

To commence the 30 day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ROCKLAND

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In the Matter of the Application of the ROCKLAND COUNTY SEWER DISTRICT NO. 1, to acquire title to certain real property for the project known as the WESTERN RAMAPO SEWER EXTENSION PROJECT

**DECISION/  
ORDER/JUDGMENT**

Relating to the following Tax Map Sections, Blocks and Lots in the Town of Ramapo: 54.06-1-10; 854.06-1-10.1; 854.06-1-10.2; 854.06-1-10.3; 854.06-1-10.4; 854.06-1-10.5; 54.07-1-3; 54.07-1-4; 854.07-1-4.1; 854.07-1-4.2; 854.07-1-4.3; 854.07-1-4.4; 854.07-1-4.5; 854.07-1-4.6

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SPLIT ROCK PARTNERSHIP,  
  
Claimant,

Index No:  
7604/04

-against -

ROCKLAND COUNTY SEWER DISTRICT NO. 1,  
  
Condemnor.

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**LaCAVA, J.**

The trial of this Eminent Domain Procedure Law (EDPL) Article 5 proceeding, challenging the valuation by the Rockland County Sewer District # 1 (RCSD, or Condemnor) of the real property taken by them in Eminent Domain from Split Rock Partnership (Split Rock or Claimants) took place before this Court on July 27, 28, 29, and 30, 2009; on January 19, 20, 21, 22, 25, 26, 27, and 28, 2010; and on March 1 and 2, 2010. The following post-trial papers numbered 1 to 5 were considered in connection with the trial of this matter:

<u>PAPERS</u>	<u>NUMBERED</u>
CLAIMANT'S POST-TRIAL MEMORANDUM OF LAW	1
CLAIMANT'S PROPOSED FINDINGS OF FACT	2
CONDEMNOR'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW	3
CLAIMANT'S REPLY	4
CONDEMNOR'S REPLY	5

The subject property consists of 64 ± acres of vacant land in the Village of Hillburn, Town of Ramapo, Rockland County, New York, more particularly described on the Tax Map of the Village as follows: Section, Block, and Lot Numbers 54.6-1-10, 854.06-1-10.4, 854.06-1-10.5, 54.7-1-4, 854.07-1-4.1, 854.07-1-4.2, 854.07-1-4.3, 854.07-1-4.4, 854.07-1-4.5, and 54.07-1-3. The property was taken in Eminent Domain by a Decision and Order of this Court (Dickerson, J.) dated February 4, 2005, and title to claimant's property vested in Condemnor RCSD on February 15, 2005. Claimant Split Rock timely filed a claim on or about April 9, 2005.

It should be noted that the parties and the Court conducted a site visit to the subject property on January 21, 2010. The several parcels constitute two distinct assemblages, split by the Duke Energy Pipeline (the Duke pipeline), a 100+ foot wide gas transmission line running generally northeast to southwest, which splits the subject into a southern parcel of approximately 29.2 acres and a northern parcel of approximately 35 acres. As set forth in greater detail below, planning concentrated on development of the former (southern) parcel. Topographically, the subject is heavily wooded, and varies in elevation from 300 to 800 feet above sea level, with significant portions consisting of rocky outcroppings and steep slopes. However, in one portion of the subject, on the southern parcel close to the pipeline, there is a plateau measuring approximately 15-acres which, claimant alleges, is suitable for development. The property's elevation above the surrounding area (including the Route 17/I-87 North and South/I-287 East and South intersections) affords expansive views, and, if developed, would, according to claimant, supply a high degree of visibility for an office or commercial structure constructed thereon.

The property was also previously the subject of a partial taking by New York State Department of Transportation on June 19, 1991 (the DOT taking), in order to alter the former southbound Route 17 access enjoyed by the subject, preparatory to the construction of southbound I-287 into New Jersey. In a Decision and Order (Patti, J.), dated December 18, 1998, the Court of Claims granted a taking by the State of the former access by the subject to Route 17 by way of Maltbie Avenue, as well as all access along

1,500 ± feet of Route 17 north from the New York-New Jersey state line, with the creation of access between the subject and Route 17 by way of a cul-de-sac constructed by the State. The taking thus affected only the southerly parcel, on its eastern side. That Court also specifically found that claimant had established a reasonable probability that a zoning change for the subject would have been granted; that claimant's failure to previously pursue the zoning change, or the necessary permits, prior to the appropriation, was reasonable under all of the circumstances; that the change in zoning would have allowed claimant to develop the subject as an office complex; and that such development constitutes the highest and best use for the property both before and after that taking<sup>1</sup>.

Based upon the credible evidence adduced at the trial, and upon consideration of the arguments of respective counsel, and the post trial submissions, the Court makes the following findings of fact and conclusions of law:

#### **FINDINGS OF FACT**

Claimant's first witness was Thomas Williams, an attorney licensed to practice law in the states of New York and New Jersey, who was one of the partners in claimant Split Rock and who had also served as its attorney. He testified that the property consisted of some 65 to 66 acres, and that formerly there was a roadway named Maltbie Avenue used to access the property from Route 17. Another partner and licensed surveyor, Peter Kirsch, prepared a survey (dated August 1, 1988) of the Split Rock property. The survey includes an area designated as "proposed development". Kirsch described the topography of the property generally as hilly in some parts, but also containing some relatively level areas. He noted in particular with regard to the 15 acre area where the proposed development was to be located, that the terrain was fairly level. Access to the property, prior to the DOT taking, was by Route 17 South, along the eastern edge of the property, and thereafter via Maltbie Avenue, which ran in a generally east-to-west direction into the property and up to the proposed development area. After the DOT taking, access from Route 17 was required to be made by way of a newly State constructed cul-de-sac.

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<sup>1</sup>The Court also notes that, on appeal, the Appellate Division, Second Department modified, striking the award of consequential damages due to the absence of proof that the taking had reduced the development potential of the property (*Split Rock Partnership v. State of New York*, 275 A.D.2d 450 (2<sup>nd</sup> Dept. 2000)).

Following production of the Kirsch survey and the DOT taking, claimant prepared a marketing sales map of the property according to Williams. Occasionally developers contacted claimant regarding the property, but none committed to development until approximately 2003, when Split Rock partner Norbert Wall attracted interest in the subject from the Wilder Companies, a Boston based developer. Wilder offered claimant a letter of intent with a plan to develop the property; Williams then personally investigated Wilder, to be satisfied that the developer was capable of completing the proposed development. Based on his research, Williams was assured of Wilder's competency. He met with company representatives, and permitted them to inspect the property. Then, in early 2004, Wilder approached Town Planner Robert Geneslaw to inquire about the Town's position on development of the property. Soon thereafter Williams also brought Wilder to meet with the Mayor of Hillburn, Brian Miele. During the meeting, development options were explored with the Mayor.

Williams did concede, however, that in March 2004 he received correspondence (addressed to Split Rock Partner William F. Dator) advising that all of the Split Rock parcel would be subject to the planned taking. Correspondence from condemnor reiterated this intention approximately four months later, and Williams took steps, including contacting Jonathan S. Penna, Esq., attorney for condemnor, and condemnor employee Diane Phillips, to insure that only a partial taking resulted. However, unsure of how much (if any) of the property RCSD actually intended to take, claimant and Wilder, nevertheless entered into a contract in November 2004, for \$10,000,000, for construction of an office complex on the subject property by Wilder. The contract had a contingency clause for the impending taking, but described it as limited to 11 acres of the property.

Subsequent to this signing, Williams approached Penna to discuss the intended location of a treatment plant proposed by the sewer authority on or near the property, and, more particularly, the issue of continued access to the property following the taking. Penna requested and was provided a copy of the Wilder contract. Williams, however, was unable to discover whether, or even how much of the Split Rock property was targeted by RCSD for acquisition. Williams' conversations about development of the property by Wilder continued thereafter with condemnor (Penna or RCSD officials) or with Mayor Miele who was also a member of the Rockland County Sewer Commission. During these discussions, Miele committed to work with Split Rock to avoid a taking of the entire property. However, since the taking was eventually of the entire parcel, the Wilder contract was ultimately breached and voided.

Claimant's next witness was William F. Dator, a licensed real estate broker in New York and New Jersey and Split Rock partner. Dator testified that, prior to the 1991 DOT taking, access to the site was via Route 17 to its intersection with Maltbie Avenue, and then on Maltbie Avenue into the subject. After the taking, February 15, 2005, however, to enter the premises one would drive to the end of a cul-de-sac which was formerly a part of Route 17, and which had been built by the State of New York to allow continued access to the subject after the 1991 DOT taking. This cul-de-sac gave access to a dirt road known as Old Route 17, located approximately where Route 17 had formerly been. Old Route 17 then ran for approximately seven to eight hundred feet, whereupon it intersected Maltbie Avenue, then a semi-paved, generally east-west road. Maltbie Avenue then runs generally westerly, and north-westerly, into the property and up the face of the hill. Dator noted that, formerly, school buses used Maltbie Avenue and Split Rock Road (which intersects Maltbie Avenue on the subject property, generally south of the proposed development area, and continues generally in a westerly and south-westerly direction into New Jersey), to travel from Mahwah, New Jersey, over the hill to former Route 17 and back. Dator also testified that it was his belief, based on a conversation with the Rockland County Sewer District's director, that only 11 acres would be taken by the condemnor, leaving ample space for the Wilder project.

