Ct, Cortland County 1997].) The claimant must also show that there is a reasonable probability that the property

could have been put to that highest and best use within the reasonably near future. (*Matter of the City of New York (Broadway Cary Corp.)*, 34 NY2d 535, 536 [1974].)

In determining an award to an owner of the property, the findings must be within the range of the expert testimony or be supported by other evidence and adequately explained by the court. (*Matter of City of N.Y. v Reiss*, 55 NY2d 885, 886 [1982].)

At the time of the taking, the property was located in a growing and densely populated area in downtown Flushing. As noted by Eric Haims, the claimant's appraiser, the neighborhood has grown to become the city's second-largest Chinatown. In addition, he stated that this area is the fourth-largest business district in New York City, with over 2,100 businesses. According to Mr. Haims, the area is "a center of commerce, transportation and finance with expensive and sought after commercial and residential properties more similar to Manhattan than to other outer borough neighborhoods." The MTA's appraiser, Matthew Guzowski, also noted that downtown Flushing is the transportation hub of northeastern Queens, with 23 bus lines transporting 75,000 persons daily to other locations in Queens and Manhattan.

Both sides used the income capitalization approach to value the property. The MTA also used the sales comparison approach. Under the income capitalization approach, an appraiser subtracts

annual expenses of the property from the annual effective gross income to obtain the property's annual net operating income. The present value of that annual net operating income is calculated by dividing it by a capitalization rate appropriate to the building type, location and date of vesting. (see *TKGSM-NY, LLC v New York State Urban Dev. Corp.*, 62 Misc 3d 721 [Sup Ct, Kings County 2018].)

Mr. Haims determined that the retail market rent at the date of the taking was \$250 per square foot of Gross Building Area of 2,375 square foot or \$593,750 per annum. Mr. Haims considered the lease for the subject property as well as the adjusted rental rates for five other comparable rentals. Mr. Haims also deducted 5% from the rental income for vacancy and credit loss to arrive at the Effective Gross Income of \$564,063.00. Mr. Haims then determined that the operating expenses was \$171,652.00 for the 12-month period after the taking. Mr. Haims reviewed the real estate taxes for the base year, the insurances expenses for the property and management fees as well as legal and professional fees. The Net Operating Income, thus, according to Mr. Haims, was \$392,411.00.

Mr. Haims then applied a capitalization rate ("cap rate") of 2.5% to the Net Operating Income. The cap rate refers to the ratio of the property's value to its rate of return. In determining the cap rate, Mr. Haims noted that the adjoining

property, at 40-34 Main Street, had a cap rate of 2.39% a few months after the June 2015 taking. Mr. Haims believed that this sale was the most relevant to be considered. This property was a two-story retail building with 4,000 square feet of gross building area. It had the same zoning as the subject property with a similar amount of development rights. Mr. Haims explained that this adjoining property had a net operating income of \$251,332.00 and sold for \$10,500,000.00 on October 30, 2015. The fact that the sale occurred four months after the subject taking is of no moment. As stated in the Uniform Standards of Professional Appraisal Practice, "data subsequent to the effective date may be considered in developing a retrospective value as a conformation of trends that would reasonably be considered by a buyer or seller as of that date." Mr. Haims stated that "[a]n appraiser rarely has an opportunity to have the property next door sell and sell so contemporaneously to the actual date of value that in this case, the appraiser needs to be aware of the sale ... To overlook it and not consider it at all I think is wrong." The court agrees with Mr. Haims' view and believes such information is relevant and must be considered. Additionally, Mr. Haims also considered five other sales of retail buildings in Queens which occurred the year before the taking. The cap rates for those sales ranged from 2.39% to 5.80%. According to Mr. Haims, the 2.5% cap rate includes the

developmental potential of the property.

Mr. Haims further opined that there was a direct correlation between interest rates and cap rates. Mr. Haims noted that at the time of the taking, the rates of return were 2.39% on 10-year U.S. Treasury notes, 3.10% on 30-year U.S. Treasury bonds and 4.16% on Aaa bonds. He testified that when interest rates are low, cap rates are low as well. Mr. Haims opined that this would support a cap rate of 2.5%.

