

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

**FILED
AND ENTERED
ON
OCTOBER 11,
2006
WESTCHESTER
COUNTY CLERK**

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In the Matter of the Application of the
VILLAGE OF IRVINGTON, for the acquisition of
fee title interest in certain lands in the
Village of Irvington for the construction
of a sand and salt supplies storage facility,

Index No: 2528/98

Petitioner,

-against-

DECISION & ORDER

ANDREW SOKOLIK, WILLOW MOTOR SALES CORP.,
HUDSON VALLEY DISTRICT GROUND BRICKLAYERS,
ST. JOHNS RIVERSIDE HOSPITAL, DISCOVER CARD,
INC., TOWN OF GREENBURGH, VILLAGE OF
IRVINGTON, CONSOLIDATED RAIL CORPORATION
and J&J LANDSCAPES, INC.,

Respondents.

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EMINENT DOMAIN: THE VALUE OF THE SOKOLIK PROPERTY

The trial of this Eminent Domain Proceeding wherein the Respondent,
Andrew Sokolik [" the Claimant "], sought " just compensation " for the
taking of his vacant property [" designated on the Village assessment map
as Sec. 04 Sheet 7A Block 230 Lots 7, 8 and 9 "¹ [" subject property "]]
by the Village of Irvington [" the Village "] for use as a sand and salt
supplies storage facility [" the Salt Shed "]² was held on April 6, 2006

and April 7, 2006. During the trial numerous witnesses testified on behalf of the Claimant³ and the Village⁴. After careful consideration of the trial record and exhibits⁵, the excellent post trial memoranda of law⁶ and findings of fact and conclusions of law⁷ submitted by the parties and a viewing of the subject property on September 19, 2006, this Court now renders its decision regarding the value of the subject property at its highest and best use.

DESCRIPTION OF THE PROPERTY

Location & Frontage

The subject property, which does not have frontage on a public or private street⁸, is located, approximately, 750 feet away from South Astor Street in the Village⁹. South Astor Street runs from a north/south direction, takes a 90 degree turn and runs in an east/west direction to meet South Buckout Street¹⁰. South Astor Street does not continue south to run in front of the subject property¹¹ notwithstanding the Claimant's assertion that access to the property is over " the so-called South Astor Street Extension "¹².

Size

The subject property is, approximately, 8,513 square feet or .195 acres¹³.

The MTA Right-Of-Way

The estimated size of 8,513 square feet includes a 20-foot right-of-way [" ROW "] of, approximately, 1,720 square feet [" the MTA ROW "] located on the front portion of the subject property that has been afforded to the Metro North/Metropolitan Transportation Authority [" MTA "]¹⁴. The MTA ROW is directly in front of the Salt Shed that was built on the subject property after it was acquired by the Village¹⁵. The MTA ROW restricts the development of the subject property since no structures may be built on it¹⁶ thus reducing the useable square footage from 8,513 to 6,793.

Access

The Village asserts that the sole access to the subject property is through a commuter parking lot owned by the MTA [" the MTA Parking Lot "]¹⁷. The MTA Parking Lot is not considered a roadway by the Village¹⁸ and is operated as a parking lot facility¹⁹. Nonetheless, the Petitioner's Appraiser stated " There is no question in my mind that there has been long-standing unfettered access to the subject property...There is no

question there is access "²⁰. In addition, the Claimant challenges the Village's assertion " that the property does not have access over a public or private street, only access through a parking lot "²¹.

Improvements

The subject property was vacant at the time of taking and the improvements thereon consisted of a concrete slab and some macadam surface paving²². After condemnation, the property was improved by the construction of a " 36 foot by 36 foot salt storage shed "²³ by the Village.

Topography

The subject property is not level²⁴. The Petitioner described the property as " contain(ing) very steep slopes"²⁵ which prior to the construction of the Salt Shed " encompassed approximately 3,000 square feet ...or over 1/3rd of the Property "²⁶. " The Property becomes very steeply sloped at approximately the midway point with elevations quickly rising from fifteen feet up to forty feet "²⁷. The Claimant described the property as " The site is generally level at street grade and rises toward the rear "²⁸. In constructing the Salt Shed a portion of the slope had to be excavated²⁹ and the rear of the Salt Shed serves as a retaining wall³⁰. The Claimant asserts that " this is not an additional expense to a builder because the rear wall of the building becomes the retaining wall. There is no rear yard setback requirement in the Industrial District "³¹. The

Petitioner asserts, however, that " the Property has a rear yard setback requirement "32 of ten (10) feet.

Utilities

" The subject property has electric, telephone, storm sewer and water at the site "33. " There was no municipal sewer connection on the Property in 1998 or at the time of trial...The closest municipal sewer line was located on Buckout Street "34.

Zoning

The subject property was zoned " Industrial " at the date of taking which permits a broad range of uses except " A. The slaughtering or processing of animals or fish... B. The manufacture of (1) Heavy chemicals...(2) Basic or semifinished chemicals...(3) Metals and alloys in ingot or stock form...cement, plaster...matches, paints...C. Any other similar use or purpose...likely to create waste gases or liquids or conditions of hazard, smoke, fumes, noise, vibration, odor or dust detrimental to the health, safety or general welfare of the community. D. Junkyards...E. Any use permitted in Multifamily Residence MF Districts "35.

ACQUIRING THE SUBJECT PROPERTY

Claimant's Acquisition Of The Property

The Claimant acquired the subject property from Michael A. Morano [" Morano "], in lieu of foreclosure³⁶. Evidently, the Claimant loaned Morano \$150,000 with the subject property used as collateral to secure the loan³⁷. " We had a mortgage on the property, which he defaulted in "³⁸. The Claimant accepted the deed to the subject property in satisfaction of the debt without having done any " due diligence " to establish " the value of the property "³⁹.

Village's Acquisition Of The Property

The Village needed the property for the storage of sand and salt materials which, apparently, it had been storing in the adjacent " parking lot area "⁴⁰. The Village notified the Claimant of its intention " to acquire the property by way of eminent domain proceedings "⁴¹.

Offer Made & Rejected

The Village made an offer of \$85,000.00 for the subject property⁴² which the Claimant rejected [" my client has invested well over \$200,000⁴³. into the property and would not consider your \$95,000. offer "⁴⁴]. Not only

did the Claimant reject the offer but he, inexplicably⁴⁵, refused to accept the \$85,000.00 as an advance payment⁴⁶.

Filing Of Acquisition Map & Order

The Village provided public notice, conducted public hearings and on or about February 24, 1998 instituted a proceeding to acquire the subject property by eminent domain. On April 22, 1998, this Court (J. Palella) granted the Village's petition for leave to file an acquisition map. On May 13, 1998 this Court (J. Palella) issued an Order which granted the Village's petition, authorized the filing of the acquisition map and the Order in the Westchester County Clerk's Office whereupon " acquisition of the subject property would be complete and title thereto would then be vested in the Village "⁴⁷. On May 18, 1998 [the day of the taking] the Order and acquisition map were entered and filed in the Westchester County Clerk's Office. On or about June 4, 1998, a Notice of Acquisition by Eminent Domain was issued to the Claimant⁴⁸. On June 15, 1999 the Claimant filed a Notice of Claim seeking \$300,000 " for damages arising from the permanent appropriation of the claimant's property by the Village "⁴⁹.

THE TRIAL

During the trial the parties, through the testimony of their expert appraisers and other witnesses, sought to establish " just and fair compensation for the property taken " [See e.g., Town of Cheektowaga v. Starlite Builders, Inc., 247 A.D. 2d 933, 668 N.Y.S. 2d 973 (4th Dept. 1998) (" The court erred in granting the Town's motion for a directed verdict, striking claimant's appraisal and dismissing the proceeding at the close of claimant's case. " ` A condemnation proceeding is not a private litigation. There is a constitutional mandate upon the court to give just and fair compensation for property taken. This means ` just ` to the claimant and ` just ` to the people who are required to pay for it. ` "); Yaphank Development Co., Inc. v. County of Suffolk, 203 A.D. 2d 280, 609 N.Y.S. 2d 346 (2d Dept. 1994) (" Since the appraisals of both parties were defective there should be a new trial to determine the proper theory of valuation...The rule is abundantly clear that property must be appraised at its highest and best use and paid for accordingly. Where we find it is not...we must remit for retrial upon the proper theory ` "); Goldstein & Rikon, The ` Bow Line Point ` Decision, New York Law Journal, September 11, 2006, p. 3 (" Another substantial difference between a condemnation claim and a tax certiorari proceeding is that petitioner is a tax assessment matter must overcome the presumption that the value set forth in the disputed assessment is presumed valid. The petitioner must demonstrate the existence of a valid and credible dispute regarding valuation. Not so in a condemnation case. There a condemnee has the burden of proof on only a few

issues, e.g., reasonable probability of re-zoning. There is no presumption of value and it is the court that has the burden to assure that just compensation is paid ")].

What The Parties Agree Upon

The Petitioner's appraisal estimated the value of the property to be \$85,000⁵⁰ and the Claimant's appraisal estimated its value to be \$170,000⁵¹. Although there was considerable dispute over the analysis performed by Petitioner's appraiser, Robert W. Balog, and Respondent's appraiser, Eugene Albert, MAI, SREA, CMI, including the appropriateness of the sales selected and the adjustments made thereto, the parties did agree on the following.

Highest & Best Use

First, " In Eminent Domain proceedings, the property owner is entitled to have the property taken appraised at its highest and best use in order to achieve ' just compensation ' "⁵² [See e.g., Matter of the County of Suffolk [Van Bourgondien Nurseries], 47 N.Y. 2d 507, 392 N.E. 2d 1236, 419 N.Y.S. 2d 52 (1979) (" The general rule is that when land is taken in eminent domain, its owner is to be compensated for the market value of the property in its highest and best use "); Metropolitan Transportation Authority v. Peerless Weighing & Vending Machine Corp., 158 Misc. 2d 832,

601 N.Y.S. 2d 768 (Queens Sup. 1993)(" An owner whose property has been taken as a result of condemnation is entitled to just compensation...which is generally calculated by reference to the fair market value of the property at its highest and best use at the time of appropriation...That the subject property was undeveloped at the time of taking does not alter the general rule. Unimproved land must be valued in accordance with the highest and best use for which it is adaptable and available...provided that the condemnee establish a reasonable probability that such use would have been made of the property in the near future...and that such use was more than a speculative or hypothetical arrangement ")] .

