SHORT FORM ORDER

# SUPREME COURT - STATE OF NEW YORK

Present:

**HON. THOMAS A. ADAMS,**
Supreme Court Justice

TRIAL/IAS, PART 25
NASSAU COUNTY

In the Matter of the Application of the CITY OF LONG BEACH,

Petitioner(s),

INDEX NO.: 14660/05

To Acquire Real Property Situated Between Broadway and the Boardwalk, Long Beach Boulevard and Riverside Boulevard

-against-

SUN NLF LIMITED PARTNERSHIP, SINCLAIR HABERMAN, LOUIS BOMBART, STEVE SILVERBERG, CHARLES ZARUCKI, LOU BOMBART, IZAK FREMD, THERESA DURR, ANN COHEN, FAYE LEWSON, SEYMORE ADELMAN, ROBERT GOLDENBERG, PEARL TEPPERMAN, NEW YORK STATE DEPARTMENT OF TAXATION & FINANCE and NASSAU COUNTY DEPARTMENT OF SOCIAL SERVICES,

Respondent(s).

## Memorandum After Trial

The trial of this matter was held on July 12, 2011 and July 13, 2011. The court conducted the required site visit pursuant to Eminent Domain Procedure Law (EDPL) on July 14, 2011.

This action involves the valuation of claimants' property that is part of real property acquired by the City of Long Beach for urban renewal purposes.

The date of the taking in this case is April 18, 2006. The claimants' property is part of a super block that is bounded on Broadway on the north; Riverside Boulevard on the west; the Boardwalk on the south and Long Beach Boulevard on the east.

The claimants have a 100% ownership interest in fee simple absolute in five parcels in the "superblock" (see this Court's

prior short form order in this action dated March 22, 2010). The superblock consists of 263,350 sq. ft. Claimants own 34,550 sq. ft. spread over five parcels – .079 acres out of six acres, and 34% of the ocean front portion. The Court has adopted use of the word "superblock" to describe the lot in which the subject parcels are located only because that is the nomenclature used by the litigants. To date, the so called "superblock" still remains a vacant, empty lot enclosed by a chainlink fence.

The City claims the five parcels of property are worth $3,005,000 as of April 18, 2006, the date of the taking.

Parcel 3 was a 10,000 sq. ft. parcel with 100' of frontage on Long Beach Boulevard. It was non-contiguous with the claimants' other parcels. It had no frontage on the Boardwalk. The City valued this parcel at $940,000.

Parcel 4 was an 11,530 sq. ft. parcel with 92' of frontage on Riverside Boulevard and 120' of frontage on the Boardwalk. Parcel 4 was contiguous with Parcel 5, non-contiguous with claimants' other parcels. The City valued this parcel at $1,020,000.

Parcel 5 was an 8,240 sft. parcel with no street frontage. It had 80' of frontage on the Boardwalk. Parcel 5 was contiguous with Parcel 4, non-contiguous with claimants' other properties. Together, Parcels 4 and 5 aggregate 19,570 sq. ft. The City valued Parcel 5 at $850,000.

Parcel 8 was a 2,210 sq. ft. substandard lot with no frontage on a street and 20' of frontage on the Boardwalk. Parcel 8 was non-contiguous with claimants' other parcels. Parcel 8 had no street frontage. They City valued Parcel 8 at $120,000.

Parcel 12 was a 2,570 sq. ft. substandard parcel with no frontage on a street and 20' of frontage on the Boardwalk. Parcel 12 was non-contiguous with claimants' other parcels. The City valued Parcel 12 at $ 75,000.

Each of the parcels was vacant, unimproved parcels on April 18, 2006. Each of the parcels was included in the City's Urban Renewal Plan and designated for acquisition in the plan.

On April 18, 2006, the City acquired the six-acre superblock, including the five parcels owned by claimants, and flipped it to a private developer for a minimum price of $46.6 million pursuant to an open-ended contract. Claimants assert the property was worth $11.1 million as of April 18, 2006, the vesting date. Claimants also seek $1,184,220 in "pre-taking damages."

In arriving at its valuation, the City contends that the sole compensable property interest as of the date of the taking was the four (4) non-contiguous lots owned by the claimants. The claimants argue that the valuation must be determined in the context of the superblock. Claimants assert the four non-contiguous parcels should be valued based on the end result of the government project that required the condemnation and assemblage of a single 263,500 sq. ft. parcel under one owner.

