

SUPREME COURT, SUFFOLK COUNTY

I.A.S. PART 2

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In the Matter of the Application of the
TOWN OF BABYLON, to acquire title to certain
parcels of real property known and described on the
Suffolk County Land and Tax Map as
0100-040.00-002.00-011.00 in connection with the
Town's Urban Renewal Plan for the Revitalization
of Downtown Wyandanch

BY: BIVONA, J.S.C.

DATED: January 14, 2015

INDEX NO. 11/11362

SUBJ

(NESSIEN HOLDING LLC/GIGI & SHAG CORP.,
Claimants)

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Decision After Trial

Introduction

In this eminent domain proceeding presented over a period of two (2) days, the Court was privileged to hear testimony from two (2) expert real estate appraisers and advocacy from experienced and learned counsel.

The real property is situated in the Town of Babylon, hamlet of Wyandanch, and is designated as Suffolk County Tax Map District 0100-Section 040-Block 002-Lot 001.

The real property encompasses 60,984 square feet of land, improved with a multi-tenant shopping center of approximately

19,000 square feet. The zoning is appropriate and there are approximately nine (9) tenants currently in possession. Many are long-term tenants. The Court is acquainted with the area and the subject property. On-site parking is adequate¹; and the railroad station nearby has additional parking spaces available for use.

The Court is presented with the question of determining the value of the subject parcel.

The condemning authority has appraised the value of the subject property at **\$2,950,000**, representing just compensation. The former owner of the real property estimates its fair market value at **\$4,570,000**.

Claimant's only witness was an expert real estate appraiser who prepared two (2) written appraisal reports-the report in chief and a rebuttal report. [Exhibits "O" and "P"].

Title to the subject property vested in the Town of Babylon on July 7, 2011 and was a full taking.

As noted, the property is improved by a neighborhood retail shopping center. The expert concluded that the gross building area measured 21,300 square feet. The zoning of the subject property

¹ The property is a non-conforming pre-existing use. See **Exhibit "O"** p. 26.

is G Industrial.

The witness examined and analyzed the actual income of the property and determined that it reflected fair market rent.

The Town adopted a safe rate of 7.75%, indicating less risk; (thus more value) and agreed by claimant. There is no evidence in the trial record that the rent reflected in the leases or paid by holdover tenants was arbitrarily fixed without regard to market rental value. Nor was there any evidence of self-dealing, a business affiliation between the landlord and tenants, or that the property was owner occupied or any evidence of collusion. **(Matter of Merrick Holding Corp. v. Board of Assessors of the County of Nassau, 45 N.Y.2d 538 (1978).**

As noted in claimant's post-trial memorandum of law the property earned a profit.

As further attested by claimant's expert, the subject property is located in a high crime area and approximately 12.9% of the residential population receives social services assistance. No evidence was adduced at trial regarding any adverse impact such facts had decreasing the market value of the subject property.

In contrast to such testimony is evidence of the excellent location of the subject property which is located adjacent to the

LIRR station, allegedly rated as one of the ten (10) most utilized commuter rail station along the main line.

Moreover, the witness was of the opinion that it is the only strip shopping center in the area and thus without any leasing competition. Based upon the expert's testimony, the Court concludes that the subject property has a history of stabilize revenue and suitable occupancy.

Petitioner-Town moved to dismiss the claim after claimant rested, arguing that claimant's appraisal was not a fee simple absolute appraisal, but was instead an appraisal of a "leased fee" estate because the appraiser had adopted the rent values of the actual leases then in place. However, the Court concludes that in the opinion of the expert the actual lease rents when compared to the market place rents are reflective of the market place. Although it may be argued that there is merit to the leased fee argument as opposed to an analysis of the fee absolute concept, the Court also concludes that such argument addresses the weight to be ascribed to the valuation opinion, and not to its admissibility. Accordingly, the motion to dismiss is denied.

Respondent presented its case in chief through its real estate expert. The parties stipulated to the qualifications of both real

estate appraisers and the court acknowledged each as qualified experts in the field of real property valuation.

As reported by Petitioner condemnor, the subject property had inadequate parking under the "G" Industrial zoning class. The property was a pre-existing, nonconforming use. As such, the building size could never be increased without obtaining a variance. Although the property is located in the hamlet of Wyandanch, the hamlet has been the subject of multiple planning projects throughout the years, including a recent plan published in May 2009. Thus, the Court takes judicial notice of the earlier plans and the current plan, recognizing depressed market values caused by the publicity impact of such plans on the market values and concomitant rents to be charged inflicted upon the subject property at the time of title vesting.