Commercial/Industrial Development

Second, the highest and best use for the subject property " would be for commercial and/or industrial development "⁵³ or " development with an industrial facility or a use consistent with the current Village of Irvington Zoning Ordinance"⁵⁴. According to the Claimant " The Zoning Code in the Industrial District permits a floor area of 1.40; a lot coverage of 70%; a building height of 3 stories or 42 feet; and as heretofore stated no side, front or rear yards are required "⁵⁵. The Petitioner, however, asserts that the subject property requires a ten (10) foot rear yard set back⁵⁶.

Reliance Upon Sales Comparison Approach

Third, both Mr. Albert⁵⁷ and Mr. Balog⁵⁸ relied exclusively upon the sales comparison approach in valuing the subject property.

What Is The Sales Comparison Approach?

The Appraisal of Real Estate⁵⁹ defines the sales comparison approach as " A set of procedures in which a value indication is derived by comparing the property being appraised to similar properties that have been sold recently, applying appropriate units of comparison, and making adjustments to the sales prices of the comparables based on the elements of comparison " .

Valuing Machinery and Equipment⁶⁰ defines the sales comparison approach as an indication of value " by analyzing recent sales (or offering prices) of properties that are similar (i.e., comparable) to the subject property. If the comparables are not exactly like the properties being appraised, the selling prices of the comparables are adjusted to equate them to the characteristics of the properties being appraised...Like the cost and income approaches, the sales comparison assumes that the informed purchaser would pay no more for a property than the cost of acquiring a comparable property with the same utility " .

Condemnation Law And Procedures In New York⁶¹, § 8.2 states that

" The market data, or comparable sales approach, is used when the subject property is similar to other properties that have been sold or perhaps are currently for sale in the subject property neighborhood. This method works well for residential properties and is always used for vacant land. The appraiser will analyze the sales by making a grid showing the expert's adjustments for location, size, zoning, marketing factors, view and other factors that a buyer would consider, all with the idea that the comparable sales, as adjusted, indicate a value of the subject. In reviewing an appraiser's adjustment factors, be alert for any large adjustment, since the greater the adjustment the less reliable the sale. "

Sales Comparison Methodology Requires Proper Adjustments

The sales comparison approach is a well accepted valuation methodology [See e.g., Matter of Merrick Holding Corp. v. Board of Assessors of County of Nassau, 45 N.Y. 2d 538, 382 N.E. 2d 1341, 410 N.Y.S. 2d 565 (1978) (" commonly the most accurate standard is provided by the sales prices of comparable properties located within the same or similar competitive area in which a parcel being assessed is located "); Matter of City of New York [Shorefront HighSchool], 25 N.Y. 2d 146, 250 N.E. 2d 333, 303 N.Y.S. 2d 47 (1969) (" Generally fair market value is determined by reference to the sales prices of similar parcels in the area...In using this method of valuation, the expert witness begins with the sales prices of the comparable parcels and makes adjustments upon them based upon his own experience to arrive at a probable market price for the subject premises

for its highest and best use ")] and, typically, requires appropriate adjustments to reflect differences between the subject property and the comparable sales [See e.g., Matter of the County of Suffolk v. Kalimnois 275 A.D. 2d 455, 712 N.Y.S. 2d 630 (2d Dept. 2000) (" claimant's expert should have adjusted the sales prices of the comparables to reflect the differences between the subject property and these lots...(As regards the) Red Creek lots...there is no evidence in the record as to the characteristics of such lots. There is no testimony, expert or otherwise, as to the proper adjustments, if any, to be made to such sale prices "); Katz v. Assessor of the Village/Town of Mount Kisco, 82 A.D. 2d 654, 442 N.Y.S. 2d 795 (2d Dept. 1981) (" Plainly, differences in size and zoning will diminish the similarity, and therefore the relevance, of comparable sales. ` The particular relevance of all data will depend upon such factors as time...relative size...condition...nature of the...neighborhoods...circumstances of the sale...'...comparable sales are ` commonly the most accurate standard ` available for valuation...Thus, dissimilarity in one or more respects should not necessarily render irrelevant a sale of an otherwise similar parcel of land...In the case at bar despite the rather large difference in size...and despite the different zoning classification of the respondents' fourth comparable...(They) were sufficiently alike in ` character, situation, usability and improvements `...to have been relevant, with...adjustments made for existing dissimilarities "); County of Niagara v. Bagwell, 36 A.D. 2d 196, 319 N.Y.S. 2d 629 (1971) (" the testimony of the defendants' appraiser concerning comparable sales lacked probative value because of the failure to make the necessary adjustments

between the comparables and the subject property "); The Appraisal of Real Estate⁶² (" (select) properties that are similar to the subject property in terms of characteristics such as property type, date of sale, size, physical condition, location and land use constraints...Look for differences between the comparable sale properties and the subject property...Then adjust the price of each sale property to reflect how it differs from the subject property ")].

Adjustments Regarding The Subject Property

And, in fact, much of the trial⁶³ and most of the contents of the parties' Memoranda of Law⁶⁴ dealt with analyzing and challenging the appropriateness of and adjustments made to the six (6) land sales selected⁶⁵ by Mr. Albert and the four (4) land sales selected⁶⁶ by Mr. Balog⁶⁷. The appraisers made various adjustments⁶⁸ to their selected comparable sales including those for location, size, topography, configuration, street frontage, water frontage, river view, zoning, motivation, utilities and improvements [See e.g., Matter of Board of Water Supply of the City of New York, 277 N.Y. 452, 14 N.E. 2d 789 (1938) (" Speaking generally it may be said that, in condemnation cases, evidence as to the age, location, condition, productiveness or lack thereof, cost and adaptable uses of the property taken or affected by the taking properly has been held relevant to the issue ")]. Petitioner was of the view that Claimant's appraisal " ignored significant negative aspects of the Property that reduced its value, including its steeply sloped topography, lack of street frontage,

lack of required access, lack of utilities and restrictive zoning "⁶⁹. Claimant was of the view that Petitioner's appraisal contained " two sales which are not comparable and must be eliminated..(one sale) has serious flooding problems...and the sale date of 1993 is too remote in time (and one sale was subject to) massive downward adjustments reducing the time adjusted base price...to support his low estimate "⁷⁰] .

Important Factors To Consider In Valuing The Subject Property

Although Mr. Albert and Mr. Balog considered many factors in valuing the subject property the most important were sloping terrain, lack of street frontage, sole access over the MTA ROW and through the MTA Parking Lot, the need for variances, the need to install a sanitary sewer, significance of a river view for industrial property and remoteness in time and location of the sales being compared.

Sloping Terrain

The subject property has sloping terrain⁷¹ described by Petitioner as " containing very steep slopes "⁷² and by the Claimant as " generally level at the street grade and rises toward the rear "⁷³ and does " not (constitute) an additional expense to a builder because the rear wall of the building becomes the retaining wall...(e.g.) the rear wall of the salt shed built by the Village is the retaining wall "⁷⁴. Topography is an element of value [See e.g., Heinemeyer v. State Power Authority, 229 A.D.

2d 841, 645 N.Y.S. 2d 660 (3d Dept. 1996) (appraiser failed " to make any adjustments for time, size, topography or frontage in his evaluation of comparable properties "); In re City of New York [West 87th Street], 222 A.D. 554, 226 N.Y.S. 2d 536 (1st Dept. 1928) (" The property...was partly covered with rock above grade which it is admitted rendered it less valuable than surrounding property at grade "), aff'd 250 N.Y. 588 (1929); Joseph v. Romano, 208 A.D. 2d 926, 617 N.Y.S. 2d 868 (2d Dept. 1994) (" Oakcrest Drive was inaccessible to emergency vehicles because of the slope of the right-of-way was steep, with grades ranging from 11.5% to 18.5% and the right-of-way was inundated by brush and trees "); The Appraisal of Real Estate⁷⁵ (" Steep slopes often impede building construction ")].

Frontage

The subject property does not have frontage on a public or private street⁷⁶. Frontage is an element of value [See e.g., Heinemeyer v. State Power Authority, 229 A.D. 2d 841, 645 N.Y.S. 2d 660 (3d Dept. 1996) (appraiser failed " to make any adjustments for time, size, topography or frontage in his evaluation of comparable properties "); Raichle v. State, 57 A.D. 2d 1071, 395 N.Y.S. 2d 122 (4th Dept. 1977) (" The comparable is adjacent to sale 2A and has approximately 550 feet of frontage on Route 57 "); The Appraisal of Real Estate⁷⁷ (" Frontage is the measured footage of a site that abuts a street, lake or river, railroad or other feature recognized by the market...Properties with frontage on two or more streets

may have a higher or lower unit value than neighboring properties with frontage on only one street...An appraiser must determine whether the local market considers a corner location to be favorable or unfavorable ")].

Access

The subject property is accessible over the MTA ROW⁷⁸ and through the MTA Parking Lot which Mr. Balog described as " long standing (and) unfettered "⁷⁹. Access is an element of value [See e.g., Pollak v. State of New York, 50 A.D. 2d 201, 377 N.Y.S. 2d 259 (1975) (discussion of the impact upon consequential damages sustained by unappropriated lands; " We are not here concerned with the question of the suitability of that access, but with the more basic issue of whether claimants have any right of access whatsoever to Charlotte Street. We note that they have not been expressly granted any such right and that ' service road ' has not been dedicated as a public street or highway...the unappropriated lands have no value without legal access "); Peasley v. State of New York, 192 Misc. 2d 982, 424 N.Y.S. 2D 995 (Ct. Cl. 1980) (" The State contends that the access over its property was permissive, and terminable at will. The claimant contends that they enjoyed a permanent easement over the road...The claimants' appraiser valued the property on the assumption that it had access by land. Since this essential premise has not been found by the court the claimants' appraiser's report and opinion must be rejected in its entirety "); The Appraisal of Real Estate⁸⁰ (" In most cases, adequate parking area and the

location and condition of the streets, alleys, connector roads, freeways and highways are important to land use ")].