Terry Rice, Esq. also testified on behalf of claimant. Rice is a practicing attorney and was called to testify as an expert on zoning. Rice served as an adjunct professor at Pace Law School, where he taught zoning law, and was also counsel to many municipalities on zoning issues. He has published extensively on zoning, and has also authored the commentaries on issues of zoning in McKinney's Town Law and Village Law. After hearing his qualifications, Rice was accepted by the Court to testify as an expert in the area of zoning.

Rice was asked by condemnor to conduct a study of the reasonable probability of rezoning the Split Rock property as of title vesting date. While the property had been zoned residential, and there had previously been some residential use of the property in the past, Rice testified that the property was currently not suited to residential use, and opined that a change of zoning to commercial, to permit commercial development, was more appropriate and would be approved. In particular, it was his opinion that a zone change to allow development of a corporate headquarters office or conference center was likely.

Rice noted that several factors supported his opinion. First, based on the report by architect Marc Sweig, and based also on his

conversations with Sweig after he was retained, Rice stated that an office development of 600,000 square feet could easily be accommodated at the site. Rice was familiar with testimony of Geneslaw during the trial of the 1991 DOT taking. He was also familiar with Geneslaw's report - that supported his trial testimony. Both supported development of the site.

In addition, Rice had conversations over a several year period with some of the municipality's officials, including former planner Geneslaw, and probably Mayor Miele, with respect to what their opinion was of commercial development of the subject. For the Town and Village, approval of a zoning change would have little direct impact on the Village, since the parcel is separated by Route 17 and I-87/I-287 from the residential population in the Village. Further, Hillburn was looking for a tax ratable, as well as a way to provide new jobs to the community. Hillburn, in fact, had shown considerable interest in placement of a corporate headquarters, or some other type of prestigious, Class A office building, on the site, given the visibility of the parcel, and thus any structure thereon, from the neighboring highways.

Finally, it was clear to Rice that the R-40 zoning which was currently applied to the subject was meant as a "holding" classification, put in with the understanding that the property could not feasibly be developed residentially, but to prevent other, less-desirable (to the municipality) types of developments (such as retail). It was his opinion, based on these facts and conversations, that it would be highly likely that the municipal officials would adopt the zoning amendment necessary for the parcel's proposed commercial use. In addition, based on their likely willingness for the aforementioned reasons to change the zoning, he was confident that they would also grant the other necessary land use (*i.e.* site plan) approvals as well, which would permit commercial development of the subject to move forward. This was his opinion despite the fact that he possessed, in his files, a copy Draft Generic Environmental Impact Statement (DGEIS) prepared by Geneslaw which recommended that any future zoning for the property be open space and recreation rather than for office space.

Claimant also called Frederick J. Margon as an expert witness in the field of engineering. Margon, a licensed professional engineer, is a principal of an engineering consulting firm, and has done extensive civil engineering work for municipalities, including in the area of roadway design. He testified to having done road design work, including construction, reconstruction, and resurfacing projects for both private and public developments. He was retained to study roadway development on the Split Rock

property, particularly access to the site as it existed on the date of title vesting, as permitted by the Hillburn Village Code. His report recommended construction of what was described as a serpentine access road, which would provide access from Old Route 17 up the side of the hill to the plateau, where the development area of the parcel was located. Margon testified that this access road had a slope which did not exceed 6%, which met the standard set forth in the Village ordinance for a municipal local road. However, such a roadway was likely to exceed 2800 linear feet in length (over 1/4 mile), and to require retaining walls over 30 feet high. In addition, such a road might possibly encroach on property not owned by claimant, and might also require a Village variance to permit construction on slopes exceeding 40%.

Although it was unlikely, in his opinion, that the Village would authorize the roadway, as designed, as a town roadway, it was possible, with municipal cooperation, to have such a roadway considered and accepted as a private drive. This would permit far greater variation (up to a 16% slope under State DOT provisions, and a 10% slope under other codes), and thus evoke a greater likelihood of approval by the Village. Reference was made by Margon to a visit to the nearby Mt. Fuji Restaurant, which had a private road with an access drive containing slopes of up to 15%. Approval of a slope steeper than 6% would, Margon pointed out, also allow for an even shorter access road. Margon also believed that road construction near or even encroaching on the gas transmission easement was possible upon consultation with the transmission line owner's engineers. Finally, the plan proposed consisted of a two lane roadway - each lane being eleven feet wide, with a four foot shoulder on each side of the road. This was wide enough for safe use by not only standard tractor-trailers but also by emergency vehicles. A cost adding factor to be considered was the likelihood that utilities, such as water, gas, electric, and sewer lines would be placed under the access roadway bed.

Claimant next called Guido Von Autenried as an expert. The witness was employed by a civil engineering firm specializing in water and waste water work, and was retained to study the feasibility and cost for water service to and sewer disposal service from the subject. Von Autenried first examined the possibility of delivering sewage to a nearby existing sewage treatment plant owned by the Village. He contacted the Sewer Plant officials, and concluded that they appeared to be inclined to receive additional sewage generated by development of the subject property. His initial report concededly was prepared prior to the I-87/I-287/Route 17 roadway changes. Those changes, occasioned by replacing the roadbed of Route 17 with that of a multi-lane interstate, obviously complicated any plan to deliver sewage to the

Hillburn plant.

Von Autenried testified that, notwithstanding any such complications, he had considerable experience with designing water waste lines required to cross highways, streams, and other problem terrain. Accordingly, following the above described roadway redevelopment and construction, Von Autenried prepared a further report calculating the continued feasibility of a sewer connection from the project to the Village sewage treatment plant. Von Autenried concluded, following both studies, that there was a manageable way for the sewage line to cross not only I-287, but also a river and a railroad. He did, however, concede that the total length of the line might be significantly in excess of the 250 feet each way that he had initially calculated. He also concluded that it was possible that, in order to cross abandoned railroad tracks, part of the line would be required to be attached to a railway bridge. He projected a cost of \$450,000.00, at title vesting, for tunneling some 250 feet under I-287 - said costs to be borne solely by the developer of the project (Wilder.)

Mitchel Wolfe, a licensed architect, testified as an expert in architecture on behalf of Split Rock. Wolfe was retained to inspect the property after architect Marc Sweig, claimant's original architecture expert, became ill. Wolfe met with the ailing Sweig and examined Sweig's report. He also was able to inspect the site with Sweig before the latter died. From his review of the Sweig report, as well as Sweig's complete file on the subject, an original survey of the site, and some drawings prepared by other consultants, Wolfe concluded that the facts and information on which Sweig had based his assumptions were correct. Sweig had been retained to prepare an architectural feasibility study, specifically to inspect, evaluate, and determine if the Split Rock parcel was physically adaptable to the development of an office building complex of approximately 600,000 square feet, along with the necessary parking and support areas required for such a structure. Wolfe limited his analysis to Sweig's physical adaptability study, however, and did not review the economic feasibility of developing the subject.

Sweig originally, and Wolfe subsequently, concluded that the parcel was physically adaptable to the development of an office structure of approximately 600,000 square feet. Also, a survey by Steven Schneider showed an access road (from Split Rock Road or Old Route 17) up to the plateau area, validating the theory that an access road to the planned building site could be designed, and presumably built. Wolfe's overlays to the Sweig report allowed him to determine that the building site could actually be moved on the plan a short distance in each direction, and even expanded as much

as 10% or more, which demonstrated to him that a building of over 600,000 square feet with parking (a combination of at grade and in a structure) could fit almost anywhere on the designated plateau. Mr. Wolfe also inspected the site with Claimant's engineer, Mr. Margon, to see whether access to the site was impacted by the gas main right of way. Additionally, according to Wolfe, of great importance in facilitating development was the fact that the site is relatively flat laterally, with sloping evident in one direction only, making the site easier to develop than if the sloping ran in two different directions.

In 2008, Wolfe wrote several reports to appraiser Richard Marchitelli relating to his opinion of the costs associated with the development. In one, he noted that removal of stone from a construction site is not quarrying or excavation, and thus does not require a permit. In Wolfe's opinion, there would no cost premium incurred for the removal of stone. This is because stone quarries or resellers of stone will gladly provide services to remove stone, which can then be used as aggregate and/or sold profitably by them. Condemnor's engineers indeed confirmed that material from the site was suitable for aggregate on the site for the building of the access road, and Wolfe verified with stone and aggregate sellers that they would be interested in doing the rock removal. Maltbie Avenue, in Wolfe's opinion, would easily provides access for construction equipment. A flat building site would thus be accomplished with no cost premium for the excavation and removal of the stone and, potentially, profit from the sale of such aggregate. The development site would in fact generate close to 300,000 cubic yards of material for sale by a contractor, while any fill necessary for construction of the access road or the building would be produced right on the site.

In another report to Marchitelli in 2008, Wolfe opined that one could also build a 388,000 square feet building with parking on grade, as distinguished from the proposed 600,000 square foot building, which would require a structured parking facility as well. A structured parking garage could be accomplished by underground parking, by a separate parking structure, or some combination of the two. The buildings could also be built on top of a parking garages, or the garages could be completely underground. In any event, the cost for the structure would be the same whether it were all underground or all above grade.