It is undisputed that the exercise of the inherent power of eminent domain, vested in the sovereign, is expressly provided in the Constitution of the State of New York, Article 1, Section 7: "Private property shall not be taken for public use without just compensation." The parties agree as to the highest and best use of the subject parcel on the date of title vesting, as a strip shopping center. Both expert appraisers submitted rebuttal appraisals. The

Town's appraiser amended his report of value during his direct examination: increasing his valuation opinion by \$310,000, and as reflected in the rebuttal appraisal.

As noted, Petitioner argues that claimant's appraiser analyzed a leasehold interest, rather than a fee simple absolute interest. The Court again notes that while claimant's appraiser analyzed the existing rent leases which burdened the subject property on the date of title vesting, he then compared the actual leases to the market and concluded that the contract rents accurately reflect the true market rental rates then existing for the subject property. The appraiser adopted the actual contract rents to determine gross annual income for the subject property as of the date of title vesting, when applying the income approach to valuation. The Court also notes that Petitioner employed the identical appraisal valuation methodology in analyzing the value of the subject property as of the date of title vesting. Considering these facts, the testimony and the written appraisal reports in evidence, the Court concludes that both appraisers valued leased properties as a fee simple estate.

In a post-trial memorandum, Petitioner makes much ado

about the phrase “leased fee interest”² as testified by claimant’s appraiser. In reviewing “**The Appraisal of Real Estate**”, 9th ed., c.1987 **Richard Marchitelli**, MAI, Chairman of Publications, the court notes at chapter 18, page 411 the following text under **MARKET VALUE AND INVESTMENT VALUE**:

“...In this text, the income capitalization approach is applied to estimate the market value of the fee simple or leased fee interest. The conclusions reached reflect the use and analysis of market data, and they should be consistent with the value indications reached with the other valuation approaches.” See also **In Re City of New York**, 39 N.Y.2d 453.

Furthermore, contract rent when similar to market rent does not require an adjustment to a comparable rent for purposes of comparison.

Petitioner’s post-trial memorandum, (p.14) draws attention to the cross-examination testimony of claimant’s appraiser (at pages 59-60). In reviewing that testimony, the Court notes the following colloquy (p.58, line 22):

Q. And in a condemnation proceeding where the property has been acquired in eminent domain it is necessary to appraise the fee

² As termed in the witnesses’s cover letter.

simple absolute interest; isn't that correct?,

A. That is correct.

Q: And in this case you appraised the lease fee estate interest; isn't that also true?

A. No.

Q: So what you did in this case was you appraised the fee simple interest of the property?

A Yes.

In analyzing the common valuation approach employed by both appraisers- (ie) the income approach-the Court is presented with the issue as to whether actual existing contract rents on the date of title vesting are a sufficient evidentiary means upon which the appraiser and the Court could rely and adopt in order to establish the gross income for the subject property. The Court accepts the property owner's proposition and analysis with respect to the selection of gross income indicators.

See **4 Nichols on Eminent Domain (3rd ed.)**, Sackman 2009 chp. 12B.08, pg.12B-45[2].

Petitioner requests that the claimant's rebuttal appraisal should be stricken from the trial record, arguing that it constitutes

an amended appraisal. The Court notes that Petitioner likewise filed a rebuttal appraisal. The Court admitted both the appraisals in chief and rebuttal of each party in evidence. All reports in evidence comply with the uniform rules of the trial court (**22 N.Y.C.R.R. §§202.59-61**).

Petitioner also challenges claimant's selection of the capitalization rate. However, both parties stipulated with the consent of counsel to a capitalization rate of 7.75%.

The crux of the issue revolves around market value conclusions based upon the income capitalization approach buttressed by other appraisal methodologies selected as checks to the primary methodology.

As explained in **Exhibit "O"** (at p. 49) the appraiser for the condemnor analyzed the actual operating history of the subject property, its rent schedule and occupancy history together with its operating costs. The appraiser had received lease data for the subject units. The appraiser analyzed similar properties to develop market estimates as well as income, expenses, vacancy and credit factors for the purpose of determining net operating income (**NOI**). The appraiser then selected a market derived capitalization rate

process to calculate an estimate of value.

Having surveyed the market for comparable rental properties and comparable anchor tenants, the condemnor's expert selected a series of rentals reflecting triple-net leases which in the opinion of the appraiser were comparable. Two (2) were located in the hamlet of Sayville, Town of Islip; one located in the hamlet of Patchogue, another in North Babylon, Brentwood, and South Huntington. All of the comparable leases analyzed were executed in calendar year 2010. No testimony was adduced indicating that any of the comparable retail rental properties were the subject or target of urban renewal plans.