The MTA ROW & Parking Lot And Village Law § 7-736(2)

Village Law § 7-736(2) provides that " [n]o permit for the erection of any building shall be issued unless a street or highway giving access to such proposed structure has been duly placed on the official map or plan ". An easement or right-of-way providing access does not satisfy the requirements of Village Law § 7-736 [See e.g., Joseph v. Romano, 208 A.D. 2d 926, 617 N.Y.S. 2d 868 (2d Dept. 1994) (" the unimproved portion of a partially dedicated street, Oakcrest Drive...the petitioners failed to establish any clear right to excavate on the privately owned portion of Oakcrest Drive or on the right-of-way shared in common with others " ; variance from access requirements of Village Law § 7-736 denied) ; Weiderspiel v. Leifeld, 197 A.D. 2d 781, 602 N.Y.S. 2d 712 (3d Dept. 1993) (" property was landlocked and access was obtained via a 335-foot deeded right-of-way...If that access is, as here, via a right-of-way or easement, a permit can only issue upon the town board's passage of a resolution...") ; Goldstein v. Zoning Board of Appeals, 78 A.D. 2d 538, 432 N.Y.S. 2d 202 (2d Dept. 1980) (" Appellant sought an exception and variance from the access and frontage provisions of section 7-736...of the Village Law (which was denied)...The proposed structures...would not front on any public road or street. Access...would be from Hessian Hills Road (a public road) via easement and fee rights in two private driveways

")]. In addition, the sole access to the subject property is through the MTA Parking Lot which is not considered by the Village to be a roadway⁸¹.

The Need To Obtain Variances

The Petitioner contends that in order to access the subject property over the MTA ROW and through the MTA Parking Lot to the public street, South Astor Street, the Claimant would need variances from Village Law § 7-736(2) [" [n]o permit for the erection of any building shall be issued unless a street or highway giving access to such proposed structure has been duly placed on the official map or plan "], Village Zoning Code § 243-52 [" [n]o building shall be erected or altered so that access thereto or to any part thereof is solely from a public parking lot or alley, whether public or private "] and other provisions of the Village Zoning Code⁸². Evidently, the property adjacent to the subject property needed frontage on a public street and was granted a variance by the Village Zoning Board of Appeals⁸³. However, the Claimant asserts that " The Village has totally misrepresented the whole frontage and access issue to the Court. In 1998, there was no street frontage requirement in the Zoning Code. The Zoning Code in effect in 1998 was Chapter 243 (which contained) no street frontage requirement...The Village argues that the property must have frontage on a public or private street equal to the width lot requirement of the Zoning Code. The problem is that...this requirement did not come into effect until amendments to the Code were made on August 18,

2003 "84. In addition, the Claimant asserts that the property has always had " long standing (and) unfettered "85 access.

The Probability Of Obtaining Variances

If variances are necessary the Claimant must demonstrate the probability of obtaining such variances [See e.g., Matter of City of New York[Shorefront High School], 25 N.Y. 2d 146, 250 N.E. 2d 333, 303 N.Y.S. 2d 47 (1969) (" The fact that governmental activity is required to achieve a use does not necessarily disqualify the use from consideration. Indeed, we have held that a particular best use of condemned property may be the basis of an award...provided it is established that the granting of such variances was reasonably probable "); Masten v. State of New York, 11 A.D. 2d 370, 206 N.Y.S. 2d 672 (3d Dept. 1960) (" No matter how probable an amendment may seem, an element of uncertainty remains and has its impact upon the selling price. At most a buyer would pay a premium for that probability in addition to what the property is worth...This record is perhaps exceptional in that it supplies an unusually strong basis for inference of probable imminent zoning change "), aff'd 9 N.Y. 2d 796, 175 N.E. 2d 166, 215 N.Y.S. 2d 508 (1960); Heintz v. State, 32 Misc. 2d 1025, 226 N.Y.S. 2d 540 (Ct. Cl. 1962) (" considerable latitude was permitted the claimants to show that there was a reasonable likelihood of a zoning change...under the facts presented we have concluded that there was only a remote possibility that such zoning would be changed "); Condemnation Law And Procedures In New York⁸⁶, § 9.1 (" Ordinarily, a court will start with

a presumption that the highest and best uses it may consider in determining value are limited to those permitted by zoning and/or other regulations in effect at the time of taking. Thus, the condemnee has the burden of proof in asserting a highest and best use other than the one to which the property is being put or that use which is allowable under the zoning and/or regulations in effect on title vesting date. The condemnee must establish that there existed, on the title vesting date, a reasonable probability that the asserted highest and best use could or would have been made of the subject property in the reasonably near future and the use was economically feasible...Where the court has determined that a probability of change of zone existed, it must nevertheless not value the subject property as rezoned. That value must be discounted to reflect that the zoning had not yet been accomplished and that there are costs and delays associated with the process of achieving it ")] .

Utilities

The subject property has water, electricity, telephone and a storm sewer but does not have a sanitary sewer connection, the nearest connection being " up the street "⁸⁷ on South Astor Street⁸⁸ [750 feet away⁸⁹] or Buckout Street⁹⁰. The availability of utilities is a measure of value [See e.g., Lawyers Cooperative Publishing Co. v. State, 47 A.D. 2d 122, 364 N.Y.S. 2d 638 (4th Dept. 1975) (" It is evident from the claimant's

appraiser's adjustment grid that the subject property was valued as if it had all utilities available. Although all necessary utilities such as gas, electric, storm and sanitary sewers were technically ' available ' to the subject parcel, sanitary sewer lines and other utilities would have to be extended into the interior of the development...All such extensions involving expense, would detract from the purchase price of particular lots "), aff'd 39 N.Y. 2d 760, 349 N.E. 2d 877, 384 N.Y.S. 2d 776 (1976); The Appraisal of Real Estate⁹¹ (" Any limitations resulting from a lack of utilities are important in highest and best use analysis...The cost of installing utilities is considered in the highest and best use conclusion and may be reflected directly or indirectly, depending on the selection of comparables sales used in the valuation ")].

Remoteness In Time & Location

Comparable sales should be fairly recent and in the same area as the subject property [See e.g., Matter of Welch Foods, Inc. v. Town of Westfield, 222 A.D. 2d 1053, 635 N.Y.S. 2d 400 (4th Dept. 1995) (" ` While it is generally true that comparable sales should not be too remote in location from the subject property "); Martin v. State, 33 A.D. 2d 599, 304 N.Y.S. 2d 467 (3d Dept. 1969); Power Authority v. Gold, 17 Misc. 2d 454, 186 N.Y.S. 2d 431 (Niagara Sup. 1959)].

Similarity In Size & Zoning

Comparable sales should be similar in size, zoning and use [See e.g., Dann v. State, 40 A.D. 2d 578, 334 N.Y.S. 2d 405 (4th Dept. 1972); Matter of General Motors Corp. v. Assessor of the Town of Massena, 146 A.D. 2d 851, 536 N.Y.S. 2d 256 (3d Dept. 1989) appeal dismissed 74 N.Y. 2d 604, 541 N.E. 2d 426, 543 N.Y.S. 2d 397 (1989); Matter of City of New York [Rockaway Point Boulevard], 28 N.Y. 2d 465, 271 N.E. 2d 546, 322 N.Y.S. 2d 708 (1971) (" The parcels used for comparison were so different from the land in issue as to throw no helpful light on the fair market value of the land condemned. The land in issue was vastly larger than the land to which it was compared, and markedly different in adjacent development, but its physical location...differed radically...The general rule as to comparable sales is that they must be related to property in the vicinity ' similar to the property taken ' "); Latham Holding Co. v. State, 16 N.Y. 2d 41, 209 N.E. 2d 542, 261 N.Y.S. 2d 880 (1965) (" Properties cannot be comparable if one is worth more than four times the value of the other "); The Appraisal Of Real Estate⁹² (" Size differences can affect value and are considered in site analysis. Reducing sale prices to consistent units of comparison facilitates the analysis of comparable sites...Generally, as size increases, unit prices decrease ")].

Hudson River View

According to Mr. Albert the subject property " is water proximate and has a direct view of the nearby Hudson River. Sale 2 is superior with actual water frontage and was adjusted down [-10%⁹³]; the remaining sales are adjusted upward [5%⁹⁴] in this category as none are water proximate and none have a direct view of the Hudson River "⁹⁵. While the subject property may presently have a " view " of the MTA Parking Lot, railroad tracks, a baseball field and then the Hudson River⁹⁶, this was not true in 1998. At the time of the taking the subject property was across the railroad tracks from " property [that] was industrial, and at times [was] an abandoned piece of property, with warehouses, and it was in operation at certain times, of course, as a lumberyard " and did not have an unobstructed view of the Hudson River⁹⁷. Assuming, however, that the subject property did have a Hudson River view in 1998 it would have little, if any, value since the property's highest and best use is commercial/industrial not residential [See e.g., McCready v. Assessor of the Town of Ossining, 11 Misc. 3d 1086 (West. Sup. 2006) (" In 1967 the Gallos built a beautiful ` contemporary style single family residence ` with a Hudson River view reminiscent of ` the cape `...The 2005 Property Card also notes ` Riverview-A+++ `...Respondent's Appraiser...count(ed) the open space as assessable ` ambiance ` with a ` view of the Hudson River ` "); The Appraisal of Real Estate⁹⁸ (" Frontage is the measured footage of a site that abuts a street, lake or river, railroad or other feature recognized by the market ")]. Even Mr. Albert admitted that he would attribute more weight to a Hudson River view in a residential " as opposed to an industrial "⁹⁹ use.

