

SCAN

MEMORANDUM

Present: HONORABLE EDWARD G. McCABE
Justice

**STATE OF NEW YORK
SUPREME COURT, NASSAU COUNTY**

In the Matter of the Application of the Town of North Hempstead Community Development Agency for the Acquisition of a Parcel of Land Known as Section 10, Block R, Lot 748 located at 542 Union Avenue, New Cassel, New York, pursuant to the Urban Renewal Plan for the Union Avenue Urban Renewal Area,

Index No. 008610/2003

Trial Date: June 2, 2005

Condemnor,

-against-

Estate of Clarence Jollie,

Condemnee,

DECISION AFTER TRIAL

This proceeding was tried on June 2, 2005 to evaluate the property located at 542 Union Avenue, Westbury, New York 11590 in the unincorporated area of the Town of North Hempstead, Nassau County, New York.

The property is the subject of a condemnation proceeding instituted by the Community Development Agency of the Town of North Hempstead for Urban Renewal, the parcel is known as Section 10, Block R, Lot 748 and zoned as Business B, and is a non-conforming use occupied by a single family residential structure, in below average condition which is surrounded by light industrial uses.

The Condemnee has filed two appraisals in this matter; one, by Appraisal Reports, Inc. and one by Kenneth M. Rossman. The Condemnor filed an appraisal by Accura Home Appraisal.

At trial, the Condemnee offered Kenneth M. Rossman as it's expert witness.

The Rossman Appraisal uses the comparable sales method relying on three comparables located at 427 Union Avenue, Westbury as Comparable 1; 478 Maple Avenue, Westbury, as Comparable 2; and 202 State Street, Westbury as Comparable 3. He also reconciled the comparable relied upon for his evaluation by use of MLS statistical data. He mentions two other properties he considered, but did not use for comparables and therefore, did not adjust or investigate as to the circumstances of the sale.

At trial, the Condemnee tried to use one or both of these properties referred to in the reconciliation, in place of Comparable 3, when it became apparent that Mr. Rossman had made a gross mistake in choosing Comparable 3. This last minute offer of proof was objected to and the Court ruled against the Condemnee.

The Court now considers the comparables Mr Rossman has chosen. Comparable 3 is a vacant land sale. It was not an arms-length transaction, since the Condemnor was the purchaser and it falls within the Urban Renewal area. It is also more than twice the square footage that the appraisal deemed it to be, as the Rossman Appraisal described it as consisting of 9,087 square feet when the correct description is that it consists of 18,555 square feet. Although Mr. Rossman testified he visited all of the sites, he did not notice this difference. Mr. Rossman also

tried to adjust the difference between the subject property and Comparable 3, by adding \$61,240 to the adjusted price by using the square foot adjustments he gave to improved properties. I find this adjustment to be improper.

Comparable 2 is located within the Incorporated Village of Westbury. It is a multi-use property utilized for both residential and commercial purposes. Again, his indicated GBA is apparently understated which affects his adjustment here.

Comparable 1, also located in the Incorporated Village of Westbury, has two free-standing improvements, not one as related in the Rossman Appraisal. It would also appear that Comparable 1 does have on-site parking and his adjustment did not consider this fact.

The Condemnor offers Eric Davidson, an appraiser with the Michael Haberman Associates, Inc. The Condemnor tried to offer the Accura Homes Appraisal through Mr. Davidson, who did not do this appraisal, but reviewed it for the Condemnor. The Court sustained the Condemnee's objection to this testimony, and Mr. Davidson was allowed to testify as an expert with regard to the Rossman Appraisal. Mr. Davidson testified that Mr. Rossman failed to follow USPAP Standards and that the appraisal was done in a careless manner and cannot be relied upon. His testimony bore out the discrepancies developed on cross-examination by the Condemnor's attorney.

The Condemnor moves to strike the Condemnee's appraisal and the testimony of Mr. Rossman as unreliable and not in conformity with the rules for condemnation.

The Condemnor's motion is granted.

The Court now finds itself with no appraisal upon which to base an opinion as to the value of the property in question. The Court finds the answer to this problem in a case entitled, *In the Matter of the County of Suffolk vs. John Kalimnios, et al*, 275 A.D. 2d 455, 712 N.Y.S. 2d 635 (Second Dept., 2000). In this case the Supreme Court rejected the opinions of both parties' experts, but then made an award of money to the Condemnee. In reversing the Supreme Court's decision, the Appellate Division found the Court properly rejected the opinions of both parties' experts as to the value of the lots, but it erred when it rendered an independent conclusion as to the value because the Court's determination must be supported by evidence in the record. When the record is insufficient for the Court to render a determination as to the value of the subject building, a new trial is warranted. See also, *Mally vs. State of New York*, 28 A.D. 2d 1083, 285 N.Y.S. 2d 652 (Fourth Dept., 1967), where the Appellate Division reversed the judgment because the theory of valuation advanced by both experts was erroneous, there was no basis upon which the Court could make an award.

A property owner must be paid just and fair compensation for any property taken by the exercise of the power of Eminent Domain. See, *Yaphank Dev. Co. vs. County of Suffolk*, 203 A.D. 2d 280, 609 N.Y.S. 2d 346 (Second Dept., 1994).

Therefore, the proper remedy is to grant a new trial. The Condemnee is directed to file a new appraisal in proper form. While the Condemnor does not have the burden of proof, the Court's ultimate determination as to the value of the property must be supported by evidence in the record.

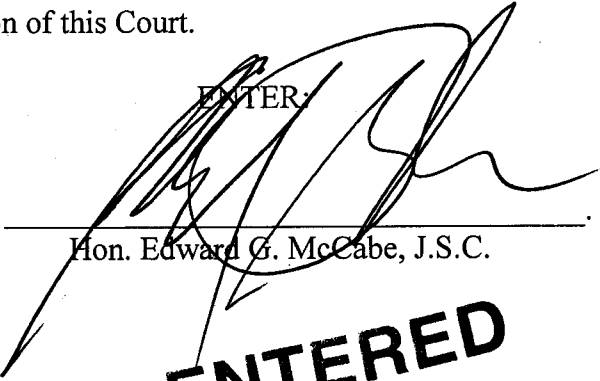
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5.

This matter is set down for Trial on September 12, 2005 at 9:30 a.m.

This constitutes the order and decision of this Court.

Dated: June 17, 2005
Mineola, New York


ENTER:

Hon. Edward G. McCabe, J.S.C.

ENTERED

JUN 30 2005

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**