The City rejects claimants' position that they were entitled to valuation based on assemblage. The question of whether there is a reasonable probability of an assemblage is a question of fact to be determined by the trial court based on a fair interpretation of the evidence. *Rodman v State of New York* 109 AD2d 737. Claimants argue that the measure of damages should be the fair market value of the condemned property at its highest and best use on the date of the taking. Claimants further argue that even if they were not utilizing the property to their fullest potential at the date of the taking, they would be entitled to the highest and best available use if there was a reasonable probability that the condemned property would be combined with other lots in the near future. *Matter of Metropolitan Transit Authority*, 86 AD3d 314.

The claimants presented detailed testimony by their appraiser with accompanying exhibits to establish the value based on the evidence to support their argument that the "assemblage" was the highest and best use of the condemned land and that condemnation was reasonably probable without condemnation. To put the issue in context, the question is whether the claimants' property was "probably within the scope of the project from the time the government was committed to it. If they were not, but were merely adjacent lands, the subsequent enlargement of the project to include them ought not to deprive the respondents of the value added in the meantime by the proximity of the improvement. If, on

the other hand, they were, the government ought not to pay any increase in value arising from the known fact that the lands probably would be condemned." *See United States v Miller*, 317 U.S. 369 at p. 377.

The claimants offered evidence at trial to establish that the City has been committed to lawful development of the "superblock site" for thirty years or more. Claimants argue that the private owners of the "superblock" parcels could have facilitated an "assembly" without the City's involvement.

In 1998 the City demapped Shore Road. The idea of demapping Shore Road began as early as 1988.

The City offered into evidence an appraisal report that attempted to establish that the claimants' land could only support one or two single-family or two-family residential homes and was worth only $3 million as of April 18, 2006. Claimants argue the City's appraiser did not consider thirty years of private and public efforts to construct mixed-use, high density, hotels and condominiums on the site; the regulatory prohibitions against construction; and the City's formal demapping of the internal street (Shore Road), to allow private assemblage of the superblock. Claimants contend that the demapping of Shore Road rendered claimants' internal lots isolated and cut off from ingress and egress so that single-family housing had become an impossibility approximately ten years before the seizure. Testimony indicates that when the claimants acquired title to the property in 1979-1980 the area was not what one would categorize as being "super," but rather, blighted and run down. At the date of the taking the subject land or block was still vacant, but all parties agree the neighborhood has improved. The City's valuation of $3 million was one-third less than the $4.1 million value set forth in a 1987 executory contract of sale for the subject parcels. Claimants question how the land could have declined in value between 1987 and 2006, while real estate prices increased significantly on Long Island. Claimants contend this is not a case where the condemning authority, by its act of condemnation, created an enhanced value. Claimants assert no owner could reasonably be expected to construct a single-family home on the subject lots. Claimants suggest that the City's Urban Renewal Plan passed in 2002 did not create the

$4.1 million value set forth in the executory contract, but rather was intrinsic to the land itself, separate and apart from any condemnation planned 15 years later. Simply put, the claimants' position is that the City's Urban Renewal Plan passed in 2002 did not "create" the superblock, but rather the superblock had existed for decades before 2002 as a result of attempts by private individuals to develop the subject property. Despite the claimants' learned and erudite valuation, the superblock is still as of this date vacant and undeveloped. The proposed superblock "finished product" as depicted on claimants' Exhibit 48 is a "pie in the sky" rendition that is more fantasy than reality. The extensive documentary evidence and testimony establishes that the creation of the "mass" that comprises the superblock was due neither to only the City nor private developers, but rather the efforts of the City and the private sector to achieve a goal that has still eluded them. The record establishes that the superblock was neither a "windfall" created by government intervention nor a project that could have been accomplished without private sector cooperation.

The City's appraiser used contradictory approaches in appraisal reports written for different parcels on the superblock. When the City appraiser valued Parcel 14, known as the Shore Road roadbed, he valued it as a contributory portion of the entire block - using an assemblage analysis - the same approach used by the claimants' appraiser to value their land. Claimants argue that the City appraised Parcel 14 to support the City's sale to Philips International. There, the claimants contend the City wanted the highest valuation possible, to get the highest price possible from Philips. But in contrast, for claimants' land, the City wanted the lowest price possible, to minimize the amount owed to claimants. So where the City wanted a high value, its appraiser used an assemblage theory. And where the City wanted a low value, it ignored assemblage theory. On cross examination the City appraiser acknowledged that he had used two, totally contradicting approaches to value two different portions of the superblock. The City appraiser used an assemblage analysis for the roadbed even though condemnation had not yet happened. Although Parcel 14 is only 42,000 sq. ft., he opined that the parcel's highest and best use was development as an assembled portion of the superblock - the very approach that he refused to apply in valuing claimants' land.