Claimant finally called appraiser Richard Marchitelli as its expert on valuation. Marchitelli's analysis included both Rockland and Bergen County, New Jersey, properties, particularly the office markets in those areas. In Marchitelli's opinion, the highest and best use of the property was for development of an office building,

based on Rice's view that there was a reasonable probability of a change in zoning from residential to commercial, and that such a development was feasible. Marchitelli then employed two separate methodologies to reach a conclusion as to value. Generally, Marchitelli used the market (sales comparison) method, by analyzing three sales that had proper zoning and were purchased for office development. He then analyzed the contract of sale (the Wilder contract), adjusting that price in light of his sales comparison approach. Finally, he reconciled those values into a final conclusion of value, as of February 15, 2005.

Mr. Marchitelli's three comparable sales consisted of one building in Nyack, New York and two New Jersey properties, one in Bedminster and one in West Windsor. Neither of the New Jersey sites were in close proximity to the subject. As adjusted for time (all three sales pre-dated the taking date), they were in a range of value of \$22 to \$27 per square foot of building area. He applied a series of adjustments, modifying the New Jersey properties downward by \$2.00 (slightly less than 10%) and the Nyack property upward the same amount, for location. He subtracted \$1.00 from the Nyack property, and added \$2.00 to the West Windsor site, for size, and subtracted amounts (\$.50 and \$2.00, respectively) from the same properties for zoning approvals and utility. All of the comparables already had approvals, and none had the subject's rock removal or road construction issues. The net adjustments for the three sites (Nyack, Bedminster, and West Windsor) were \$.50, \$2.00, and \$4.00, respectively, yielding adjusted prices per square foot of \$23 to \$24. Applying the smaller potential building area (i.e. without construction of a parking garage, which would not have been required for the smaller building) of 388,800 square feet to these amounts provided indicated values of between \$8,942,400 and \$9,331,200, from which he concluded a value of \$9,150,000. Marchitelli then deducted \$475,000<sup>2</sup>, the cost of the abovementioned sewer hookup, which he considered an extraordinary cost, and arrived at a value conclusion, by the sales comparison approach, of \$8,675,000.

As set forth above, Marchitelli also reviewed the contract of sale (the Wilder contract) to arrive at a value conclusion. Initially, he investigated the purchaser, the Wilder Companies, which was an out of state firm, to determine its reputation in the market place. In his review of the contract, he noted that the sale price was based on a building of 640,000 square feet, rather

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<sup>2</sup> While Marchitelli did deduct the cost of the sewer line in his analysis, and he did examine (but he did not deduct) rock excavation costs, he otherwise declined to consider cost premiums related to other aspects of the project.

than the smaller building used in his market calculation. However, based on the Sweig report, which provided that a building of 600,000 square feet could be constructed, Marchitelli adjusted the projected size downward 40,000 square feet, and the price from \$15.63 to \$15.00 per square foot, reasoning that if 600,000 square feet could be constructed and the contract price wasn't final, that the buyer would probably adjust it downward. This reduction in the size of the project yielded a corresponding reduction, from \$10,000,000.00 to \$9,400,000.00, in the purchase price. Marchitelli then, as with the market analysis, deducted \$475,000 for the cost of the sewer line crossing I-287, and concluded a market value of \$8,900,000.00 based on the contract.

While the value reached by the sales comparison approach, \$8,675,000, was considered reliable by Marchitelli, he conceded that it was based on an analysis of only three comparable sale properties. The low number of comparable properties resulted from the difficulty he encountered in verifying the terms of sales of properties which were closer in distance to the subject. Given the limited sample for his market analysis, and the fact that he had to go into the central and southern New Jersey office markets for comparable sales, he determined that an adjustment of the contract price to \$8,900,000.00 was more persuasive. Thus, he elected to place the most emphasis, in his analysis, on the Wilder contract of sale, and he reconciled the value between the market approach and the adjusted contract price by giving a preference in his analysis to the latter amount. He did this, he conceded, even though the contract called for "not less than 10,000 square feet per acre (which would yield a building of 640,000 square feet, well in excess of Marchitelli's own building size conclusion). His final conclusion on value was that the market value of the fee simple interest in the property on the date of taking, February 15, 2005, was \$8,850,000.

Marchitelli noted that he considered no extraordinary costs in the construction except the sewer hook-up. In his opinion, a parking structure was a common and regular cost of construction, and neither the topography, nor a roadway to the site, presented any unusual challenges. Further, he was assured, by Wolfe, that rock and aggregate removal would be sold to alleviate the cost of the removal, and there was nothing extraordinary about the construction of the sewer line below I-287. In fact, he was aware that, if the Wilder contract was completed by the closing of the sale, Wilder not only took title, but would also be responsible for **all** costs associated with the project. They would bear all the costs of stone removal, the cost of constructing an access road to the building, all design and construction costs, any additional costs for water or utilities including the sewer line under I-287,

and they were even vested with sole discretion of whether to build a 388,800 or 600,000 square foot building, since the contract was contingent on approvals for 640,000, not the actual building of that size structure. Wilder in short would pay any and all expenses to put in the office complex, including even any costs associated with rezoning the property.

After claimant rested, condemnor called John Byron, a consulting environmental engineer, as a witness. During initial questioning, counsel for claimant objected that claimant had no notice that Byron would be appearing as a witness; condemnor responded that he was the author of the unsigned feasibility study appended to the appraisal produced by their appraiser, William Beckmann. Counsel for claimant continued to object that no *curriculum vitae* for Byron had been provided, so he had been deprived of the opportunity to prepare for cross-examination of the witness. Since Byron did not sign the feasibility study, counsel for claimant was completely unaware that Byron would be called as a witness. Based on these facts, the Court ruled that, while it would hear his testimony on the preparation of the feasibility study, Byron would not be qualified as an expert or be allowed to give opinion testimony on that subject.

Condemnor then offered the report in evidence, and claimant was allowed to *voir dire* regarding Byron's experience relative to the report. Mr. Byron's expertise and experience was admittedly in waste water and other water projects, and the unsigned Stearns & Wheler report was in fact authored by a variety of persons, perhaps more than twenty, working on different portions of the report. Consequently, although admitting that the report, since it was attached to the Beckmann appraisal, was likely to be admitted at some point, the Court declined to admit the report into evidence at that time.

Byron then testified regarding his preparation of the feasibility study. While he did provide an opinion regarding several aspects of the development of the site, including the cost of an access road, the cost of providing utilities to the site, sewer and storm water treatment costs, and surface parking at the site, the Court had already declined to accept his testimony as expert on those subjects. Byron also admitted that he was not personally familiar with the construction of a parking garage, and that he had never prepared a feasibility study for the construction of an office building, designed an access road to an office building, or built a parking structure. Byron also conceded that Stearns & Wheler was not only paid over \$8,000,000 for acting as project manager for RCSD's sewer plant constructed on the subject property, but it also received about \$300,000.00 in fees for

producing the feasibility study appended to condemnor's appraisal.

Byron also agreed that his study was based on a hypothetical retail development of the site, and that cost estimates would differ from those that would be incurred for development of an office complex. Byron was unaware, when the report was prepared, that the retail use that he assumed, was in conflict with the highest and best use found by condemnor's appraiser. He was also unaware that the Village would not permit retail use of the site. During cross-examination, Byron admitted that two or three drafts of the feasibility study were prepared and delivered to the Sewer District and its counsel for comment. The first draft, for example, delivered in the Spring of 2006, was subjected to many changes. The final report underwent many revisions as well, and was not finalized until June, 2008. Counsel for claimant then sought production of the drafts, and, upon the failure of condemnor to produce them, a negative inference for that failure was requested, a motion which the court reserved on at that time.

Byron was further cross-examined on particulars relating to his opinion on the costs associated with the development. Byron conceded that condemnor had itself done boring under I-287. Byron also testified that, if the access road were private, with a 10% slope, such a change would decrease the road length, so that it would be considerably shorter than the 3,000 linear feet that Stearns & Wheler calculated for an 8% slope. Further, Byron conceded that he had inspected the roadway leading to the Mt. Fuji Restaurant, and found that there were steep sections of the roadway. He also agreed that with approval of an access road of 15%, the road length would be shortened by a half, and that shortening the access road by a half meant less cut and less fill, and a reduction in the amount of guardrails, utility lines, lighting, and pavement required. In any event, Byron agreed, any development costs would be borne by the developer, Wilder.

Byron was also asked questions regarding the impact of the development on the gas transmission line. He gave his opinion that, not only can one cross over a transmission line, but it can be paved over, and be driven over. Construction of the sewer plant, in fact, had included blasting in close proximity to the line. He also noted that other utility lines, and more specifically a fiber optical line, already crossed the transmission line. The Duke Transmission guidelines also allow other utilities to cross the pipeline right of way. Byron was aware that the New York State Department of Environmental Conservation (NYS DEC) did not require a quarrying permit to remove stone or rock from this site so long as the removal was incident to construction. Byron

also had investigated the cost associated with processing rock on site and selling it, and determined that a profit of \$3.00 a ton could be realized in that manner. Byron also agreed that the proposed 15 acre developable site was adaptable to different configurations, and could easily accommodate an office building in several configurations.