Mr. Guzowski applied a cap rate of 6.5%. The court finds that the credible evidence supports Mr. Haims' cap rate of 2.5%. One way Mr. Guzowski determined his rate was through the band of investment method. This method considers mortgage financing rates, yield rates, appreciation and amortization. Mr. Guzowski selected an appreciation rate of 1% per year for 10 years. However, as noted earlier, the area of downtown Flushing is a booming area with significant development potential, and as Mr. Haims noted, the growth of the downtown Flushing retail market would continue to increase. Moreover, Mr. Haims explained that this 1% appreciation is not consistent with the trends reported in numerous surveys. He also explained that the 1% rate is less than New York City's Consumer Price Index, stating that the Consumer Price Index does not really reflect real estate in downtown Flushing. Indeed, Mr. Haims explained that it is important to look at the real estate market in downtown Flushing

in recent years.

Moreover, Mr. Guzowski conducted market surveys and relied on, *inter alia*, The Price Waterhouse Coopers National Strip Shopping Center Market Report for the first quarter of 2015. However, his reliance on this report is misplaced. Although the report indicated cap rates in the range of 5%-10%, the property herein is not a strip shopping center. The subject property is a single retail store and not part of a strip shopping center commonly found in suburban areas that provides parking.

Additionally, the reliance on the Cushman & Wakefield Property Sales Reports for Queens is similarly misplaced. The reports indicated the average cap rate of 5.09% for the first half of 2015 and 5.51% for the second half of 2015. These cap rates, though, were for the entire borough of Queens and did not focus on specific neighborhoods.

Mr. Guzowski also used the Local Market Transaction Survey to determine the cap rate. This survey listed six sales but only two were located in the Flushing area and none in downtown Flushing, where the subject property is located. Even the Flushing sales, though, were not truly comparable because, as Mr. Haims explained, the property is "located in an area that does not have the same redevelopment potential as does the subject property." He further stated that the property "does not produce the pedestrian traffic that is available at the subject

property.”

Another method Mr. Guzowski used was the comparable sales approach, and he valued the property at \$5,000,000.00 under this method. (Mr. Haims did not use this methodology.) Under this method, the appraiser finds sales that are similar to the subject property and then adjusts for differences such as location, physical characteristics and economic characteristics. (*Matter of Excelsior v Assessor, Town of Amherst*, 51 Misc 3d 1210[a][Sup Ct, Erie County 2016].) However, his comparable sales are not from a time period near the taking. Although Mr. Guzowski identified five comparable building sales, the closest one is from January 28, 2013. Mr. Guzowski admitted that the sales he found were the most recent sales. Thus, the sales he selected are too remote in time from the date of the taking to constitute a viable sales comparison. In addition, the court notes that in at least two of these sales, there was a significant time gap sale between the signing of the contract and the actual sale. Furthermore, some of these sales were not located in downtown Flushing, and, thus, are not truly comparable. Mr. Haims explained that he could not use the comparable sales approach because he could only find one sale comparable to the subject property. Moreover, as was noted in the rebuttal appraisal by Mr. Haims, some of these properties contained two or more tenants and some did not have a usable basement.

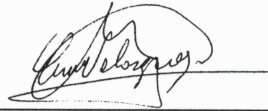
The court, thus, finds the testimony of Mr. Haims to be highly credible and concludes, based upon the all the testimony and evidence presented, that claimant is entitled to compensation in the amount of \$15,430,000.00.

Accordingly, it is

ORDERED, that the Condemnor pay as compensation to the claimant the amount of \$15,430,000.00, with interest thereon from the date of the taking, June 12, 2015, less any amounts previously paid, together with costs and allowances as provided by law.

This determination constitutes the decision and order of the court.

Date: April 30, 2021



CARMEN R. VELASQUEZ, J.S.C.