The City's report was issued seven months before the date of vesting. He stated then that the valuation of the roadbed parcel (No. 14), as a portion of the superblock, is "the current market value of the fee simple interest in the subject property, effective as of the date of the preparation of this report (September 15, 2005)." Report at p. 2 (Exh. 70). Therefore, claimants argue that the City's valuation of the roadbed parcel as a contributory portion of the superblock, seven months before the date of Vesting, is further proof that the claimants' methodology is correct. In short, the City used contradicting approaches to value two different portions of the superblock, in one instance where the City desired a high valuation, and in the other instance where the City wanted a low valuation. The Court also notes that in his September 2005 report when the appraiser knew that the City would be receiving payment for the land in question, he described an "escalating" and "accelerating" real estate market in Long Beach. However, when he appraised the claimants' land just five months later, he did not describe Long Beach with such enthusiasm or mention the "still accelerating market" (Tr. 263-265) to categorize the area.

The City argues that the claimants' appraiser failed to take into account that two of the parcels were virtually unbuildable (Lots 8 and 12). Also, the claimants' appraiser appraised their property as if the claimants could build mixed-use structures as a matter of right. They could not. The City asserts the claimants' appraiser does not take into account that Parcels 4 and 5, 3, 8 and 23 are non-contiguous with each other. The City argues that claimants' parcels should not have been valued as part of a single unit. Although the claimants had no ownership interest with the other parcels that made up the superblock, the City's argument that the claimants showed no "unity of use" between the claimants' parcels and the other parcels making up the superblock is misplaced.

Claimants' conclusion of market value is based on the assumption that 325 condominium units and 100 hotel rooms would be built on a fully-assembled 263,350 sq. ft. parcel. This supposition is grounded on the development contract with a designated developer that capped the number of units and hotel rooms the developer could seek to build at these limits. It was

contemplated that a first-class hotel would be built on the superblock. Claimants' appraiser used as a comparison the Allegra Hotel, located on West Broadway, and adjacent to the Boardwalk. At the time of the sale of the Allegra, there was a nursing home business at the site operating 170 rooms. Claimants' appraiser failed to clarify what part of the value was attributed to the nursing home business that was shut down. Nor did the claimants' appraiser factor in the value to the non-conforming use of the Allegra when comparing it to the subject property. The claimants' expert offered no proof of architectural plans, approved site plans, building permit applications, construction bids, environmental clearances, electric and water availability, and any other indicia of a firm development project. The contract relied upon by claimants' appraiser was amended no less than four times from its 2001 execution to October of 2006.

This Court notes that the entire superblock remains vacant and unimproved. The project, as conceived by the City, has not progressed to anything remotely resembling a formal approved project. Claimants' appraiser's view as to the market value of a completed superblock from which he extrapolates a vicarious land value for claimants' four non-contiguous parcels is not based on fully determined structures to be built, a set number of units and/or rooms; no completed architect plans were submitted; no bids for construction costs were referenced. In this regard, the claimants' appraisal can be considered to be speculative and overly generous in their evaluation.

Shore Road, the 42,000 sq. ft. parcel running through the center of the superblock, was demapped by the City and never part of the claimants' property, which ended at the beginning of the street line. Claimants' appraiser states that his conclusion as to market value is based on 17% of the overall $65 million value of the superblock. The City argues that claimants are only entitled to a valuation based on a 13% ownership factor, were it to concede on the assemblage theory (which it does not) rather than the 17% used by the claimants' appraiser. The claimants' appraiser indicated that in valuing claimants' land as a contributory portion of the assembled superblock, he considered claimants' allocable interest in the Shore Road roadbed to the center line, in light of claimants' easement rights that had been divested by the