John Ferlow was next called to testify for condemnor. Counsel for claimant objected to his testimony on the same grounds as that of Byron, namely that he had been a contributor to the unsigned feasibility study appended to the Beckmann appraisal but that his status as a witness had not been provided by condemnor, nor had a *curriculum vitae* for Ferlow been provided to claimant prior to trial, so counsel had been deprived of the opportunity to prepare for cross-examination of the expert witness. The Court, however, reasoned that the report would likely be admitted through Beckmann, and thus permitted testimony by one who had contributed to it, albeit not as an expert (his expertise being in landscape architecture, with a specialty in wetlands) due to the failure of condemnor to disclose that he would be called by them as an expert witness.

Ferlow like Byron, visited the site in May 2006, after title vesting. Also like Byron, Ferlow's work was premised on a retail use for the site, either highway commercial or local shopping. Although not an expert on parking and parking structures, Ferlow was asked to comment on several types of parking configurations under consideration for the site. He also gave his opinion that, due to the slopes involved, the access road would be a private road. Mr. Ferlow had also inspected the Mt. Fuji Restaurant roadway, and observed a small section which sloped approximately 15% or slightly higher. While Ferlow saw some evidence of blacktop on Maltbie Road on his visit, he did not consider Maltbie Road as a potential access to the site due to its then-current condition.

Appraiser William Beckmann was next called by condemnor, and was recognized by the Court as an expert in the valuation of real estate. Condemnor's offer of Beckmann's Appraisal was objected to on the basis that the second volume thereof, the feasibility study, previously marked for identification and testified-to, in part, by Byron and Ferlow, was hearsay. The Court repeated its prior ruling that it would not recognize Byron and Ferlow as experts, even though they may have been otherwise qualified, because of the failure of condemnor to reveal its intention to have those witnesses testify as experts at trial. However, the court ruled that, based on the pre-trial disclosure of the study (albeit unsigned), claimant was on notice as to the existence of the study, its attachment to and integration into the appraisal's methodology,

analysis, and conclusions, and its likely inclusion in the condemnor's proof at trial. Thus the Appraisal, including Volume II, the Stearns and Wheler feasibility study/appendix of the Appraisal, was deemed admissible. The court warned, however, that if Beckmann testified in areas that were not testified to by the other witnesses in the case, and/or his report relied on areas that were not testified to by those witnesses in this case regarding the feasibility study, then the court probably would not credit that testimony.

Despite condemnor having presented no evidence of a likelihood of a zoning change, Beckmann assumed, for his highest and best use, that a zoning change to any other use (including office, retail, hotel, and industrial) could be obtained. Beckmann then analyzed the site for its current zoning (residential) and each of those four uses, in light of the Stearns and Wheler cost estimates (perhaps as much as \$22,000,000.00 to \$27,000,000.00).

Regarding residential use, he examined the bulk requirements by multiplying the number of acres by the slope. He then multiplied the acres by the square footage, allowing 50% for roads, and computed a development area. Due to the difficulty of developing the site, Beckmann concluded that each residential lot should measure two and one-half acres, which would yield a total of 12 building lots. However, in his opinion, the site costs were prohibitively high relative to the potential gain from the sale or development of 12 building lots.

Beckmann next analyzed a hotel use for the site. He determined almost immediately that one would have to build a hotel of 700 to 750 rooms, with 700,000 to 750,000 square feet, in order to simply cover the cost of development of the site. Such a hotel far exceeds the requirements of the market for hotels in Rockland County.

Beckmann then examined industrial uses, including warehouses, by noting the vacancy rates and rents then in the marketplace. Here too, according to Beckmann, considering the well-over \$20,000,000.00 cost of building on the plateau, industrial development was simply not feasible for the site.

In addition, Beckmann included in his appraisal an analysis of the feasibility of office development of the subject. He examined two possibilities for building Class C office space (Class C, rather than Class A, used to limit costs), a 100,000 square foot facility and a 400,000 square foot facility which would need a parking garage. The former, based on the Stearns and Wheler study, would cost approximately \$27,000,000.00, or \$277 per square foot,

while the latter would cost approximately \$62,000,000.00, or \$155 per square foot. Beckmann found that the potential sale price in the marketplace for such buildings, even before additional site costs were incurred, was at least 15% lower than the costs calculated for the site. When consideration was also given to a market with considerable vacancy rates and space available, Beckmann concluded that development of the site as office space was not feasible.

Beckmann similarly considered a retail development for the property, and likewise deemed it not financially feasible. He did opine, though, that, based on the marketplace on the vesting date, and more particularly, since one could count on the highest rents and highest income from a retail development, that the most feasible option among all of the aforementioned ones, was the development of retail space on the subject.

From his study of all of the development options for the subject, Beckmann determined that, based on the cost estimates in the Stearns & Wheler feasibility study, it was simply not financially feasible to develop the subject for any of the above uses, which led him to his final conclusion that the highest and best use of the Split Rock property was to hold onto it for speculation.

Beckmann also conducted an analysis of the Wilder contract. Initially, he noted that there were several contingencies, including that the purchaser obtain approval for 10,000 square feet of retail or commercial space per acre of property. Beckmann concluded that the contract was speculative, at best, due to the contingencies, particularly its being contingent on approvals, and that no approvals had even been sought from the Village by the date of the taking. However, he conceded that he never contacted Wilder to discuss the contract or the property, although he was generally familiar with the Wilder company which seemed to be a sophisticated real estate investor. Beckmann also examined the real estate market in the Rockland County/Lower Hudson County area, and determined that there were significant vacancies in industrial, office, and retail uses, including an office building in Orange County which contained approximately 480,000 square feet and was completely vacant, and the nearby Nanuet Mall, which suffered significant vacancies following the opening of the Palisades Mall in 1998.

Beckmann used five comparable properties, all in the same town as the subject (Ramapo). One (Stoneworks Estates) was also in the same village, while the remainder (Pierson Projects, Rock Hill, Potake Lake, and Lorterdam) were in the Village of Sloatsburg, located a short distance (less than four miles) north of Split

Rock. All were zoned residential except that Stoneworks was partly also zoned Highway Commercial, and all were purchased for residential development, with, in the case of Pierson, such development having been commenced. All sales occurred between April 2002 and April 2004, with sizes and prices as follows:

Location	Size (acres)	Price	Price per Acre
Stoneworks	52.66	\$450,000	\$8,545
Pierson Projects	69.870	\$1,000,000	\$14,312
Rock Hill	249.280	\$600,000	\$2,407
Potake Lake	566.220	\$1,300,000	\$2,296
Lorterdam	274.780	\$2,075,000	\$7,551

Beckmann adjusted all of the comparables for time, based on market appreciation, at 5% per year, or 8.3% for the latest sale (Stoneworks) and 18.8% for the earliest (Pierson Projects; Rock Hill; and Lorterdam). Beckmann deemed the subject in a "below average" location, and modified the comparables accordingly (reducing the similarly "below average" Stoneworks 2.5%, and the remaining "average" properties 10%.) And he modified the much larger Rock Hill, Potake, and Lorterdam comparables by adding 15%, 35%, and 15%, respectively. Beckmann also reduced all of the comparables 10% for zoning and use, reasoning that, unlike the speculative purchaser of the subject, all five of the comparables were likely to be developed residentially in the near future. His adjustments for topography and site access, however, significantly reduced the comparables to a range he deemed closer to the subject. For example, based on the subject's steep slopes, he modified Stoneworks down 20%, and the other four parcels down 15%. And he deemed access to the subject severely limited, thus justifying a reduction in value for the comparables of an additional 20%. This produced total adjustments, and adjusted prices per acre, as follows:

Location	Total Adjustment	Adjusted Price per Acre
Stoneworks	- 52.5%	\$4,604
Pierson Projects	- 65.0%	\$5,949

Rock Hill	0.0%	\$2,858
Potake Lake	20.0%	\$3,272
Lorterdam	- 40.0%	\$5,173

Beckman thus found a range of values for his comparables of between \$2,858 and \$5,949 per acre, and selected \$5,000 as the appropriate value. Applied to the 64.05 acres of the Split Rock property, an estimated land value of \$320,250 was yielded, which Beckmann accepted as the value estimate of the property. Since this was a taking of the entire Split Rock property without leaving any residual, the fee taking was deemed to be \$320,250 with no consequential damages.

On cross-examination, Beckmann conceded that arguably Stoneworks was largely unbuildable, with 50% of the property containing slopes of 30% or more, a brook, and significant wetlands. He also agreed that none of his sales had a fully-executed contract of sale for \$10,000,000 in place, and that none of them had any real prospect of obtaining a zoning change for use as an office development. In addition, Beckmann chose five residential sale properties, with none of the comparables having a highest and best use of office development. All of the sale parcels were encumbered with steep slopes, and, unlike the subject, none had an identifiable buildable plateau. Further, many of Beckmann's sale properties also had designated wetlands, and he conceded that he did not examine the wetlands maps to determine the extent of the wetlands contained on those properties. Finally, not all had access to public streets; some of the five were in flood zones; and most of the sales had high voltage power lines running through them.

Beckmann admitted that he was retained by RCSD in 2003, and that, in addition to the appraisals he prepared, he assisted the Sewer District in collecting easement agreements in properties that he had appraised. He acknowledged that he received substantial fees from the Condemnor for his services, including in excess of \$900,000 for appraisal services for the project, and at least \$158,000 for the Split Rock claim alone. Beckmann agreed that Split Rock would provide an excellent site for an office tower or office building since the property lies in such close proximity to I-287, I-87, and Route 17, and since a structure thereon would be visible for a distance on those roads.

