

At an IAS Term, Part 74 of the Supreme Court of the State of New York, held for the County of Queens, at the Courthouse, in the County of Kings in the Civic Center, Brooklyn, New York, on the 30th day of June, 2006

P R E S E N T:

HON. ABRAHAM GERGES,

Justice.

-----X

In the Matter of the Application of THE CITY OF NEW YORK, relative to acquiring title in fee simple and other interests in certain real property not heretofore acquired for

Index No. 14010/00

POWELL'S COVE ENVIRONMENTAL WATERFRONT PARK, QUEENS.

-----X

The following papers numbered 1 to 5 read on this motion:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	<u>1 - 3</u>
Opposing Affidavits (Affirmations) _____	<u>4</u>
Reply Affidavits (Affirmations) _____	_____
_____ Affidavit (Affirmation) _____	_____
Other Papers <u>Transcript of oral argument</u> _____	<u>5</u>

Upon the foregoing papers, claimant Malba Cove Properties, Inc., moves for an order, pursuant to 22 NYCRR 202.61 (a) (3), permitting it to file an amended appraisal report.

Facts and Procedural Background

Claimant is the former owner of Block 3963, Lot 110; Block 3989, Lots 1, 20, and 25; Block 3990, Lot 75; Block 3991, Lot 1; Block 3922, Lot 1, Block 3993, Lot 20; and Block 3994, Lots 1 and 21 in Queens County. On February 7, 1996, the City of New York (the City) acquired the property in this eminent domain proceeding for the development of the Powell's Cove Environmental Waterfront Park. The property was vacant land, consisting of approximately 655,188 square feet of upland that can be utilized for development.

The trial is currently scheduled to commence on July 12, 2006.

Claimant's Contentions

In support of its motion, claimant explains that its appraiser, Daniel Sciannameo of Albert Valuation Group of New York, relied upon the analysis of its zoning expert, Ronald Ogur, in valuing the subject property. Mr. Ogur originally concluded that the property could be developed for multi-family use, as an apartment house, or as eight single family, detached homes; he analyzed both scenarios with and without the de-mapping of the unimproved streets. Mr. Ogur then calculated the gross building area available for development. In his rebuttal report, Mr. Ogur increased the number of single family homes that could be constructed to ten.

Subsequent to the exchange of the appraisal and rebuttal reports, Mr. Ogur discovered that he had made what claimant characterizes as a "miscalculation" regarding the permitted area of the third floor for each of his development scenarios. More specifically, Mr. Ogur discovered that the mathematics were incorrect and that the

maximum floor area of the third floor is 81.6% of the floor below, and not 60%, as he had originally opined. Accordingly, by letter dated May 1, 2006, Mr. Ogur made the necessary revisions to his reports, stating that the increased area is “due to the use of the ‘base plane’ rather than the ‘curb level’ as the starting point for maximum building heights.” In his affidavit in support of the motion, Mr. Ogur further explains that “the mathematical calculations that I used to determine the area of the third floor space did not properly account for the fact that the base plane was three feet above curb level.” By letter amendment dated May 25, 2006, Mr. Sciannameo incorporated Mr. Ogur’s revisions and prepared a corresponding amendment.

Claimant thus argues that the amendment should be permitted, since it does not seek to introduce a new legal theory or concept, claimant has not changed the zoning regulations upon which it relies, nor has it altered the basis of its conclusions. Hence, “[t]he Amended Appraisal is simply a matter of making the correct calculations based upon the underlying facts.” Claimant further contends that since the constitution requires that a property owner receives just compensation for property taken by eminent domain, this constitutional mandate compels the conclusion that it should be permitted to amend its appraisal report.

The City’s Contentions

The City opposes claimant’s motion, arguing that claimant’s request to amend its appraisal is based upon a mistake made by Mr. Ogur as the result of inadvertence or oversight which increases the value of the subject property from \$10,000,000 to \$11,290,000. Hence, the motion should be denied on the ground that claimant fails to

demonstrate good cause for the amendment. In addition, the exchange of appraisal reports is part of disclosure. Inasmuch as the note of issue was served on January 31, 2006, claimant similarly fails to establish “unusual or unanticipated circumstances” sufficient to permit further discovery after said filing.

The Law

In addressing the issues raised herein, the court first recognizes that court rules control the exchange and content of appraisal reports submitted in tax assessment and condemnation proceedings. In accordance with 22 NYCRR 202.61 (c), appraisal reports in both proceedings are subject to the same requirements.¹ Hence, the reports “must contain a statement of the method of appraisal relied on and the appraiser's conclusions as to the property's value, along with facts, figures and calculations by which the conclusion was reached” (*Bialystock & Bloom v Gleason*, 290 AD2d 607 [2002], citing 22 NYCRR 202.59 [g] [2]²).