ANALYSIS OF CLAIMANT'S COMPARABLE SALES

Mr. Albert selected six (6) sales for comparison with the subject property¹⁰⁰, made adjustments and created a " Land Sales Grid "¹⁰¹ and arrived at a reconciliation and conclusion of value of \$170,000¹⁰². The selection of the six (6) sales and the adjustments made thereto were explained by the Claimant¹⁰³ and Mr. Albert¹⁰⁴ and analyzed by the Petitioner¹⁰⁵.

Adjustments Applicable To All Sales

Several adjustments apply to all of the Claimant's six (6) sales such as Hudson River View, Frontage, Access and Variances, Time/Market, Steep Slopes, Buyer Motivation and Sanitary Sewer.

Hudson River View Adjustment Disallowed

Each of the Claimant's Sales was adjusted because of the subject property's view of the Hudson River [Sale # 1 (5%); Sale #2 (-10%), Sale #3 (5%), Sale #4 (5%), Sale #5 (5%), Sale #6 (5%)]. These adjustments are disallowed because the subject property did not have an

unobstructed view of the Hudson River in 1998 and even if it did, such a view has no value for property, the highest and best use of which is industrial.

Frontage, Access & Variances

The subject property does not have frontage on a public or private street and access is over the MTA ROW and through the MTA parking lot. The parties are of differing views¹⁰⁶ as to whether and to what extent variances will be necessary to put the subject property to its highest and best use. The Court finds that some variances will be necessary. However, given the acknowledged history of "unfettered access"¹⁰⁷ to the subject property it is more likely than not that the required variances can be obtained. However, the lack of street frontage, restricted access and the necessity of obtaining variances reduces the value of the subject property which should be reflected in appropriate adjustments.

Time/Market Adjustment Of 5% Per Annum

Mr. Albert used an "upward" time/market adjustment of 5% per annum which was "applied to sales predating the appraisal date for improving market conditions"¹⁰⁸. The Court adopts this adjustment.

Steep Slopes

The subject property suffers from steep slopes which reduce its value and must be reflected in appropriate adjustments.

Motivation Of The Buyer

Mr. Albert used a " downward " adjustment of -10% for the motivation of the buyers in Sale # 1 [" Grantee occupies adjoining property and uses this site as additional parking. As a result some excess buyer motivation may have been applicable "¹⁰⁹] and Sale # 6 [" Buyer operated restaurant on nearby property and purchased for parking (probable purchaser motivation) "¹¹⁰] that were adjoining property owners which the Court adopts [The Appraisal of Real Estate¹¹¹ (" Adjustments for conditions of sale usually reflect the motivations of the buyer and the seller. In many situations the conditions of sale significantly affect transaction prices...For example, a developer may pay more than market value for lots needed in a site assemblage...When non-market conditions of sale are detected in a transaction, the sale can be used as a comparable but only with great care. The circumstances of the sale must be thoroughly researched before an adjustment is made and the conditions must be adequately disclosed in the appraisal. Any adjustment must be well supported with data ")].

Failure To Adjust For Absence Of Sanitary Sewer

Regarding all six (6) sales Mr. Albert failed to make an adjustment for utilities since each sale has " All " utilities while the subject property requires the installation of a sanitary sewer, the closest connection being 750 feet away. The absence of a sanitary sewer and the length of the closest connection must be reflected in appropriate adjustments.

Specific Adjustments To Claimant's Comparable Sales

Claimant's Sale #1

Claimant's Sale #1 is a 20,132 square foot parcel located in the City of Mount Vernon¹¹² in an area zoned " I, General Industrial District " with double frontage on South MacQuesten Parkway and Grove Street which sold in 1995 for \$400,000 or \$19.87 per square foot. Sale #1 is " relatively level and even with the grade of McQuesten Parkway ", has " All " utilities and was purchased by the adjoining landowner for use as a parking lot.

Adjustments To Sale # 1¹¹³

Sale #1 sold three years prior to 1998 and was properly adjusted (1) 15% for " Sale Date-Market Conditions ", (2) -10% for buyer motivation and (3) 5% for size [Sale # 1 being three times the size]. Sale #1 was improperly adjusted 10% for location based upon the conclusion that it had " an inferior, less desirable location "¹¹⁴ because the subject property has no frontage on a public or private street, is accessible over the MTA ROW and through the MTA Parking Lot and requires some variances¹¹⁵. Hence, the proper adjustment for location should be -5%. Sale # 1 should not be adjusted 5% for " Waterfrontage/Exposure/View " [" Hudson River View "]. The -5% adjustment for configuration based upon the conclusion that the " sale is a double frontage parcel and the subject has only one frontage "¹¹⁶ should be -10% because the subject property has no frontage on a public or private street. There should be a -10% adjustment for topography because of the subject property's sloping terrain and -5% for utilities because of the subject property's lack of a sanitary sewer. Based upon the foregoing the net adjustment for Sale # 1 should be -25% [not 15%] and the adjusted unit value per square foot should be [\$20.56 - \$5.14 =] \$15.42.

Claimant's Sale #2

Claimant's Sale #2 is a 10,650 square foot parcel located in the Village of Port Chester¹¹⁷ in an area zoned " C-2, Business " with direct frontage on the Byram River which sold in 1995 for \$300,000 or \$28.17 per square foot.

Sale # 2 Is Rejected As Not Comparable

This sale is not comparable and is rejected [notwithstanding a -10% adjustment for improvements¹¹⁸] because it is not a land sale but an income producing property that was being used as a marina when it was purchased in 1995¹¹⁹. It was a viable business rather than a vacant parcel of land and is still being used as a marina [See e.g., Dann v. State, 40 A.D. 2d 578, 334 N.Y.S. 2d 405 (4th Dept. 1972) (" The trial court found that the highest and best use of the property was as a diary farm and diary products processing plant, that the diary plant enhanced the value of the property as a whole, and that partial taking destroyed claimant's business. Having made such findings...the trial court erroneously valued the land based on sales of commercial and residential property and adding the value found for the improvements. This approach was inconsistent with the highest and best use found by the court..."); Matter of General Motors Corp. v. Assessor of the Town of Massena, 146 A.D. 2d 851, 536 N.Y.S. 2d 256 (3d Dept. 1989) (valuation of heavy industrial property using 18 [out of 20] comparable sales involving " facilities devoted to warehousing and light industry or light manufacturing...market data analysis of petitioner's expert was seriously flawed by the failure to take into account the heavy industrial capacity of the subject property in the selection and analysis of comparable sales "), appeal dismissed 74 N.Y. 2d 604, 541 N.E. 2d 426, 543 N.Y.S. 2d 397 (1989)].

Claimant's Sale #3

Claimant's Sale # 3 is a 13,782 square foot parcel located in the Village of Ardsley¹²⁰ in an area zoned " B-1 Business " with " very irregular double frontage " on Ashford Avenue and Bridge Street, with access only on Bridge Street and which sold in 1998 for \$350,000 or \$25.40 per square foot. Sale # 3 is " relatively level to partly sloping; land is roughly even with the grade of Bridge Street but well below the grade of Ashford Avenue "¹²¹ and has " All " utilities.

Adjustments To Sale # 3¹²²

Sale # 3 was properly adjusted (1) -5% for configuration because of its irregular double frontage, (2) 5% for being twice the size of the subject property and (3) -5% for location. Sale #3 should have been adjusted (1) -5% for utilities and (2) -5% [instead of 5%] for topography because the subject property has steeply sloping terrain [while Sale # 3 has " partly sloping " terrain]. Sale # 3 should not have been adjusted (1) 5% for a Hudson River view and (2) 5% for Zoning because its zoning restrictions are comparable¹²³ to the subject property. Based upon the foregoing the net adjustment for Sale # 3 should be -15% [not 10%] and the adjusted unit value per square foot should be [\$25.40 - \$3.81 =] \$21.59.

Claimant's Sale # 4

Claimant's Sale # 4 is a 16,381 square foot parcel located in the Town of Greenburgh¹²⁴ in an area zoned " LI, Light Industrial " with direct frontage on Nepperhan Avenue which sold in 1995 for \$375,000 or \$22.89 per square foot. Sale # 4 is a " relatively level ", " irregular, interior (non-corner) parcel " and has " All " utilities.

Adjustments To Sale # 4¹²⁵

Sale # 4 was properly adjusted (1) 15% for " Sale Date-Market Conditions ", (2) 5% for size because it is twice the size of the subject property and (3) -5% for location. Sale # 4 should not have been adjusted 10% for Zoning but 5% because of its 20% coverage compared to the subject property's 70% coverage¹²⁶ or 5% for the Hudson River View and should have been adjusted -10% for sloping terrain and -5% for utilities. Based upon the foregoing the net adjustment for Sale #4 should be -10% [not 15%] and the adjusted unit value per square foot should be [\$26.33 - \$2.63 =] \$23.70.

Claimant's Sale # 5

Claimant's Sale # 5 is a 6,189 square foot " irregular, corner " parcel located in the City of New Rochelle in an area zoned " M-1, Light Manufacturing " with double frontage on Portman Road and Sharot Street which sold in 1998 for \$120,000 or \$19.39 per square foot. Sale # 5 is " Generally level, slight slope north to south "¹²⁷ and has " All " utilities.

Adjustments To Sale # 5¹²⁸

Sale # 5 was properly adjusted 5% for Zoning¹²⁹. Sale # 5 was improperly adjusted -5% for configuration and should be adjusted -10% since it has double frontage and the subject property has no frontage on a public or private street. Sale # 5 was improperly adjusted (1) 10% for location based upon the conclusion that it had " an inferior, less desirable location " [should be -5%] and (2) 5% for Hudson River View. Sale # 5 should have been adjusted -5% for utilities and -10% for topography because of the subject property's slopping terrain. Based upon the foregoing the net adjustment for Sale #4 should be -25% [not 15%] and the adjusted unit value per square foot should be [\$19.39 - \$4.85 =] \$14.54.

Claimant's Sale #6

Claimant's Sale # 6 is a 9,963 square foot " generally rectangular, interior (non corner) parcel "¹³⁰ located in the City of Yonkers in an area zoned " CM, Commercial, Storage and Light Manufacturing " with frontage on Saw Mill River Road and which sold in 1997 for \$195,000 or \$19.57 per square foot. Sale # 6 is " Generally level " and has " All " utilities. Sale # 6 is the same as Petitioner's Sale # 3.