Beckmann was also asked questions about USPAP requirements that an appraiser consider the reasonable probability of the re-

zoning of a property. Beckmann was aware that the Village's land planner, Geneslaw, had testified in the DOT taking case, and that the Hon. Philip J. Patti, judge of the Court of Claims, had found in the prior case that there was a reasonable probability of rezoning the Split Rock property to allow office development. He was also aware the Appellate Division, Second Department, on appeal in the DOT taking case, affirmed Judge Patti's finding that the property's highest and best use was as a commercial office center. Although Beckmann knew Geneslaw, he admitted that he did not speak to him with respect to the Village's attitude to a zoning change on Split Rock to allow office development. However, he did speak to Mayor Miele, who was also a member of the RCSD board, and Beckmann conceded that Mayor Miele was in favor of getting ratables into the Village. Beckmann also agreed that the Village was absolutely amenable to a zone change to allow commercial office development at Split Rock. Regarding access, Beckmann testified that it was his understanding that access to the parcel, after the DOT taking, was along old Route 17 to a point approximately some 500 to 550 feet below the transmission line. In addition, he agreed that the decision on appeal on the DOT taking case held that there was no evidence that an office building would have to be reduced in size due to an alleged lack of access, or that a new access road would not support the same amount of traffic as the old road.

After condemnor rested, architect Mitchel Wolfe was called as a rebuttal witness by claimant. Wolfe was familiar with the Stearns & Wheler report, and had heard the testimony of all the witnesses who appeared for the condemnor. It was Wolfe's opinion that there was nothing in any report which indicated that an office building could not be built on the subject property on the plateau. Regarding access, Wolfe's opinion was that the access road as then proposed was about 2,900 to 3,000 feet long, at an approximate grade of about 8 percent, but that an increase in the grade (as for a private road) would lead to a reduction in the length of the road, which would also reduce the cost of the road. Thus, he noted, one engineering model showed a road of only about 1,900 linear feet, while another, the Margon road, showed about 2,800 feet, but with a grade of less than six percent. Indeed, all of the suggested access roads - the abovementioned, the Kirsh drawing, the Schneider drawing, and two by PCI (for Stearns & Wheler) - were all done by either licensed surveyors or engineers, and all were viable access plans for the subject. Ultimately, according to Wolfe, the decision would be based on cost, and on feasibility, a decision by Wilder and its engineers and architects.

Wolfe also testified that the Duke pipeline would not restrict construction of an access road; excavation and blasting would only have to be done in consultation with Duke. Wolfe also demonstrated,

through prepared overlays, how it was possible to construct an access road by using minimal development area. As applied to Margon's road, for example, road construction would only affect a small portion of the developable area, leaving the rest of the site unaffected. The Stearns & Wheler proposal, on the other hand, impacts the development area considerably. Increasing the slope, as noted, would both shorten the overall length of the road, making it less circuitous, and prevent encroachment on the gas line right-of-way.

Wolfe also stated that, with his background in construction, it was his opinion that the construction costs in the Stearns & Wheler feasibility study and in Beckmann's appraisal were substantially overstated. For example, an office building of 400,000 square feet would require only about 1334 parking spaces. A garage structure was not even required if the site was properly prepared and graded for outdoor parking. Further, if a garage were constructed, the garage premised by Stearns & Wheler, calculated from costs for a garage constructed for Syracuse University, was, based on Wolfe's research and investigation, actually over \$7,000,000 less expensive than stated in the study. Similarly, Wolfe found that Beckmann did not use the proper pricing provided by the Marshal & Swift manual, mixing Class C and Class A building costs in his analysis.

### **CONCLUSIONS OF LAW**

1. The right of an owner to just compensation for property taken from him by eminent domain is one guaranteed by the federal and state constitutions (Federal Constitution, Fourteenth Amendment; N.Y. Constitution, Art. 1, Subd. 7).

2. An Appraisal should be based on the highest and best use of the property even though the owner may not have been utilizing the property to its fullest potential when it was taken by the public authority. (*Matter of Town of Islip*, 49 N.Y.2d 354,360 (1980); *Keator v. State of New York*, 23 N.Y. 337, 339 (1968); *Chemical v. Town of E. Hampton*, 298 AD2d 419,420 (2<sup>nd</sup> Dept. 2002.)

### 3. The Binding Nature of the Court of Claims Decision

As set forth in greater detail above, the Court of Claims found after trial that claimant had established a reasonable probability that a zoning change for the subject would have been granted; that claimant's failure to previously pursue the zoning change, or the necessary permits, prior to the appropriation, was reasonable under all of the circumstances; that the change in zoning would have allowed claimant to develop the subject as an

office complex; and that such development constitutes the highest and best use for the property both before and after that taking. As RCSD properly points out, it was not a party to that litigation (the matter involving only claimant and the New York State Department of Transportation). Thus, neither *res judicata*, nor collateral estoppel, nor law of the case, properly apply to the aforementioned holdings. Nevertheless, the Court is well aware that those holdings were arrived-at after a trial on the merits at which the very same witnesses, including Dator, Kirsch, Von Autenried, and Geneslaw, and additional witnesses, including Mayor Miele, supported claimant's arguments, and then the findings (as to valuation and highest and best use) were affirmed by the Appellate Division, Second Department. Claimant has presented, in essence, these same witnesses and facts once again at this trial, and, importantly, condemnor was entirely unable to demonstrate any change in the situation in the seven years following the Court of Claims decision, or the 14 years since the DOT taking. There was, in fact, no testimony at all regarding significant changes in value, or in the marketplace, or to suggest that the Court of Claims decision was in error in any way, much less as to valuation and highest and best use.

This Court also notes that condemnor's appraiser at the Court of Claims, Gerald Griffin, was specifically criticized by the Court there for arriving at his opinion on highest and best use, and on value, without inquiring of the municipal officials about the possibility of a zoning change. In the instant matter, condemnor's current appraiser, in preparing his appraisal, and concluding a highest and best use, apparently failed to heed that very criticism as well, since he similarly failed, prior to the instant trial, to contact Village officials either, except that he did speak to the mayor, who was in favor of such a change. Further, no testimony in the instant claim was produced by condemnor that, for example, the municipality had in any way, in the interim, changed its interest (negatively) in the development of the parcel; that it no longer held to its opposition to a retail or residential development there; that the R-40 zoning was anything other than temporary; or that the same simple change in zoning recognized at the Court of Claims and affirmed by the Second Department, which would have permitted the commercial development of an office building on the parcel, would not still do so.

In addition, there was also no testimony from condemnor seriously questioning the Court of Claims' determination then, nor challenging claimants proof again now, that commercial development of the parcel, by construction of an office complex, was physically possible and economically feasible, and thus the highest and best use of the property. Condemnor, instead, merely offered expert

opinion to the contrary, opinion which, for reasons set forth below, is open to question. In short, while neither *res judicata*, nor collateral estoppel, nor law of the case, may be applied to those holdings, either before the Court of Claims, or as affirmed by the Second Department, such holdings, absent significant evidence to the contrary, will be accorded great weight by this Court in its determination.

4. It is acknowledged that in determining value, the reasonable probability of the rezoning of the property may properly be taken into account (*Matter of Town of Islip*, supra, 360-361). As the Court further stated in *In re City of New York*, 25 N.Y.2d 146, 149 (1969):

However, it must also be established as reasonably probable that the asserted highest and best use could or would have been made of the subject property in the near future. (1 Orgel, *Valuation Under Eminent Domain*, p. 141.) A use which is no more than a speculative or hypothetical arrangement in the mind of the claimant may not be accepted as the basis for an award (*Triple Cities Shopping Center v. State of New York*, 26 A.D.2d 744 [3rd Dept. 1966], *affd.* 22 N.Y.2d 683 [1968]).

We hold that upon a proper showing of probability that a Mitchell-Lama subsidy would have been granted, and upon proof that such a project could or would have been constructed upon the subject premises in the foreseeable future but for the appropriation, there is no reason to prevent the court from finding that this was the highest and best use of the land... Indeed, we have held that a particular best use of condemned property may be the basis of an award even though governmental activity in the form of issuance of zoning variances is required, provided it is established that the granting of such variances was reasonably probable. (25 N.Y.2d 146, quoting *Masten v. State of New York*, 11 A.D.2d 370 [3<sup>rd</sup> Dept. 1960], *affd.* 9 N.Y.2d 796 [1961]; *Genesee Val. Union Trust Co. v. State of New York*, 11 A.D.2d 1081 [4<sup>th</sup> Dept. 1960], *affd.* 9 N.Y.2d 795 [1961]; *Yochmowitz v. State of New York*, 25 A.D.2d 930 [3<sup>rd</sup> Dept. 1966], *mot. for lv. to app. den.* 18 N.Y. 2d 579

[1966]).

Here, the subject property was located in the Village's R-40 (Residential) Zone. According to the uncontested testimony of petitioner's zoning expert, Terry Rice, although the Split Rock property had been zoned residential, and although there had been some residential use of they property (primarily nearer to Route 17) in the past, the property was currently not suited to residential use, and therefore a change of zoning to commercial, to permit commercial development, would be approved. Further, it was also his understanding, from conversations with Village officials (including the mayor) who were in favor of such a change, that an office development of up to 600,000 square feet was feasible for the subject, and that the R-40 zoning was merely a "holding" zoning classification, since the site was no longer deemed suitable for residential development, and the Village opposed other development.