¹ 22 NYCRR 202.61 (c), which pertains to eminent domain proceedings, provides that:

“The contents and form of each appraisal report, including any rebuttal, amended or supplementary report, shall conform to the requirements of sections 202.59 (g) and 202.60 (g) of this Part.”

² 22 NYCRR 202.59 (g) (2), which pertains to appraisal reports in tax assessment review proceedings in counties outside the City of New York, provides that:

“The appraisal reports shall contain a statement of the method of appraisal relied on and the conclusions as to value reached by the expert, together with the facts, figures and calculations by which the conclusions were reached. If sales, leases or other transactions involving comparable properties are to be relied on, they shall be set forth with sufficient particularity as

As is also relevant here, CPLR 3140 provides, in pertinent part, that “the chief administrator of the courts shall adopt rules governing the exchange of appraisal reports intended for use at the trial in proceedings for condemnation.” 22 NYCRR 202.61 (a) (3) provides that:

“Upon application of any party upon such notice as the court in which the proceeding is pending shall direct, the court may, upon good cause shown, relieve a party of a default in filing a report, extend the time for filing reports, or allow an amended or supplemental report to be filed upon such conditions as the court may direct.”

Although the rule does not define good cause:

“It has been held that inadvertence or oversight is not good cause (*Matter of Consolidated Edison Co. v State Bd. of Equalization & Assessment*, 83 AD2d 355, *affd* 58 NY2d 710), nor is the mere desire to introduce a new theory or new evidence (*see Matter of City of Troy v Board of Assessors*, 53 AD2d 794; *Home Gas Co. v Miles*, 40 AD2d 896). Finally, dissatisfaction with an attorney and the appraisal report, without proof of undue hardship, does not constitute good cause (*Laken Realty Corp. v State of New York*, 37 AD2d 885).”

(*Niagara Mohawk Power v Peryea*, 102 AD2d 986, 986 [1987]; *accord Salesian Soc. v*

to permit the transaction to be readily identified, and the report shall contain a clear and concise statement of every fact that a party will seek to prove in relation to those comparable properties. The appraisal reports also may contain photographs of the property under review and of any comparable property that specifically is relied upon by the appraiser, unless the court otherwise directs.”

The language of 22 NYCRR 202.60 (g) (3), which pertains to tax assessments review proceedings in the counties within the City of New York, is identical, except that the final sentence provides that “[t]he appraisal reports also shall contain photographs of the property under review and of any comparable property that specifically is relied upon by the appraiser, unless the court otherwise directs.”

Village of Ellenville, 98 AD2d 927 [1983], citing *Matter of Consolidated Edison Co.*, 83 AD2d 355 [1981], *affd* 58 NY2d 710 [1982]; *Binghamton Urban Renewal Agency v Levene*, 34 AD2d 241 [1970]). Similarly, leave to file a supplemental appraisal report has been denied under circumstances where “no convincing reason is given why the appraisal could not also have included therein whatever ‘additional factual support’ or ‘greater detail’ she now seeks to proffer by way of a supplemental appraisal” (*Matter of Acquisition of Country Knolls Water Works*, 229 AD2d 859, 860 [1996]).³

As is also relevant to the issue now before the court, 22 NYCRR 202.21, which rule pertains to the filing of a note of issue and certificate of readiness, provides that the court can permit further discovery after a note of issue is filed “[w]here unusual or unanticipated circumstances develop.”⁴

Discussion

Claimant herein fails to establish good cause to amend its appraisal report. In so

³ While a more liberal rule has been applied where an extension of time in which to file an initial report is sought, since “the obvious and severe hardship that accrues to the offering party as a result of rejection of that report – namely, preclusion of the introduction of ‘any appraisal testimony on value,’” (*Matter of Acquisition of Real Property by Town of Guilderland*, 244 AD2d 604, 605 [1997], citing 22 NYCRR 202.61[e]; *Matter of G.T.I. Co. v Assessor & Assessment Bd. of Review of City of Kingston*, 88 Misc 2d 806, 809 [1976]; *see also In re Honess* 52, 295 AD2d 429 [2002]), application of a more liberal rule herein is not warranted, since claimant is seeking to serve and file a supplemental or amended appraisal report

⁴ 22 NYCRR 202.21 (d) provides, in relevant part, that:

“Where unusual or unanticipated circumstances develop subsequent to the filing of a note of issue and certificate of readiness which require additional pretrial proceedings to prevent substantial prejudice, the court, upon motion supported by affidavit, may grant permission to conduct such necessary proceedings.”

holding, the court rejects the only argument offered by claimant, i.e., its assertion that good cause exists because it is merely attempting to correct a mathematical calculation. In seeking to amend its report, claimant alleges that Mr. Ogur's original calculations "did not properly account for the fact that the base plane was three feet above curb level." Accordingly, claimant is changing a basic premise upon which its appraisal was based, which in turn necessitated significant changes to its calculations.⁵ Hence, this is not a case in which a mathematical error is being corrected. Instead, claimant is seeking to introduce a new theory upon which its appraisal is based. The court further finds that changing the theory of the valuation at this stage of the proceeding would prejudice the City, since it has prepared for trial in reliance upon claimant's use of curb level as a starting point for its calculations, only weeks before the trial commences.