Adjustments To Sale #6¹³¹

Sale # 6 was properly adjusted (1) 5% for " Sale Date-Market Conditions ", (2) -10% for motivation because it was purchased by an adjoining property owner and (3) 5% for Zoning¹³². Sale # 6 was improperly adjusted (1) 10% for location based upon the conclusion that it had " an inferior, less desirable location " [should be -5%] and (2) 5% for Hudson River View. Sale # 6 should have been adjusted -5% for utilities and -10% for topography because of the subject property's slopping terrain. Based upon the foregoing the net adjustment for Sale #6 should be -15% [not 20%] and the adjusted unit value per square foot should be [\$18.50 - \$2.78 =] \$15.72.

Claimant's Market Value Estimate Revised

Based upon the Court's analysis of the Claimant's six (6) sales the adjusted unit values range from \$14.54 to \$23.70. The average adjusted unit value is \$18.19. Multiplying the subject property's useable 6,793 square feet times \$18.19 equals a market value of \$123,564.67.

ANALYSIS OF PETITIONER'S COMPARABLE SALES

Petitioner's Sale # 1

Petitioner's Sale #1 is a 10,000 square foot " rectangular shaped corner " parcel located in the Town of Greenburgh¹³³ in an area zoned " LI, Light Industry " with double frontage on Paulding Street and Hayes Street which sold in 1993 for \$115,000 or \$11.50 per square foot. Sale # 1 is " level with grade of both Paulding Avenue and Hayes Street " and has " All public utilities ".

Sale # 1 Is Rejected As To Remote In Time

Sale # 1 occurred in 1993, some five years prior to the 1998 taking of the subject property. Sale # 1 is rejected as too remote in time.

Comparable sales should be fairly recent and in the same area as the subject property [See e.g., Martin v. State, 33 A.D. 2d 599, 304 N.Y.S. 2d 467 (3d Dept. 1969) (" While the sales used by the State's expert as comparable might be considered as not truly comparable by reason of remoteness in time (four years old), they were similarly situated and within the area of taking, and the values were adjusted upwards to account for the differences in time "); Power Authority v. Gold, 17 Misc. 2d 454, 186 N.Y.S. 2d 431 (Niagara Sup. 1959) (" The court believes that the comparables relied upon by the plaintiff's expert for a sale in 1953 are too remote to be considered true comparables for property taken in...1958...The Court of Appeals has held...that to permit the purchase price paid for other property said to be comparable within two and a half years prior to the date of appropriation was not reversible error "); The Appraisal of Real Estate¹³⁴ (" Sales of other types of real estate that took place during the same period may better reflect the market conditions for the specific property being appraised "); Review and Reduction of Real Property Assessments in New York¹³⁵ (" the foundation must be laid that the same were not too remote in time and did not involve property too remote in location, in addition to the fact that the other properties were fairly comparable to the subject property ")].

Petitioner's Sale #2

Petitioner's Sale #2 is a 21,126 square foot " irregular in shape " parcel located in the Village of Tarrytown¹³⁶ in an area zoned " NS,

Neighborhood Shopping " with double frontage on Tarrytown-White Plains Road (Route 119) and Sawyer Avenue which sold in 1996 for \$350,000 or \$16.57 per square foot. Sale # 2 is " level with grades of both Tarrytown-White Plains Road and Sawyer Avenue " and has " All public utilities ".

Sale # 2 Is Rejected Because It Does Not Permit Industrial Use

Sale # 2 is zoned " NS, Neighborhood Shopping " which does not permit manufacturing or industrial uses as confirmed by Mr. Balog¹³⁷. Sale # 2 is not comparable and is rejected [notwithstanding an adjustment of 25% for location] [See e.g., Dann v. State, 40 A.D. 2d 578, 334 N.Y.S. 2d 405 (4th Dept. 1972) (" The trial court found that the highest and best use of the property was as a dairy farm and dairy products processing plant, that the dairy plant enhanced the value of the property as a whole, and that partial taking destroyed claimant's business. Having made such findings...the trial court erroneously valued the land based on sales of commercial and residential property and adding the value found for the improvements. This approach was inconsistent with the highest and best use found by the court..."); Matter of General Motors Corp. v. Assessor of the Town of Massena, 146 A.D. 2d 851, 536 N.Y.S. 2d 256 (3d Dept. 1989) (valuation of heavy industrial property using 18 [out of 20] comparable sales involving " facilities devoted to warehousing and light industry or

light manufacturing (was error)...market data analysis of petitioner's expert was seriously flawed by the failure to take into account the heavy industrial capacity of the subject property in the selection and analysis of comparable sales "), appeal dismissed 74 N.Y. 2d 604, 541 N.E. 2d 426, 543 N.Y.S. 2d 397 (1989); cf, Katz v. Assessor of the Village/Town of Mount Kisco, 82 A.D. 2d 654, 442 N.Y.S. 2d 795 (2d Dept. 1981) (" In the case at bar...despite the different zoning classification of the respondents' fourth comparable...(They) were sufficiently alike in ' character, situation, usability and improvements '...to have been relevant, with...adjustments made for existing dissimilarities ")].

Petitioner's Sale # 3

Petitioner's Sale # 3¹³⁸ is the same as Claimant's Sale #6¹³⁹ and has been previously analyzed.

Sale # 3 Is Rejected

To the extent that Petitioner's analysis of Sale # 3¹⁴⁰ diverges from that performed by the Court for Claimant's Sale # 6 it is rejected.

Petitioner's Sale # 4

Petitioner's Sale # 4 is a 73,174 square foot " rectangular shaped parcel " located in the Village of Hastings-on-Hudson¹⁴¹ in an area zoned " Marine Waterfront " with " minimal frontage along the northerly terminus of River Street " which sold in 1997 for \$590,000 or \$8.06 per square foot. Sale # 4 is " flat...level in (its) entirety "¹⁴² and has " All " utilities.

Sale # 4 Is Rejected Because It Does Not Permit Industrial Use

Sale # 4 is zoned " Marine Waterfront " which does not permit industrial and manufacturing use as confirmed by Mr. Balog¹⁴³. Sale # 4 is not comparable and is rejected [notwithstanding adjustments for location [-10%] and zoning [10%]][See e.g., Dann v. State, 40 A.D. 2d 578, 334 N.Y.S. 2d 405 (4th Dept. 1972); Matter of General Motors Corp. v. Assessor of the Town of Massena, 146 A.D. 2d 851, 536 N.Y.S. 2d 256 (3d Dept. 1989), appeal dismissed 74 N.Y. 2d 604, 541 N.E. 2d 426, 543 N.Y.S. 2d 397 (1989)].

ADDITIONAL VALUATION FACTORS

The Assessed Value

The Claimant asserts that the 1998 assessed value of the subject property times an agreed upon equalization rate of 7.56%¹⁴⁴ constitutes some

evidence of value¹⁴⁵. For example, using the assessed value of \$9,650¹⁴⁶ which appears on the 1998 Village tax bill¹⁴⁷ divided by 7.56% equals a value of \$127,646¹⁴⁸. However, it appears that the land value of the 1998 assessment was \$7,650¹⁴⁹ which when divided by 7.56% would result in an assessed value of \$101,190¹⁵⁰.

Some Evidence Of Value

An interesting though moot issue herein [since the Court has concluded a value for the subject property at its highest and best use of \$123,564.67, a figure above the assessed value of \$101,190] is whether the assessed value should be (1) considered a valuation floor or (2) some evidence of value or (3) no evidence of value.

Valuation Floors & Ceilings

We have found it useful in determining the true value of real property to establish a valuation floor and/or ceiling below which and/or above which this Court may not go, based upon certain well accepted principals¹⁵¹.

" Along With Other Evidence Of Value "

Notwithstanding Mr. Balog's anecdotal statements that " it is more often the case than not that the assessed value of the taxable value is not really a true reflection of the market value "¹⁵², that " the assess(ed) values more often times than not mean nothing "¹⁵³ and that properties in the Town of Greenburgh are " over-assessed "¹⁵⁴, there is considerable authority for the rule that assessed values may be considered " along with other evidence of value " [See e.g., Matter of City of New York [East Harlem], 40 N.Y. 2d 1057, 360 N.E. 2d 924, 392 N.Y.S. 2d 245 (1976) (" The ` ultimate and basic ` test for establishing the amount of a condemnation award is always market value...Assessed valuation is ` one of many recognized factors to be considered...' but it is not, by itself, controlling "); Matter of City of New York [Boston-Secor Houses], 25 N.Y. 2d 430, 255 N.E. 2d 156, 306 N.Y.S. 2d 918 (1969) (" Assessed valuation may, of course, be shown as one of many recognized factors to be considered in connection with market value, which is the ultimate and basic factor, but it is not market value "); Columbus Holding Corp. v. State of New York, 36 A.D. 2d 674, 318 N.Y.S. 2d 382 (3d Dept. 1971) (" Evidence of the purchase price and the assessed valuation of the property were, of course, relevant to the issue of value...but these are only some of the factors to be considered "); Harvey Chalmers & Sons, Inc. v. State of New York, 35 A.D. 2d 864, 315 N.Y.S. 2d 184 (3d Dept. 1970) (" Assessed valuation and equalization rates constitute some evidence of what the city assessors deemed to be the full value of the property and it is proper for the court to consider it along with other evidence of value...and such evidence has been held to be relevant, material and competent upon the

issue of damages "); City of Buffalo v. George Irish Paper Co., Inc., 31 A.D. 2d 470, 299 N.Y.S. 2d 8 (4th Dept. 1969)(" It is common knowledge, of which we take notice, that in most communities the assessors, presumably after conference with higher officials therein, determine to assess property throughout the municipality at a stated percentage of its estimated full value...Although that percentage figure is not, strictly speaking, an equalization rate, the result of its application is some evidence of what the City Assessors deemed to be the full value of defendant's property, and it was proper for the court below to consider it along with other evidence of value "), aff'd 26 N.Y. 2d 869, 258 N.E. 2d 100, 309 N.Y.S. 2d 606 (1970); Vasile v. State of New York, 30 A.D. 2d 1042, 294 N.Y.S. 2d 854 (4th Dept. 1968)(" Giving consideration to the conflicting estimates of the experts and according proper weight to the prior sales of the property to claimants and the assessed valuation thereof "), aff'd 24 N.Y. 2d 969, 250 N.E. 2d 79, 302 N.Y.S. 2d 596 (1969); City of Buffalo v. Strozzi, 54 Misc. 2d 1031, 283 N.Y.S. 2d 919 (Erie Sup. 1967)(" I hold that the proof respecting the equalization rates as it relates to the assessed valuation is competent and relevant as some evidence of value...and is admissible. Using the figures of the equalization rate by mathematical extension would give the property a market value between \$31,000 and \$33,000 depending on which assessed valuation figure is used. In condemnation, the weight to be given the assessed valuation varies inversely with the other evidences of value "); cf, Matter of City of New York [Brooklyn High School of Speciality Trades], 281 A.D. 842, 118 N.Y.S. 2d 926 (2d Dept. 1953)(award of \$12,000 affirmed without opinion;