It was thus his opinion that a zone change to allow development of a corporate headquarters office or conference center was likely, and that there was a reasonable probability that an office complex such as that proposed and contemplated in the Wilder contract could or would have been constructed in the foreseeable future but for the taking. The Court also notes that this was the opinion of the claimant's appraiser before the Court of Claims which found in favor of that opinion, and that the Second Department affirmed that opinion on appeal. Pursuant to *City of New York, supra*, then, this Court finds that such a zoning change was likely, and that use of the parcel for development of a large office complex with parking (either open or pursuant to a structure), such as that proposed by claimant, was one possible highest and best use of the land.

5. Claimant's Motion for Sanctions regarding Condemnor's Engineer and Appraisal Testimony

During the course of cross-examination of condemnor's witness John Byron, counsel for claimant inquired of Byron regarding any draft copies of the Stearns & Wheler's feasibility study of the subject property. Byron testified in response that two or three drafts of the feasibility study were prepared by Stearns & Wheler, and were delivered to the Sewer District and their counsel for their comment and "extensive changes." The first draft, for example, delivered in the spring of 2006, was subjected to many changes. The final report underwent many revisions as well, and was not finalized until June 2008. Counsel for claimant then sought production of the drafts, but they were unavailable for his inspection and cross-examination of the witness. Claimant then sought a negative inference for the failure to produce the drafts,

a motion which the court reserved on at that time. The feasibility study, however, was also incorporated into Beckmann's appraisal, serving as the second volume thereof and referred to throughout the body of the appraisal, particularly as relates to the study's cost analysis of the projected development. In addition, Beckmann admitted that he too had previously submitted appraisal drafts to counsel for condemnor, which drafts counsel commented on, and some of which comments were incorporated into Beckmann's subsequent drafts and/or the final appraisal. Those drafts as well were not available to be produced to claimant.

As the parties are undoubtedly well aware, Beckmann's ethical obligation pursuant to the Uniform Standards of Professional Appraisal Practice (USPAP) is the retention of written reports, which latter are defined as any communication of an appraisal transmitted to the client at the completion of an assignment. Upon such time as an appraiser, such as Beckmann, forwards a draft appraisal to the client for review, such draft, under USPAP, must be preserved in the file, and must be provided for review of opposing counsel upon the completion of the appraiser's direct testimony.

Claimant asserts here that Beckmann conceded that he completed draft appraisals for the client's review, which, pursuant to USPAP, Beckmann was ethically bound to retain in his file, and produce for cross-examination. Claimant also argues that Beckmann was not able to produce copies of such draft reports from his files. To the extent that Beckmann failed to comply with his obligations under USPAP to retain such reports, and was thus unable to produce such reports upon conclusion of his direct testimony, the Court elects to accord an adverse inference with regard to the destruction of prior draft appraisals by Mr. Beckmann.

However, the Court has been provided with or directed to no corresponding ethical rule or guideline with respect to the failure of an engineer (Byron) to retain copies of previous drafts of reports submitted to clients, for the purpose of producing those draft reports on cross-examination. Nevertheless, there was on-going litigation in this matter, during which Stearns and Wheler in general, and Byron in particular, were retained to produce a feasibility study with respect to a property which had already been taken in eminent domain. Byron was retained, of course, for the express purpose of the inclusion of such study in the report of an appraiser, and the appraiser was himself ethically bound under USPAP to retain such draft reports. It is conceded that he and counsel for condemnor had input with respect to the preparation of the report, and thus in the finalizing of said report. Where such reports were not retained and thus were not available for cross-

examination of such witness, the Court likewise elects to accord an adverse inference with regard to the destruction of prior drafts of the feasibility study by Stearns and Wheler and Byron.

#### 6. Highest and Best Use

In *In re City of New York*, *supra*, the Court also stated:

We have consistently held that a condemnation award should be determined according to the fair market value of the property in its highest and best use (*Keator v. State of New York*, 23 N.Y.2d 337, 339 [1968]).

The appraisers herein did not agree as to the highest and best use of the property. As condemnor properly points out, the burden of proof is on the claimant to demonstrate that the highest and best use asserted is a reasonable probability as of the date of the title vesting. (*ITT Realty Corp. V. State*, 120 A.D.2d 706 [2<sup>nd</sup> Dept. 1986].) Here, claimant presented extensive, expert proof on the feasibility of obtaining a zoning change to allow an office development on the premises; expert testimony that the planned development was otherwise fully compliant with existing municipal requirements or could meet them; testimony that the sole significant contingency in the Wilder contract, municipal approval of a certain amount of buildable space in the development, was likely to be granted given the attitude of the municipality towards development of the subject; and its appraiser's opinion that, under all of the attendant circumstances, there was a reasonable probability of Wilder's diligent pursuit of development, as to render it economically feasible to build such a project on the subject property.

In contrast, condemnor failed to present any expert proof that a zoning change for the planned development was unlikely to be issued; indeed, they did not seriously contest that there was a likelihood of a zoning change, since their appraiser assumed for his own analysis that it **would be** approved. In addition, the Court of Claims specifically found that there was a reasonable likelihood of a zoning change, and that finding was affirmed by the Second Department. Condemnor produced no proof of any change in the interim (1991 to 2005) showing that the likelihood of a zoning change in 1991 to facilitate such development had somehow been reversed. Although arguing that holding for future development was the highest and best use, Beckmann failed to even address the Court of Claims holding, as affirmed by the Appellate Division, which found that the highest and best use was a commercial use, and squarely rejected any other use including that posited by

condemnor's then-appraiser, recreation. Consequently, claimants met their initial burden of demonstrating that the highest and best use of the property was for commercial development of an office building.

Both appraisers sought to determine the highest and best use of the parcel by examining whether the proposed use was physically possible, legally permissible, economically feasible and maximally productive. The expert testimony adduced is that, based on the accessibility of the parcel, its generally level topography in the developable area, and its significant size - over 64 acres - the proposal to build commercial building, a multi-level office structure, was physically possible at the subject location. Further, the grant of a zoning change from residential to commercial development was deemed likely, given the Village's development interests, and the expert testimony that the plan either met the Village's requirements, or, particularly regarding the slope of the access road, the Village's requirements could be circumvented by use of a private road. There was testimony that, with the Wilder contract of sale, a significant likelihood existed of the project being economically profitable, and the project was deemed to be a productive use of the subject. Consequently, the Court concludes, based on the expert testimony and other evidence presented, that claimant met its burden of demonstrating the reasonable probability of its proposed highest and best use, as a commercial structure (an office building), as of the date of the title vesting. (*C.f. Gyrodyne, supra.*)

#### 7. The Ceiling and the Floor

The Court has found it useful in determining the true value of real property in tax certiorari and eminent domain proceedings to establish a valuation floor and/or ceiling below which and/or above which this Court may not go, based upon certain well accepted principles.

This Court finds that the Ceiling, based on the claimant's appraisal, their appraiser's trial testimony, and the corresponding market values, and the Floor, based on the pre-vesting offer, and the condemnor's appraiser's trial testimony and the corresponding market values, are as follows:

Claimant's Value	Pre-Vesting Offer	Condemnor's value
<b>\$8,850,000</b> (Ceiling)	<b>\$244,800</b>	<b>\$320,250</b> (Floor)

## 8. Valuation

### a. Condemnor's Appraiser's Methodology

As set forth above, Condemnor's appraiser rejected not only commercial, but all other proposed uses - residential, retail, hotel, and industrial - and selected holding for future speculative use as the highest and best use of the property. The Court notes that the Court of Claims valued the property, at a highest and best use of commercial development, at \$3,863,208.00 as of 1991; that that valuation was affirmed at the Appellate Division; and that condemnor presented not a bit of evidence to shed any doubt whatsoever on that valuation (or, indeed, the use), as proper. Further, although neither he nor condemnor seriously challenged the 1991 value established after trial and affirmance in the Appellate Division, Beckmann concedes in his report that local rental rates increased at least 10% in just the several years immediately prior to the taking; that sales prices per square foot of office space at least stayed stable (increasing slightly) during that same several year period before the taking; and, as disclosed by Marchitelli from a publically-available Cushman and Wakefield analysis, rental rates rose in the local office market by approximately 30% from 1991 to 2005. Finally, as Beckmann again himself reports, an offer to purchase was made to Split Rock by One on One Sports Radio Stations, Inc., in May 2000, for \$4,350,000. The Court is thus, in evaluating Beckmann's analysis, hard pressed to credit his conclusion of value of \$320,250 on the date of taking in 2005; indeed, the Court finds it highly unlikely, given all of the above-mentioned factors, that the valuation of the subject could have suffered a decrease of **over ten times** from 1991 to 2005, particularly given no explanation by condemnor of this occurrence, and thus the Court simply rejects as unreliable an analysis which produced such a value.