discontinuation and demapping of Shore Road without claimants' consent. He calculated that claimants were entitled to 17% of the overall superblock's value, which credited claimants with 10,200 sq. ft. of roadbed surface added to their 34,550 sq. ft. of deeded land. ( *See* Claimants' Appraisal Report at p. 2, Exh. 4). Claimants' appraiser calculated the entire superblock's value at $70 million - but he did not apply the 17% factor to this figure; instead, he first deducted the $4.5 million that the City was paid for the roadbed - to avoid crediting claimants unfairly for land that the City owned or controlled before any condemnation. Claimants' appraiser next applied the 17% factor to a discounted value of $65.5 million - leading to the $11.1 million figure for claimants' contributory portion. Although the claimants' appraiser discounted the $70 million overall price to remove the roadbed value, the City argues that it was wrong for the claimants to apply a 17% ownership factor, and that a 13% figure should have been used (34,550 sq. ft. owned by claimants, divided into the 263,350 total sq. ft. of all private parcels, yields an ownership percentage of 13%). The City argues that claimants' appraiser should not have added any square footage to claimants' 34,550 sq. ft. of deeded land, because the City owned or controlled the roadbed and claimants' easement rights in the roadbed should be ignored. Accepting the City's position that a discounted 13% factor should be applied would yield a contributory valuation of $9.1 million based on the $70 million total superblock valuation. Applying the 13% factor to the lesser $65.5 million valuation (which excludes the roadbed value controlled by the City before condemnation) would yield a contributory valuation of $8.515 million.

On November 7, 2001, the City contracted with Philips International d/b/a Janow Associates LLC (Philips) for resale of the land later to be acquired from the claimants and the other owners of the superblock. The closing took place on October 30, 2006. Approximately six months after the vesting date, Philips paid to the City a minimum price of $42,098, 800 plus an additional $4.5 million for the Shore Road roadbed portion of the superblock. The City then paid the claimants $87 per square foot for their portion of the superblock ($3,000,000/ 34,550 sq. ft.=+ $87). The $46,598,800 "minimum" price paid by Philips indicates a square foot price of $178 ($46,588.80/263,350 sq. ft. = $177). Where there is no real market as of the vesting date, the "fair market" value of

the property actually taken may be considered at the nearest date when there was a fair market value. *See In re Board of Water Supply of the City of New York*, 277 NY 452.

There is no formula or set of rules by which just compensation can be realized in dollars and cents. New York courts have generally examined the issue of just compensation in equitable terms and determined that just compensation is the fair market value of the property at the time of the taking. Morever, just compensation is measured by what the property owner has lost, rather than what the condemner has gained. *See Matter of City of New York v Mobil Oil Corporation*, 12 AD3d 77, 78 (internal citations omitted). As stated by Judge Cardozo, in *New York, Ontario v W. Ry Co. v Livingston*, 238 NY 300, 306 "the problem is one of justice between the individual proprietor on the one hand and on the other hand, the Sovereign or the representative of the Sovereign."

In determining an award to an owner of condemned property, the finding must be within the range of the expert's testimony. *See Matter of City of New York (Reiss)*, 55 NY2d 855.

After considering the testimony and appraisals submitted by the learned experts for the respective parties, the executory contract claimants entered into for $4.1 million in 1987 and the executed contract of sale between the City and Philips six months after the vesting date, it is the determination of this Court that the appropriate award should be $7.9 million.

Claimants argue they are entitled to a pre-taking damage of $1,184,221.96 based on the demapping of Shore Road in 1998 and the City's imposition of construction moratoria imposed in August of 1995 and allegedly continuing through the date of taking - April 18, 2006. The alleged direct damages equal the insurance and tax associated costs associated with their ownership of the five taxable lots within the superblock. Claimants characterize this action as a *de facto* taking. The concept of *de facto* taking has traditionally been limited to situations involving a direct invasion of the condemned property or a direct legal restraint on its use. The evidence at trial established neither.

> A *de facto* taking requires a physical entry by the condemnor, a physical ouster of the owner, a legal interference with the physical use, possession or enjoyment of the property or a legal interference with the owner's power of disposition of the property. On the other hand, "condemnation blight" relates to the impact of certain acts upon the value of the subject property. It in no way imports a taking in the constitutional sense, but merely permits of a more realistic valuation of the condemned property in the subsequent *de jure* proceeding. In such a case, compensation shall be based on the value of the property at the time of the taking, as if it had not been subjected to the debilitating effect of a threatened condemnation. *City of Buffalo v J.W. Clement*, 28 NY2d 241, 356, 357.

Strong public policy considerations prohibit a finding of a *de facto* taking in the within action. *City of Buffalo v J.W. Clement, supra*, at pg. 358. In determining the award to the claimants in the sum of $8.5 million, the Court was cognizant of the demapping of Shore Road and any building moratoriums that may have been in effect. The Court will not enhance the award based on the theory of a *de facto* taking. The application for the "pre-taking damages" is denied.

It is the determination of this Court that the award in favor of the claimants shall be $8.5 million.

Settle judgment on notice.

DATED OCT 03 2012

J.S.C.