Dissenting Opinion (" The city offered the testimony of two experts...One fixed the value at \$15,000 and the other at \$11,219. The claimant's expert testified to a value of \$22,000. The assessed valuation, fixed by the city and upon which the owner has been paying taxes, is \$17,000. *It seems to me that it is unconscionable for the condemnor to have two standards of value, one for tax purposes and another for condemnation purposes. The value fixed by the court, which is more than 25% less than the assessed valuation, is shocking* " [emphasis added]), aff'd 306 N.Y. 709, 117 N.E. 2d 805 (1953); Matter of City of New York [Lincoln Square], 22 Misc. 2d 260, 194 N.Y.S. 2d 259 (N.Y. Sup. 1959)(" The assessment itself is entitled to very little weight in determining the ` just compensation ` which the Constitution requires to be paid to the owner "); Matter of Town Board of Town of Islip, 21 Misc. 2d 657, 189 N.Y.S. 2d 221 (Suffolk Sup. 1959)(" While valuations fixed by tax assessors are considered in New York City where realty is assessed at full value, they are not elsewhere a reliable source of information "); In re Shinnecock Inlet, 143 N.Y.S. 2d 532 (Suffolk Cty. Ct. 1955)(" In any event, where the facts and the testimony differ so widely from the real property tax valuation as do those in this case, the tax valuation has little, if any, probative value ")].

Condemning Authorities May Be Bound By Assessed Value

Condemning authorities such as Petitioner may be bound by the assessed values they impose on property [See e.g., Matter of City of New York [

Boston-Secor Houses], 25 N.Y. 2d 430, 255 N.E. 2d 156, 306 N.Y.S. 2d 918 (1969) (" Assessment figures may also be offered as tending to bind the condemning authority when it is seeking to impose values that are lower "); Matter of the City of New York [Polo Grounds Area], 20 N.Y. 2d 618, 233 N.E. 2d 113, 286 N.Y.S. 2d 16 (1967) (" Assessed value, which is the judgment of officials charged with a special duty of limited scope, may not have large significance in a condemnation proceeding, especially if there be adequate proof in the record, but, in looking at the end result on appellate review, it seems to have some bearing that the same condemning authority will be called on to pay \$175,000 to acquire property only a portion of which it had concurrently assessed at three times that sum "); Golden City Park Corp. v. Board of Standards, 29 N.Y.S. 2d 837 (Kings Sup. 1941) (" If the City had taken the land and buildings at the assessed valuation (which ought to be the price, *because the City ought never to be in the position of fixing a price for taxes and then denouncing the price when it is used for condemnation* [emphasis added]).."), rev'd on other grounds, 263 A.D. 52, 31 N.Y.S. 2d 411 (2d Dept. 1941), aff'd 289 N.Y. 720, 46 N.E. 2d 345 (1942)].

The Amount Of The Loan Not A Measure Of Value

The amount of the Claimant's \$150,000 loan to Morano [for which the subject property was collateral] has no bearing on the value of the property, especially, since the Claimant neither performed due diligence

nor obtained an appraisal¹⁵⁵ [See e.g., In re School Site on West 187th Street, 222 A.D. 554, 226 N.Y.S. 536 (1st Dept. 1928) (" An award may not be reversed because it is less than a mortgage on the property. (Citing) Matter of City of Brooklyn, 73 Hun. 499, 26 N.Y.S. 198...' It is not obligatory upon a commission appointed to appraise lands taken for public use than an award shall be made greater than the mortgage on the property...Otherwise an excessive mortgage would prevent condemnation for public use '...The property taken may not be worth the amount said to have been paid for it and may not be worth the amount of the alleged mortgage. It is well known that many mortgages are for more than the value of the property...') , aff'd 250 N.Y. 588 (1929)] .

CONCLUSION

Based upon the foregoing this Court finds that the subject property at the time of its taking in 1998 had a value in its highest and best use of \$123,564.67.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, N.Y.
October 11, 2006

HON. THOMAS A. DICKERSON
SUPREME COURT JUSTICE

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ENDNOTES

1. Respondent Andrew Sokolik's Post-Trial Memorandum of Law dated August 7, 2006 [" R. Memo. "] at pp. 2-3; R. Exs. 1, 14-17.

2. P. Exs. D, E, G & K.

3. The Claimant's witnesses included the owner of the subject property, Andrew Sokolik [T. Rec. at pp. 7-41], and his expert appraiser, Eugene Albert [T. Rec. at pp. 42-117; R. Ex. 4].

4. The Village's witnesses included the Village's Clerk-Treasurer, Lawrence Schopfer [T. Rec. at pp. 124-171, 361-375], the Village's Building Inspector, Edward P. Marron, Jr. [T. Rec. at pp. 173-230] and the Village's expert appraiser, Robert William Balog [T. Rec. at pp. 232-361; P. Ex. 10].

5. In a letter dated October 3, 2006 from Village counsel, Lino J. Sciarretta, [" Sciarretta Ltr. "] the Petitioner submitted a document described as " a computerized version of the Village's 1998 assessment roll for the Property, which is a public record...It also confirms the Village Clerk/Treasurer's [Lawrence Schopfer] testimony at trial that the appraisal submitted by the Village indicated that 2000 land assessed value for the Property was \$7,650...We hereby submit this document as Village Exhibit R and respectfully request that the Court take judicial notice of it ". Evidently, " The Claimant's attorney has consented to the Village's submission of this document to the Court ". The Sciarretta Ltr. and its attached document are hereby made a part of the Trial Record on consent.

6. Petitioner's Post-Trial Memorandum of Law dated August 8, 2006 [" P. Memo. "]; Petitioner's Post-Trial Reply Memorandum of Law dated October 3, 2006 [" P. Reply Memo. "]; Respondent Andrew Sokolik's Post-Trial Memorandum of Law dated August 7, 2006 [" R. Memo. "]; Respondent Andrew Sokolik's Post-Trial Reply Memorandum of Law dated October 3, 2006 [" R. Reply Memo. "].

7. Petitioner's Post-Trial Findings of Fact and Conclusions of Law dated October 3, 2006; Respondent Andrew Sokolik's Findings of Fact and Conclusions of Law dated October 3, 2006.

8.T. Rec. at pp. 159(9-12), 186(23-24), 190(7-19), 242(3-23). The Petitioner's appraiser, Robert W. Balog, seemed confused and uncertain as to whether the subject property has frontage on South Astor Street or not [P. Ex. O Cover Page (" Unimproved Parcel of Land Easterly Side of South Astor Street Right-of-Way "; P. Ex. at p. 5 (" The property has frontage on the easterly side of South Astor Street in the vicinity of its southerly terminus ", " Directly across South Astor Street from the subject property is automobile parking which services the Irvington Train Station "); P. Ex. O at p. 8 (" The subject land comprises a generally rectangular shaped parcel of land which has no street frontage "); T. Rec. at pp. 243(13-18)(" And I've never been able to determine that in fact there is a public or a private street that abuts this property "), 280].

9. P. Ex. M; T. Rec. at pp. 152(24-25), 153(2-6).

10. P. Ex. M; T. Rec. 154(9-16).

11.P. Ex. M; T. Rec. at p. 154(21-23).

12.R. Memo. at pp. 1, 3 (" Access to the subject property, as well as to other properties in the immediate area, was over a twenty (20) foot private right-of-way known as the South Astor Street Extension ").

13. P. Ex. O at p. 2.

14. P. Ex. C; T. Rec. at pp. 49(3-6), 278(14-21). The Respondent asserts for the first time in R. Reply Memo. at p. 2 that the MTA does not own the Right-of-Way in front of the subject property (" The right-of-way is a non-exclusive means of ingress and egress afforded to the abutting owners (including the subject property) pursuant to filed map 2921. It is not an MTA right-of-way. With the exception of the adjoining former Metro-North power plant, the right-of-way is owned by the abutting owners and not the MTA "). It is curious, indeed, that during the trial the Respondent never challenged the testimony of Lawrence Schopfer to the effect that the Right-of-Way was owned by the MTA (T. Rec. at p. 128(3-7)(" A...we were not permitted to construct any permanent structure on the right of way. This was a directive from Metro North "), p.132 (Q. And you testified that the reason why the shed is where it is, is because Metro North wanted you to put it there? A. Metro North would not allow us to put it within the area of the 20-foot right of way. ") or introduced any testimony or documentary evidence to support its belated assertion that abutting landowners and not the MTA own the Right-

of-Way.

15.P. Ex. D; T. Rec. at p. 127(16-23).

16. T. Rec. at pp. 49(3-10), 128(3-7), 132(7-11).

17.T. Rec. at pp. 35(9-16), 152(16-23), 156(14-23).

18.T. Rec. at p. 159(16-17).

19.T. Rec. at p. 159(16-21).