Beckmann's comparables, as residential uses, also cannot be adjusted to use in a commercial analysis, and in fact he conceded this point when cross-examined, agreeing that his comparables were properties for current or future (speculative) residential uses. Having determined that Beckmann's methodology was in error to the extent that it chose holding for future speculative use as the highest and best use, to the extent that he concluded a market value, without explanation, of just 10% of that affirmed by the Appellate Division for 1991, and since he conceded that his comparables could not be used in an analysis for a commercial highest and best use, the Court elects to base its analysis solely on the methodology employed by claimant's appraiser, particularly, as set forth in greater detail below, the Wilder contract, with some lesser emphasis to his comparable properties.

b. The Wilder Contract as Evidence of Value

Claimant's appraiser placed prime reliance for his valuation of the subject on a recent sale of the subject, namely the Wilder Contract, a contract of sale between claimants and Wilder for \$10,000,000. The contract contemplated the construction of an office complex by Wilder on the subject, and was executed in November 2004, just three months before the taking. It is well-settled under New York law that "the purchase price set in the course of an arm's length transaction of recent vintage, if not explained away as abnormal in any fashion, is evidence of the 'highest rank' to determine the true value of the property at that time." *Plaza Hotel Assoc. v. Wellington Assoc.*, 37 N.Y.2d 273, 277 (1961); *F.W. Woolworth Co. v. Tax Comm. of City of New York*, 20 N.Y.2d 561, 565 (1967); *Matter of Grant v. Srogi*, 52 N.Y.2d 496, 511 (1981); *Matter of Allied Corp. v. Town of Camillus*, 80 N.Y.2d 351, 356 (1992); see also *In re Metropolitan Transportation Authority (Washed Aggregate Resources v. Metropolitan Transportation Authority)*, 28 Misc.3d 1229 (A) (Supreme Court, Dutchess County, 2010. Where there exists a "significant and unexplained disparity between the purchase price of the subject property and the prices for comparable properties," a sale may be deemed to be "abnormal." *Matter of Kishor Patel-Fredonia Motel, Inc. v. Town of Ponfret*, 252 A.D.2d 943 (4<sup>th</sup> Dept. 1998). The burden of persuasion falls upon the party alleging an "abnormality." See, e.g., *Plaza Hotel Assoc.*, 37 N.Y.2d at 277.

It is the claimant's position that there was an executed contract of sale of the subject real estate, evidenced by a signed contract and a deposit in escrow with the buyer's counsel of the down payment amount, which contract is the best indicator of the subject property's market value. It is, of course, indisputable that this transaction qualifies as of "recent vintage", as it was nearly contemporaneous with the taking. Condemnor argues that the contract does not qualify as a "sale", however, because: it was never completed since the sale of the premises never closed; since, while the down-payment was placed with an escrow agent, that agent was the buyer's attorney; and since the contract was dependent on several contingencies, not least being zoning modifications and/or approvals for a development of not less than 10,000 square feet per acre of retail or commercial use.

I. Contracts as Evidence of Value

Contracts (specifically, the sales prices therein) are valid and admissible evidence of the value of real property at the time the contract was executed. As stated in *In re City of New York (Hamilton Place)*, 67 Misc. 191, 193, (Supreme Court, New York

County, 1910),

the price agreed to be paid for the land, therefore, affords a fair indication of its value at the time the contract was made.

In *Hamilton Place*, a contract of sale entered-into 17 months prior to the taking therein was deemed the best evidence of the value of the taken parcel. Furthermore, in *In re County of Nassau (Searingtown Rd., Town of N. Hempstead)*, 68 Misc. 2d 405, 406 (Supreme Court, Nassau County, 1910), the Court stated

Contracts of sale entered into in good faith are not only evidence of value, they are the value, at the time they are made. This is the law in New York State and in most jurisdictions....[I]n the absence of any evidence tending to impeach the good faith of the transaction or show that the property was sacrificed, [the price] affords a fair indication of its value at the time the contract was made and should be considered in arriving at its value when taken.

68 Misc. 2d, 406, citing to *Hamilton Place, supra*.

Furthermore, a court is entitled to place considerable weight on a prospective sale as evidence of value. As the Court noted in *Matter of W.O.R.C. Realty Corp., v. Board of Assessors*, 2012 Slip Op 06146 (2<sup>nd</sup> Dept., September 12, 2012),

The comparative sales approach, advocated by appellants, involves the determination of the value of the subject property by "comparing properties similar to the subject property that have recently sold, are listed for sale, or are under contract" (Appraisal Institute, *The Appraisal of Real Estate*, at 297 [The Sales Comparison Approach] [13<sup>th</sup> ed]), *W.O.R.C., emphasis added*.

The Appraisal of Real Estate notes that by "under contract" is meant "for which purchase offers and a deposit have been recently submitted." *The Appraisal of Real Estate, supra. Garland Properties, Inc. v. Assessor of City of Elmira*, 40 A.D.2d 566 (3<sup>rd</sup> Dept. 1972), like *W.O.R.C.*, was a tax certiorari matter; the parties had both employed an income valuation methodology, but respondent City had also introduced proof of an oral contract of

sale, contingent on a reduction in the assessment and adequate financing. The Court stated that such agreements of sale, between "petitioner and the prospective buyer, if believed by the court, can be the best evidence of market value." 40 A.D.2d, 567; notably, the Court was not at all concerned with the contract's being contingent on the rather questionable likelihood of a reduction in the assessment. And, as properly argued by claimant, where a taking interferes with a prospective contract, the good faith contract price will still be admissible as evidence of value. (See *Novack v. State of New York*, 61 A.D.2d 288 [3<sup>rd</sup> Dept., 1978], where the contract of sale in question was a comparable offered by the State in its sales comparison methodology; the taking at issue also prevented the closing of that sale, and the Court there nevertheless held that the uncompleted sale was a proper measure of the value of the comparable property).

Consequently, the Court concludes that the unclosed contract of sale, the Wilder Contract, may be considered for valuation purposes as if the sale had closed, absent an explanation that this contract of sale was abnormal in some fashion.

ii. Was the Contract Abnormal or Not Arms-Length

Claimant further claims that the sale was indeed an arm's-length transaction and, therefore, represents a reliable measure of market value. The evidence adduced by claimant at trial is that the transaction was between two separate real estate investment companies, one (the buyer) prominent; that both were represented by counsel in the transaction; that there were no unusual financing or other arrangements; and that the sale was not in any other way unusual. As Split Rock properly contends, upon proof of a prior sale of the subject that appears arm's-length and not unusual in some fashion, condemnor bears the burden of convincing the court that the sale should be perceived as "abnormal" (*Washed Aggregate*, supra). Notably, RCSD#1 has failed to meet this burden; condemnor has, in fact, produced no evidence at all that the transaction was abnormal or not at arm's length. Thus, the Wilder contract will be considered as evidence of the highest rank to determine the true value of the subject property at the time the contract was executed, as well as at the time of the taking just three months thereafter.

iii. Valuation Pursuant to the Contract

As set forth in greater detail above, Marchitelli employed the Wilder contract and its sale price (\$10,000,000.00 or \$15.63 per square foot) to arrive at a value conclusion for the subject from his market analysis. Since the sale price was based on a building

of 640,000 square feet, rather than the 600,000 square feet building from the Sweig report, he adjusted the projected size downward 40,000 square feet, and the price from \$15.63 to \$15.00 per square foot. This yielded a reduction in the purchase price from \$10,000,000.00 to \$9,400,000.00. In his market analysis, Marchitelli had calculated the cost of the sewer line crossing I-287, an exceptional cost, to be \$475,000, and deducted this cost from the sale price, which gave him an adjusted market value, under the contract, of \$8,925,000.00, which he rounded to \$8,900,000.00.

c. Marchitelli's Sales Comparison Analysis

As set forth in greater detail above, Marchitelli also examined three comparable properties in his market analysis, one of which was in the nearby Village of Nyack, Town of Clarkstown, in Rockland County, the other two of which were more of a distance away, in Central and South New Jersey. Condemnor argued, and Marchitelli admitted, that the latter two were a significant distance away from, and thus in a different market than, the subject, but he defended his choice in that regard by explaining that he was simply unable to acquire other more similar commercial sales whose details he could use in his analysis. Marchitelli's efforts and intentions notwithstanding, due to the disparate nature of the two New Jersey comparables, the Court declines, except as noted below, to make full use of them in its own valuation analysis (*See Matter of W.O.R.C. Realty Corp., supra*, where the Court noted that it is in the sound discretion of the trial court whether to accept evidence of sales "beyond the immediate vicinity of the subject property", quoting *Welch Foods v. Town of Westfield*, 222 A.D.2d 1053, 1054 [4<sup>th</sup> Dept., 1995]; see also *Bialystock and Bloom v. Gleason*, 290 A.D.2d 607 [3<sup>rd</sup> Dept., 2002], noting the reduction in evidentiary value for comparable properties requiring extensive adjustment due to geographic remoteness from the subject).

Comparable #1 was a land sale of 13.76 acres in size for \$1,994,707.00 in July 2003. The parcel was zoned for laboratory/office use, and the sale was for a medical and professional office development, on a generally rectangular plot which was considered suitable for a building of 93,290 square feet. The parcel was described as steeply sloping, and the subsequent development included extensive terracing of the property. It was considered to have good access, frontage, and visibility, and all public utilities were in place. The subject, of course, was a larger parcel, suitable for a building four to six times that for the comparable, and it was not zoned for office use (although such a change was anticipated to be likely). Although the subject is steep in some portions, a development plateau did exist on the southern portion. It also has some frontage and superior

visibility, but significant challenges relating to access. While it already has gas, electric, and water present, sewer is at some distance, although a sewer hook-up was calculated to be achievable.