Having so determined, since this proposed change is attributable to inadvertence or mistake on the part of Mr. Ogur, or the desire to introduce a new theory upon which claimant's appraisal is based, the above discussed case law compels the conclusion that claimant has failed to establish good cause to amend (*cf. In re Town of Guilderland*, 267 AD2d 837, 838 [1999] [court prudently allowed claimant to file a supplemental appraisal incorporating an arm's length sale that occurred after the appraisal was filed]).

In so holding, the court implicitly rejects claimant's assertion that its constitutional right to just compensation compels the conclusion that the proposed amendment must be permitted. In this regard, it must be emphasized that claimant has already submitted both

⁵ In this regard, it is significant to note that Mr. Sciannameo's amended report, dated May 25, 2006, includes three pages of amended figures.

an appraisal report and a rebuttal appraisal, so that the court's refusal to permit an amendment of the appraisal does not deprive claimant of the opportunity to present any evidence on valuation (*see generally Matter of Acquisition of Real Property by Town of Guilderland*, 244 AD2d 604, 605-606). Further, if the mere assertion that the proposed amendment supports a higher value for the condemned property was found to constitute good cause to amend, 22 NYCRR 202.61 (a) (3) would be effectively nullified, since no claimant would seek leave to amend an appraisal that supports a lower valuation. In addition, claimant offers no statutory authority or case law precedent in support of its contention.

The court also notes that in a letter dated December 7, 2005 from Mr. Ogur to Mr. Goldstein in which he reviewed the appraisal prepared by the City, Mr. Ogur notes that the height of the proposed building can be calculated from the base flood elevation, which is two to three feet higher than the grade in this case. This paragraph clearly establishes that Mr. Ogur was aware that the height of the proposed buildings would vary, depending upon whether the base plane or the curb level was utilized in his calculations. Nonetheless, claimant waited an additional six months, until the eve of trial, to recalculate its valuation premised upon the base flood elevation instead of curb level. Claimant's knowledge of the facts upon which its proposed amendment is premised months before seeking leave to amend further supports the conclusion that it has failed to establish good cause for the relief sought.

Claimant's motion must also be denied in accordance with 22 NYCRR 202.21. Herein, since the City served its note of issue on January 31, 2006 and claimant did not

seek permission to file a supplemental appraisal report until June 14, 2006, in order to obtain permission for further discovery, claimant is required to establish that additional discovery is necessary because unusual or unanticipated circumstances have developed (*see e.g. Rodriguez v Sau Wo Lau*, 298 AD2d 376 [2002]; *Perla v Wilson*, 287 AD2d 606 [2001]; *Aviles v 938 SCY*, 283 AD2d 935 [2001]; *Audiovox v Benyamini*, 265 AD2d 135 [2000]). Claimant fails to make such a showing, particularly since the above discussed letter, dated December 7, 2005, establishes that claimant was aware of the facts and issues raised by the use of base plane rather than curb level before the note of issue was filed (*see e.g. Francis v Board of Educ. of the City of Mount Vernon*, 278 AD2d 449 [2000] [supreme court providently exercised its discretion in denying that branch of plaintiffs' motion, made after the plaintiffs filed a note of issue and certificate of readiness, which was to compel the defendant to provide additional disclosure, since plaintiffs failed to offer any evidence of unusual or unanticipated circumstances that developed subsequent to the filing requiring additional pretrial proceedings to prevent substantial prejudice]; *cf. Karakostas v Avis Rent A Car Sys.*, 306 AD2d 381 [2003] [unusual or unanticipated circumstances sufficient to allow respondent to pursue additional discovery were present under circumstances where plaintiff served a supplemental response to discovery indicating for the first time that plaintiff would call an expert to testify about plaintiff's disability and lost future earnings after the filing of the note of issue]; *see generally James v New York City Tr. Auth.*, 294 AD2d 471 [2002] [defendants waived their right to conduct physical examinations of the injured plaintiff by their failure to move to vacate the note of issue within 20 days after service of it and the certificate of readiness]).

Conclusion

For the above stated reasons, claimant's motion for leave amend its appraisal is denied.

The foregoing constitutes the decision and order of the court.

E N T E R

J. S. C.