20.T. Rec. at p. 283(5-11).

21.R. Reply Memo. at pp. 4-5 (" Again, the Village is looking at 2006, and not 1998. Neither appraiser valued the property as not having legal access...Moreover, the section of the code regarding access to and from a parking lot (§ 243-52) [R. Ex. 10 at p. 24362 (§ 243-52 Buildings abutting public parking lot. No building on a lot in a business district which abuts a public parking lot shall be erected or enlarged...")] has application only to the ' B ' business district. The access to the property was over the improved right-of-way...Access through the parking lot is only after 2003...the Village appraiser made no negative adjustment for lac(k) of access, only for lack of frontage...The Village also argues that the subject property has inferior restrictive zoning because of the parking lot access. It has no application to the Industrial District, only the Business District...").

22. P. Exs. C, O at p. 8. The assessed value of these improvements in 1998 was \$2,000 [See N. 5, supra, and N. 154, infra].

23. P. Memo. at p. 3.

24. See P. Exs. D, E, G, I, L.

25.P. Memo. at pp. 2-3; P. Exs. K, L; T. Rec. at p. 128(15-19).

26.T. Rec. at pp. 190(2-11), 194(8-25), 195(2-16).

27.P. Memo. at p. 3; P. Ex. K, L; T. Rec. at pp. 128(15-19), 133(22-25), 134(2-7), 136(10-11), 144(19-22), 145(4-10).

28.R. Memo. at p. 3.

29. T. Rec. at p. 133(1-17).

30. T Rec.. at p. 133(11-21). See R. Memo. at p. 3 (" The Petitioner attempted to make a point to support Mr. Balog's sales adjustment relating to topography, that the property is steeply sloped in the rear and would require a retaining wall... In fact, as conceded by Lawrence Schopfer, Village Clerk/Treasurer, the rear wall of the salt shed...is the retaining wall ").

31.R. Memo. at p. 3.

32.P. Reply Memo. at p. 3 (" Specifically, Section 243-41 of the (Zoning Code) [R. Ex. 10 at p. 24357; P. Ex. N at p. 224:54] provides that if a lot in the Industrial District adjoins the boundary of any residence district, the yard adjoining such boundary must have a width or depth of ten feet or more...The rear of the Property adjoins the 1F-5 One Family Residence District...Accordingly, the Property has a rear yard setback requirement of at least ten feet ").

33.R. Memo. at p. 3; T. Rec. at pp. 33(3-10), 68(13-24), 290(20-25), 291(1-6).

34.P. Memo. at p. 5; T. Rec. at pp. 225(11-25), 226(2-4).

35.R. Memo. at p. 4.

36. T. Rec. at p. 17(5-11), 18(2-20); R. Ex. 1.

37.T. Rec. at p. 18(18-20).

38.T. Rec. at p. 11(13-14).

39.T. Rec. at pp. 17(16-22) (" Q. Prior to you taking this deed in lieu of foreclosure, did you do any analysis of the value of the property? A. No. Q. Did you do any appraisal of the property back in '91?. A. No. "), 19(15-17).

40.T. Rec. at pp. 125-126.

41.R. Ex. 2.

42.R. Ex. 2

43.The Record contains no evidence that the Claimant invested any monies " into the property ".

44. P. Ex. B; T. Rec. at pp. 21(24-25), 22(2-4), 24(5-10).

45. See e.g., In The Matter of the Application of The Village of Port Chester, 5 Misc. 3d 1031 (West. Sup. 2004) (" Pursuant to E.D.P.L. § 304(A) the Village of Port Chester...After acquiring three pieces of property owned by the Claimant, made ` offers...to tender payment with regard to acquisition of the fee title...The offers totaling \$975,000 were accepted by claimants pursuant to E.D.P.L. § 304(A)(3) as advance payments without ` prejudice [to] the right of a condemnee to claim additional compensation `...The purpose of real property tax refunds, however, is to compensate taxpayers for paying more taxes than they should have, typically, several years ago. While such a windfall is welcome there is none of the urgency and, perhaps, even desperation, which condemnees face when their property is taken in a condemnation proceeding. This is why advance payments have been mandated, why advance payments should be paid sooner rather than later and why statutory interest of 6% should be imposed ").

46. T. Rec. at pp. 21(24-25), 22(1-4) (" Q. And did you ever state to Mr. McCabe in words or substance that you were going to accept 85 back then as an advance payment. A. No "), 24(5-10). This statement is contrary to Claimant's assertion at R. Memo. p. 2 [" The Respondent accepted the offer as an advance payment and filed a notice of claim...No part of the advance payment has been paid "]. Petitioner accurately points out that Claimant " refused to accept the Offer as an advance payment " [P. Memo. at p. 7] .

47. P. Memo. at p. 7.

48. Id.

49. R. Ex. 3.

50. P. Ex. O at p. 22.

51. R. Ex. 4 at p. 66.

52. R. Memo. at p. 5; R. Ex. 4 at p. 44; P. Ex. O at p. 9.

53. R. Ex. 4 at p. 45.

54. P. Ex. O at p. 9.

55. R. Memo. at p. 5.

56. See N. 32, supra.

57. R. Ex. 4 at pp. 46-47 (" The subject is unimproved and non-income producing vacant land; therefore, the Sales Comparison Approach has been employed to value the subject land. Because the subject is viewed as unimproved and non-income producing vacant land, the Income and Cost Approaches are not developed in this analysis ")

58. P. Ex. 0 at p. 10 (" In the valuation of the subject property, the Appraiser has utilized the Sales Comparison Approach...(Which) is deemed most appropriate in the valuation of vacant land. The Cost Approach to value has not been utilized since the subject parcel is not improved with a structure. The Income Approach to value has not been utilized to value the subject property "); T. Rec. at pp. 237(24-25), 238(2-6), 238(13-17) (" [t]he true methodology for appraising vacant land is a sales comparison approach, where you seek to identify the best comparable land sales that you can find in order to render your opinion of market value for the subject property...the best comparables are essentially those that are geographically most approximate to the subject property ").

59. The Appraisal of Real Estate, Appraisal Institute, 12th Edition (2001) at p. 417.

60. Valuing Machinery and Equipment: The Fundamentals of Appraising Machinery and Technical Assets, American Society of Appraisers (2000) at p. 115.

61. Condemnation Law And Procedures In New York, N.Y.S.B.A. (2005), Editor Jon Santemma, Chapter 8, What's It Worth-Who Wants to Know?- The Valuation of Real Property in Litigation, Michael Rikon, § 8.2.

62. The Appraisal of Real Estate, Appraisal Institute, 12th Edition (2001) at p. 417.

63. T. Rec. at pp. 42-117, 232-361.

64. R. Memo. at pp. 6-15, 16-19; P. Memo. at pp. 8-10, 12-13, 16-35, 40-45; R. Reply Memo. at pp. 2-5; P. Reply Memo. at pp. 8-15, 18-19.

65. P. Memo. at pp. 23-35, 40-44; P. Reply Memo. at pp. 8-15.

66. R. Memo. at pp. 10-14, 17-19.

67. Claimant's land sale 6 is the same as Petitioner's land sale 3. See R. Memo. at p. 13 (" However, there is a huge difference between the two appraisers as to how they adjusted the sale to the subject property ").

68. R. Ex. 4 at p. 63; P. Ex. O at p. 18.

69. P. Memo. at p. 1.

70. R. Memo. at pp. 19-20.

71. P. Exs. D, E, G, I & L.

72. See N. 25, supra.

73. See N. 28, supra.

74. R. Memo. at p. 3 (" There is no rear yard setback requirement in the Industrial District "); T. Rec. at p. 138; P. Reply Memo. at p. 3 (" Specifically, Section 243-41 of the (Zoning Code) [R. Ex. 10 at p. 24357; P. Ex. N at p. 224:54] provides that if a lot in the Industrial District adjoins the boundary of any residence district, the yard adjoining such boundary must have a width or depth of ten feet or more...The rear of the Property adjoins the 1F-5 One Family Residence District...Accordingly, the Property has a rear yard setback requirement of at least ten feet ").

75. The Appraisal of Real Estate, Appraisal Institute, 12th Edition (2001) at p. 199.

76. The Claimant asserts that " The Village has totally misrepresented the whole frontage and access issue to the Court. In 1998, there was no street frontage requirement in the Zoning Code " [R. Reply Memo. at pp. 3-4; See also R. Memo. at pp. 16-18] .

Edward Marron, the Village Building Inspector, testified [T. Rec. at pp. 186-197] that § 188-19(G) of the Irvington Code [" Minimum lot frontage. All lots shall have a minimum frontage on a public street equal to the frontage required in Chapter 224 [P. Ex. N at p. 188:17]"] applied to the subject property. " Q...Now, Mr. Marron, with respect to the lot in question; the salt shed, if one were to come to develop that lot as an industrial/commercial facility...would that lot meet the frontage requirement? A. No, it would not. Q. Okay. Why? A. It does not have frontage on a public street...A. It would need a variance at a minimum. Q. And a variance for lot frontage, correct? A. Lot frontage " .

However, the Claimant noted that this provision of the Irvington Code was not in effect in 1998. The Irvington Zoning Code circa 1998 [R. Ex. 10 at p. 24312] defined " Lot Frontage " as " The length of the street line of a lot " and the Irvington Subdivision of Land Code circa 1998 [R. Ex. 11 at p. 20705] defined " Street " as " streets, roads, avenues, lanes and other ways " and " Minor Street " as " A street intended to serve primarily as an access to abutting properties ". The Claimant was of the view that " other ways " and " Minor Streets " would include the MTA ROW which provides access to the subject property. Mr. Marron agreed that the definition of " Minor Street " would include a " way or right of way " [T. Rec. at 229-230] .

The Claimant also noted that " the Codes in effect (in 1998) did not provide for a street frontage requirement. In 2003, the Code was amended to require street frontage to be the same as the ' width of lot ' requirement [P. Ex. N at p. 224-26, § 224-10] " [R. Memo. at p. 17] .