The appraiser selected \$16.50 per square foot of gross leaseable area with significant weight placed on comparable rental #3 located on State Highway Route 110, South Huntington, New York. The Court is well familiar with the site of comparable lease #3. It is located in proximity to a major shopping mall-the Walt Whitman Mall, containing many high profile stores such as Bloomingdale's, Sacks Fifth Avenue, Macy's, Victoria's Secret, and Apple - a concentration of high-end tenants, exceeding more than ten (10) tenants in number. The Court does not consider it a

comparable site as adjusted.

As a check against income analysis and conclusions, the appraiser examined comparable retail building sales concluding that a mean indicator of value settled at \$165.09 per square foot. All of the comparable sales cited were located a significant distance to the East and situated along major highways unlike the subject parcel.

In examining the claimant's appraisal, a value of \$4,260,000 as amended by a rebuttal report, the opinion of value was increased to \$4,570,000. Thus, the Court is confronted with a variance of value conclusions by the litigants.

Petitioner

\$2,950,000-\$3,050,000

Claimant

\$4,260,000-\$4,570,000

Each column reflects the final conclusions recited in the record.

Claimant in its post-trial memorandum urges the Court to reject Petitioner's alleged defective income methodology approach. Such request is denied.

The Court however does agree that the petitioner's comparable sales approach deserves little evidentiary weight.

Having reviewed the evidence and the record, and having further contemplated the testimony of the expert witnesses, the Court concludes that little weight should be ascribed to Petitioner's appraisal report. None of its analyzed comparable leases or rentals are appropriately adjusted to the subject parcel. Its market approach analysis, as above discussed, is rejected.

In considering the claimant's appraisal report, the Court notes that the experts are in agreement as to highest and best use (HBU), methodology selection (income approach) and capitalization rates (7.75%). They disagree as to gross income, effective gross income, and expenses.

As to gross income, claimant's appraiser calculated effective gross income at \$488,230 (p 61), compared to Petitioner's estimate of \$364,231 (p 64).

As to total operating expenses, claimant concluded its estimate at \$340,411 (p 61) whereas Petitioner concluded total expenses at \$132,065 (p 66).

Claimant concluded that the net operating income estimated as of title vesting date at \$340,411. Petitioner Town concluded operating expenses at \$232,166. Their calculations are summarized below:

	<u>Petitioner</u>	<u>Claimant</u>
G. Inc.	364,231	488,230
Tot. Exp.	132,065	147,818
NOI	232,166	340,411

The actual rents demonstrate the highest and best use of the subject property, reflecting its location and proximity to the LIRR station. See **Colombian Service Club, Inc. V. State**, 55 A.D.2d 973, 390 N.Y.S.2d 657 (1977).

The Court rejects the gross income analysis and expense analysis of the Petitioner's appraiser. The actual rents and expenses reflected the truer and more just overall value of the subject property.

Comparing the expense analysis of each appraiser:

	<u>Petitioner</u>	<u>Claimant</u>
CAM	\$2/sq.ft.	\$1/sq.ft.
VACANCY	7%	7%
Res.	.25	.30
Prof. Fees	3.5% EGI	1.95% EGI
etc.		
Total	6.95/sq.ft.	7.75/sq.ft.

The expenses are \$.80 per square foot apart in expense estimates, claimants appraiser using actual expense data (Exhibit

“O”, p.52). The expense conclusion used by Petitioner’s appraiser is selected from the market and adjusted to the subject property. The Court further notes that the Petitioner’s appraiser did not interview the operator of the subject property, nor its tenants. He did not consider the leases existing as of date of title vesting (TR³ dated 12/10/13 p. 124). Nor did he obtain appropriate expense information from tenants in the area near the subject property, as suggested in a noted appraisal treatise “**The Appraisal of Real Estate**”(9th ed.), American Institute of Real Estate Appraisal 1987, p.148.

Therefore, for all of the foregoing reasons, the Court concludes, based upon the range of evidence and the opinions of value, that claimant is awarded the total sum of \$4,260,000 together with interest from the date of title vesting.

Claimant shall submit a proposed Judgment on or before **March 31, 2015** on notice.

This constitutes the DECISION and ORDER of the Court.

Dated: January 14, 2015


HON. JOHN C. BIVONA, J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION

³ Trial Record.