Marchitelli calculated, from the sale price and the potential building area, a price per square foot of \$21.38 for Comparable #1. Since the rights transferred, financing, and conditions of sale were similar to the subject, he did not adjust for those items. He then applied a market adjustment of 3% per year (4.9% for the 19 months between the sale and taking dates) and found an adjusted value of \$22.43 per square foot. He then adjusted for location (\$2.00), Size (- \$1.00), and Zoning approvals/utility (- \$ .50), to reach an adjusted price per square foot of building area of \$22.93.

However, while the Court generally accepts his calculation for location adjustment, an increase of \$2.00 (which the Court deems to be 10%) to account for the good location of the subject, it takes issue with several other adjustments made by Marchitelli, and several not made by him. For example, he adjusted this comparable - \$1.00 (approximately - 5%) for size, when in fact the comparable is considerably smaller, only approximately 20% of the size of the subject. The Court thus elects to adjust - 10% for size for comparable #1. Marchitelli also adjusted - \$.50 (approximately - 2.5%) for zoning and utility, when in fact, while a zoning change for the subject was considered likely, it was not in place, whereas all approvals were already in place for the comparable. The Court thus elects to adjust - 5% for zoning alone. As for utility, all parties acknowledge that access to the subject presents significant challenges to a developer, which challenges are believed solvable, but at a cost. In addition, while the comparable was also a steep property, the subject's topography as a whole is inferior. For utility (access and topography), then, the Court also elects to adjust an additional - 10%. Finally, Comparable # 1 has full access to utilities, while the subject lacks a sewer connection. Claimants calculated that this deficiency could be remedied, as set forth above, by a sewer line under I 287 to a nearby treatment plant, an exceptional cost to be deducted from the calculated value after all other costs have been deducted. The Court accepts this cost, and concurs in deducting it, as Marchitelli did, from the final calculated value.

To the above-mentioned adjusted price per square foot of building area of \$22.93, therefore, the Court must apply a positive adjustment of 10% for location, and several adjustments which total - 25%, for an aggregate adjustment of -15%. These adjustments thus reduce the adjusted price per square foot of building area to \$19.49. For a building of 388,000 square feet, this is an adjusted

sale price of \$7,562,314. From this, however, the Court must still deduct the extraordinary cost of the sewer line, calculated, as set forth above, to be \$475,000. After this final deduction, the Court, from its analysis of Comparable #1, thus calculates a market value for the subject of \$7,087,314, rounded to \$7,100,000.

d. Other Indicia of Value

The Court is also aware of several other indicia of market value for the subject. First, while rejecting full use of Comparables #2 and 3 in its own analysis, the Court recognizes that the properties may be broadly employed as a check on its own market analysis. Marchitelli calculated, from the sale price and the potential building area, a price per square foot of \$26.15 for Comparable #2 and \$26.65 for Comparable #3. The similarity of the rights transferred, financing, and conditions of sale led to no adjustment for those items, and he applied the same market adjustment of 3% per year (4.0% for Comparable #2 and 1.9% for Comparable #3) to arrive at adjusted values of \$27.19 and \$27.16 per square foot for the two comparables.

Marchitelli's location adjustment of - \$2.00, however, while apparently accurate as to the variance between the physical location of the subject and that of the two comparables, would seem to have understated the significant difference between the Rockland County, New York, and Central and Southern New Jersey, markets. The Court, therefore, would elect, as a check, to employ a -15% adjustment to each comparable, to account for both of these variances. Further, he curiously adjusted \$2.00 for size for Comparable #3, which was virtually the same size as the subject, but did not adjust for size for Comparable #2 which was just slightly more than 50% of the size of the comparable. The Court thus would employ no adjustment as to size for either comparable. Zoning approvals and utility, for which Marchitelli employed a - \$4.00 adjustment only for Comparable #3, actually appears to understate the superior nature, in regard to those areas, of Comparable #3; the Court would thus, as a check, employ a - 15% adjustment in this respect. And, as noted above, Comparable # 2 and 3 have access to all utilities, while the subject lacks a sewer connection. The Court, as noted above, accepts the calculated exceptional cost of the sewer line under I 287 cost, and will deduct it, as Marchitelli did, from the final calculated value.

As to Comparable #2 then, to the above-mentioned adjusted price per square foot of building area of \$27.19, the Court would apply solely an adjustment of - 15% for location. This adjustment would reduce the adjusted price per square foot of building area for Comparable #2 to \$23.11. For a building of 388,000 square

feet, this is an adjusted sale price of \$8,966,680. As to Comparable #3, to the adjusted price per square foot of building area of \$27.16, the Court would apply an adjustment of - 15% for location, and an adjustment - 15% for zoning/utility, for a - 30% aggregate adjustment. These adjustments would reduce the adjusted price per square foot of building area for Comparable #2 to \$19.01. For a building of 388,000 square feet, this is an adjusted sale price of \$7,375,880. From these amounts, however, the Court must still deduct the extraordinary cost of the sewer line, calculated by Marchitelli to be \$475,000. After these final deductions, the Court, as a check on its above market analysis, calculates final adjusted prices per square foot of building area of \$8,491,680.00 as to Comparable # 2 and \$6,900,880.00 as to Comparable # 1, rounded to \$8,500,000.00 and \$6,900,000.00, respectively, or nearly identical with the Court's higher (Wilder contract) and lower (market analysis) values.

In addition, as noted at great detail above, the Court of Claims found, and the Second Department affirmed, a 1991 value for the subject of \$3,863,208. While there was no direct testimony as to the trended 2005 value for the 1991 value found by the Court of Claims, were the Court to, for example, accept Beckmann's opinion that local residential property appreciated at the rate of 5% per year just from 2000 to 2005, that would indicate a trended 2005 value, even assuming no increase between 1991 and 2000, of at least \$4,800,000. Conversely, were the Court to accept Marchitelli's opinion that commercial rents increased from 1991 to 2005 by over 38%, such an increase would suggest a corresponding increase in commercial sales prices of properties, and thus a possible 2005 trended value, for the subject, in excess of \$5,100,000. As noted above, Beckmann also reported an offering price for the subject in May 2000 of \$4,350,000. Using again his projected increase in residential property values of 5% per year form 2000 to 2005, that would suggest a trended 2005 value of over \$5,430,000. While none approaches closely to the above indicated values as derived from the Wilder contract or from Comparable # 1, these values far exceed the \$320,250 argued by condemnor, and validate the Courts' methodology which produced primary values between \$7,100,000.00 and \$8,900,000.00, and check values between \$6,900,000.00 and \$8,500,000.00.

e. The Court's Reconciliation of Value

The Court has accepted Marchitelli's initial calculation of a market value for the subject on the date of taking, based on the Wilder contract, of \$8,900,000.00. The Court, however, having rejected Marchitelli's sales comparison approach and its indication of value of \$8,675,000 as flawed, has itself employed a market

analysis, albeit by employing the sole comparable offered by Marchitelli which the Court deemed usable, and making adjustments to Comparable # 1 to arrive at a market value for the subject on the date of taking of \$7,100,000.00. The Court is particularly mindful, too, that a sale price of recent vintage set in the course of an arms-length transaction, if not explained away as abnormal in any manner, is the best indicia of value. As set forth in greater detail above, the Wilder contract, entered-into by claimant just months before the taking, was not demonstrated to be anything other than an arms-length transaction, nor was there any proof whatsoever at trial that the value it established was abnormal in some way. Upon all of these considerations, therefore, including a range of values in its primary analysis of between \$7,100,000.00 and \$8,900,000.00, and a range in its check analysis of between \$6,900,000.00 and \$8,500,000.00, the Court reaches, by a slight preference for said sale price over the adjusted sale price reached in its own, limited market analysis, a final value conclusion for the subject on the date of taking, February 15, 2005, in the amount of \$8,100,000.

Claimant Split Rock Partners is therefore awarded the calculated cost of the loss from the direct taking, namely the amount of \$8,100,000.00, with interest thereon from the date of the taking, February 15, 2005, less any amounts previously paid, together with costs and allowances as provided by law.

### **CONCLUSION**

Upon the foregoing papers<sup>3</sup>, and the trial held before this Court on July 27, 28, 29, and 30, 2009; on January 19, 20, 21, 22, 25, 26, 27, and 28, 2010; and on March 1 and 2, 2010, it is hereby

**ORDERED**, that the claim by claimant for compensation for a taking conducted by the condemnor Rockland County Sewer District #1 herein, pursuant to EDPL Article 5, is hereby granted; and it is further

**ORDERED**, that condemnor Village of Haverstraw shall pay as compensation to claimant the amount of \$8,100,000.00, with interest thereon from the date of the taking, February 15, 2005, less any

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<sup>3</sup> The Court acknowledges the assistance of Erica Gilerman, Elizabeth Granci, Crystal Green, Cesare Ricchezza, Jimmy Zgheib, Adam Kudovitsky and Melvin Monachan, summer interns and second year students at Pace University School of Law, in the preparation of this Decision and Order.

amounts previously paid<sup>4</sup>, together with costs and allowances as provided by law.

Settle Order.

The foregoing constitutes the Opinion, Decision, and Order of the Court.

Dated: White Plains, New York  
November 13, 2012

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**HON. JOHN R. LA CAVA, J.S.C.**

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<sup>4</sup> The Court has been advised that the pre-vesting offer of \$244,800.00, by RCSD#1 to claimant, was accepted by claimant as partial compensation for the taking. See EDPL § 304 (A) 3.