77. The Appraisal of Real Estate, Appraisal Institute, 12th Edition (2001) at p. 196.

78. See N. 14, supra.

79. T. Rec. at p. 283(5-11).

80. The Appraisal of Real Estate, Appraisal Institute, 12th Edition (2001) at p. 207.

81. T. Rec. at pp. 35(9-16), 152(16-23), 156(14-23), 159(16-21).

82. P. Reply Memo. at pp. 17-18 (" It is clear that the Zoning Code and Subdivision Regulations require the Property to have frontage. Specifically, Zoning Code § 243-66 requires site development plan approval to be obtained in order to build a new building on the Property because it was a vacant lot at the time of the taking. Zoning Code §§ 243-69A(4), (7), 243-69D(5) and 243-72C(2) require the consideration of frontage when the Village Planning Board (the ' Planning Board ') reviews site development plan applications. Indeed, frontage on a public street has been taken into consideration by the Planning Board in its review of site development plan applications for vacant lots. Zoning Code § 243-72D authorizes the Planning Board to condition a site development plan approval upon the compliance by the owner or its successors in interest with such conditions as the Planning Board may deem appropriate to accomplish the purposes of the Zoning Code and the Subdivision Regulations. Subdivision Regulations § 188-19G provides that: [a]ll lots shall have

minimum frontage on a public street equal to the frontage required in Chapter 224, Zoning. Frontage on private streets shall be deemed acceptable only if such streets are designed and improved in accordance with these regulations [P. Ex. N. § 188-19G]. Subdivision Regulation § 188-19G refers to the Zoning Code. Subdivision Regulation § 188-5B defines ` street ` as including ` streets, roads, avenues, lanes and other ways `...Zoning Code § 243-3 defines ` lot frontage ` as ` [t]he length of the street line of a lot ` [P. Ex. N § 243-3]. As defined, the Zoning Code and the Subdivision Regulations are to be read together...(fn5) In addition, a variance is required in order to construct a building on the Property because the sole access to it would be through the MTA Parking Lot [P. Ex. N § 243-52; T. Rec. at pp. 35(9-16), 152(16-23), 156(14-23)] ").

83.T. Rec. at pp. 188(16-25), 189(2-8).

84.R. Reply Memo. at pp. 3-4.

85.T. Rec. at p. 283(5-11).

86.Condemnation Law And Procedures In New York, N.Y.S.B.A. (2005), Editor Jon Santemma, Chapter 9, Highest And Best Use Defined And Applied, Edward Flower, § 9.1.

87.R. Memo. at p. 3; T. Rec. at pp. 33, 290-291.

88.T. Rec. at p. 68.

89.P. Ex. M; T. Rec. at pp. 152(24-25), 153(2-6).

90. See N. 34, supra.

91.The Appraisal of Real Estate, Appraisal Institute, 12th Edition (2001) at p. 206.

92.The Appraisal of Real Estate, Appraisal Institute, 12th Edition (2001) at p. 196.

93.R. Ex. 4 at p. 63.

94.R. Ex. 4 at p. 63.

95.R. Ex. 4 at p. 65.

96.P. Ex. G.

97. T. Rec. at pp. 157(23-25), 158(7-24).

98. The Appraisal of Real Estate, Appraisal Institute, 12th Edition (2001) at pp. 196-197.

99. T. Rec. at pp. 113(23-25), 114(1-11).

100. R. Ex. 4 at pp. 49-61.

101. R. Ex. 4 at pp. 63-65.

102. R. Ex. 4 at p. 66.

103. R. Memo. at pp. 6-10.

104. T. Rec. at pp. 50-58, 85-116.

105. P. Memo. at pp. 40-46; P. Reply Memo. at pp. 15-16.

106. See Ns. 14, 21, 74, 76 & 82, supra.

107. See N. 20, supra.

108. R. Ex. 4 at p. 64.

109. R. Ex. 4 at p. 49.

110. R. Ex. 4 at p. 59.

111. The Appraisal of Real Estate, Appraisal Institute, 12th Edition (2001) at p. 433.

112. R. Ex. 4 at pp. 49-50.

113. R. Ex. 4 at p. 63.

114. R. Ex. 4 at p. 64.

115. See N. 73, supra.

116. R. Memo. at p. 7.

117. R. Ex. 4 at p. 51-52.

118. R. Ex. 4 at p. 63.

119.T Rec. at 273(6-12),(21-25)(" Well, in my opinion, it's not a land sale. It has economic factors in play. Specifically, an income stream that would be flowing from the operation of the marina "); 97(12-22)(" A. Before it was sold, it was a marina with that so-called factory building, about 1600 feet. Q...At the time this was done, it was still a marina; correct? A. Yes, it was limited to a marina use at that time ").

120.R. Ex. 4 at p. 53.

121.R. Ex. 4 at p. 53.

122.R. Ex. 4 at p. 63.

123.Sale # 3 has an " FAR 1.95 (65% coverage, 3-story building height) " [R. Ex. 4 at p. 53] and the subject property has " a floor area of 1.40; a lot coverage of 70%; a building height of 3 stories or 42 feet " [R. Ex. 4 at p. 40].

124.R. Ex. 4 at p. 55.

125.R. Ex. 4 at p. 63.

126.Sale # 4 has an " FAR 0.60 (20% coverage, 3 story building height) " [R. Ex. 4 at p. 9] while the subject property has " a floor area of 1.40; a lot coverage of 70%; a building height of 3 stories or 42 feet " [R. Ex. 4 at p. 40].

127.R. Ex. 4 at p. 57.

128.R. Ex. at p. 63.

129.Sale # 5 has an " FAR 1.20 (60% coverage, 2-story building height) [R. Ex. 4 at p. 57] while the subject property has " a floor area of 1.40; a lot coverage of 70%; a building height of 3 stories or 42 feet " [R. Ex. 4 at p. 40].

130.R. Ex. 4 at p. 59.

131.R. Ex. 4 at p. 63.

132.Sale # 6 has an " FAR 1.00 " [R. Ex. 4 at p. 59] while the subject property has " a floor area of 1.40; a lot coverage of 70%; a building height of 3 stories or 42 feet " [R. Ex. 4 at p. 40].

133.P. Ex. 0 at p. 13.

134. The Appraisal of Real Estate, Appraisal Institute, 12th Edition (2001) at p. 434.
135. Lee & LeForestier, Review and Reduction of Real Property Assessments in New York, N.Y.S.B.A. (1988), (2000 Supp), § 1.04.
136. P. Ex. O at p. 14.
137. T. Rec. at pp. 303(9)-(25)(" Q. Are there any industrial uses in this immediate area? A. What do you mean by industrial use? Q. Industrial; warehousing, manufacturing? A. No. It's primarily a retail, commercial, office, residential area. Q. Right. It is not an industrial area, is it? A. No. "), 304(1)-(25), 205(1)-(12).
138. P. Ex. O at p. 15.
139. R. Ex. 4 at p. 59.
140. P. Ex. O at p. 18.
141. P. Ex. O at p. 16.
142. T. Rec. at p. 267.
143. T. Rec. at p. 308 (" Q. What is the zoning on this property? A...marine waterfront...Q. And it's used as a restaurant; correct? A. Correct. Q., And it's industrial and manufacturing permitted in that zone? A. No ").
144. R. Ex. 12.
145. R. Memo. at pp. 15-16; P. Memo. at pp. 36-40; R. Reply Memo. at p. 5; P. Reply Memo. at pp. 19-21.
146. R. Ex. 4 at p. 43.
147. R. Ex. 14.
148. T. Rec. at pp. 346-347; P. Memo. at p. 39.
149. See N. 5, supra.
150. R. Reply Memo. at p. 5 (" The Village argues that of the \$9,650.00, \$2,000.00 is for improvements. Although there was no building on the property, there was a movable concrete traffic

barrier and some macadam. If the \$2,000.00 were deducted, the resultant value is \$101,190.00 which is still more than the \$85,000.00 offer. However, it must be remembered that in eminent domain cases, the property is required to be valued as its ' highest and best use '. The tax assessment does not reflect highest and best use, only existing use "); P. Reply Memo. at pp. 19 (" The 1998 Land Assessed Value component of the 1998 Assessed Value is \$101,190, which is close to the market value set forth in the Village Appraisal ").

151. See e.g., VGR Associates LLC v. Assessor of the Town of New Windsor, 2006 WL 2851618 (Orange Sup. 2006)(" We have found it useful in determining the true value of income producing property to establish a valuation ceiling above which this Court may not go based upon certain well accepted principals. One of those principals is that the Respondents may not rely upon an appraised value [\$12,800,000 for 2002 and \$13,100,000 for 2003] which exceeds the equalized full market value [\$9,915,000 for 2002 and \$11,180,000 for 2003] which they established for the subject property "); Orange And Rockland Utilities, Inc. v. Assessor of the Town of Haverstraw, 12 Misc. 3d 1194 (Rockland Sup. 2006)(" Having established a valuation floor, it is necessary to establish a valuation ceiling, above which this Court may not go. The Town's equalized full value figures are as follows "); Mirant New York, Inc. v. Town of Stony Point Assessor, 13 Misc. 3d 1204 (Rockland Sup. 2006)(" We found it useful in determining the true value of Bowline to begin our analysis by constructing a valuation floor and ceiling based upon several well accepted principals. First, the Petitioners and Respondents are bound by their admissions of reconciled values in their respective appraisals for each year under review. Second, the Petitioners are bound by their full value figures set forth in their Petitions but only to the extent [as in Bowline but not herein] that they are greater than the admissions of value which appear in their appraisal. "); Orange and Rockland, Inc. v. Assessor of the Town of Haverstraw, 7 Misc. 3d 1017, 801 N.Y.S. 2d 238 (Rockland Sup. 2005)(" Petitioners sought ' to amend its petitions [for the years 1995 through 2003] to conform them to the proof of the fair market value opined by (Mirant's) appraiser at trial ' ").

152. T. Rec. at p. 348(12-15).

153. T. Rec. at p. 323(17-19).

154. T. Rec. at p. 323(20-25).

155. See N. 39, supra.

