

## Issues Confronted in the Taking/Redevelopment of Environmentally Constrained Property

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### A. General Overview of Environmental Contamination in Eminent Domain Proceedings

#### 1. Housing Authority of the City of New Brunswick v. Suydam Investors, LLC., 177 N.J. 2 (2003)

In Housing Authority of the City of New Brunswick v. Suydam Investors, LLC., 177 N.J. 2 (2000), the New Jersey Supreme Court established a general framework to determine “just compensation” for condemned property which is environmentally contaminated. The Court’s decision bifurcated condemnation actions into two parts:

- A. A proceeding to determine “just compensation” based on the condemned property’s value as if remediated, and
- B. A proceeding to determine the property owner’s liability for the cost of any environmental remediation of the condemned property.

The Suydam decision also provided for the creation of an environmental trust escrow to secure the funding of the property owner’s liability for any remediation costs. The environmental trust escrow is to be created from the just compensation paid for the property’s value as if remediated. The environmental trust escrow is funded by the just compensation that a condemnor must pay into the Superior Court, Trust Fund Unit before acquiring title and possession of the condemned property.

Prior to gaining title and possession of condemned property, a condemnor must deposit its estimate or any final determination of just compensation into the Superior Court. N.J.S.A. 20:3-18. Once the deposit is made, the condemnor may file a declaration of taking which transfers record title to the condemnor. N.J.S.A. 20:3-17. The condemnor then serves notice on the property owner that the funds have been deposited and the declaration of taking is filed in order to gain the right of exclusive possession to the condemned property. N.J.S.A. 20:3-19. This may occur even before the final determination of just compensation.

In return for relinquishing title and possession of condemned property, the property owner may withdraw the full amount of just compensation deposited in the Superior Court. N.J.S.A. 20:3-23. After Suydam, however, the condemnor may object to the withdrawal of the funds that it believes is necessary to remediate the condemned property. The condemnor’s objection must be supported by a reasonable basis to support its contention. The reasonable basis can be established by environmental investigation reports such as Phase I and Phase II studies, an approved remedial action workplan and a reputable cost estimate to implement the remedial action workplan. The property owner may respond to the condemnor’s objection by providing its own investigations, workplans and cost estimates. The court will ultimately rule on the amount that will be retained in court which becomes the “environmental trust escrow”. The court’s ruling

creating the environmental trust escrow establishes only the amount of the fund and is not a final determination of liability. The condemnor may then seek to withdraw funds from the environmental escrow on motion with appropriate proofs. The property owner may object to the condemnor's motion and provide support that the condemnor's claim is not the property owner's liability.

## **2. New Jersey Transit v. Cat in the Hat et als, 177 N.J. 29 (2003)**

Another important case decided at the same time as Suydam, was New Jersey Transit v. Cat in the Hat et als, 177 N.J. 29 (2003) which held that a condemnor may reserve the right to make future claims for environmental remediation without bearing the risk of being barred by res judicata or collateral estoppel. Underlying this decision is the immunity granted condemnors under the Spill Compensation and Control Act, N.J.S.A. 58:23.11, et seq.

Any federal, State, or local governmental entity which acquires ownership of real property through bankruptcy, tax delinquency, abandonment, escheat, eminent domain, condemnation or any circumstance in which the governmental entity involuntarily acquires title by virtue of its function as sovereign, or where the governmental entity acquires the property by any means for the purpose of promoting the redevelopment of that property, shall not be liable, pursuant to subsection c. of this section or pursuant to common law, to the State or to any other person for any discharge which occurred or began prior to that ownership. This paragraph shall not provide any liability protection to any federal, State or local governmental entity which has caused or contributed to the discharge of a hazardous substance. This paragraph shall not provide any liability protection to any federal, State, or local government entity that acquires ownership of real property by condemnation or eminent domain where the real property is being remediated in a timely manner at the time of the condemnation or eminent domain action.

N.J.S.A. 58:23.11-11g(d)(4)

The Court determined that this immunity from liability did not expire upon the taking of the property. Instead, the property owner remains liable for the conditions which existed on the property prior to the taking. The failure of the condemnor to raise an environmental claim when condemning the property does not relieve the property owner from this liability. Cat in the Hat, supra, 177 N.J. 42.

## **B. Developing the Initial Cost Estimates for Environmental Remediation**

N.J.S.A. 20:3-16 permits a prospective condemnor to enter property which it has the "authority to condemn for the purpose of making studies, surveys, tests, soundings, borings and appraisals." Such entry may only be made after providing the property owner and occupant notice by certified mail at least 10 days prior to the inspection. Entry is made under the general police powers and does not require the payment of compensation upon entry. The condemnor is liable only for any damages suffered by the property owners if the property is not ultimately condemned within two years of the entry. N.J.S.A. 20:3-16.

### **1. Objections to preliminary entries**

The Court will generally uphold the condemnor's right to enter a property for the purpose of conducting inspections. In some cases, the entry may be permitted under certain reasonable conditions. However, there may be occasion when a property owner does not permit the prospective condemnor to enter the property. In these cases, the condemnor is required to file a Superior Court action to gain access. Defenses that the property owner may assert include:

**i. The requesting party lacks the authority to condemn;**

Entry is sought for a potential taking for which the condemning authority does not have the power to acquire.

**ii. The proposed entry is overly burdensome,**

A taking may unduly interfere with a business causing irreparable harm.

**iii The proposed taking is more than a mere entry and is more akin to a temporary taking.**

An entry which may be argued as more than a mere temporary taking could be one which requires the installation of a monitoring well. In other jurisdictions, temporary wells have found to be within the scope of police power and not a permanent taking. Cf. Rohaly v. State, Dept. of Environmental Protection and Energy, 323 N.J. Super. 111 (App. Div. 1999) (taking a factor of whether the well is permanent or temporary); National Compressed Steel Corp. v. Unified Government of Wyandotte County/Kansas City, 38 P.3d 723 (Ka 2002); Boise Cascade Corp. v. U.S., 296 F.3d 1339 (C.A. Fed.Cir. 2002), rehearing and rehearing en banc denied (2002).

**2. Property Owner's oversight of inspection**

A prospective condemnee should consider whether it is necessary to hire its own consultant to monitor the environmental inspections. The property owner can potentially limit the discrepancies between its testing results and those of the condemnor if it participates in the inspection process. The prospective condemnee's consultant can monitor the types of testing, obtain split samples to check any test results, and give advice to the property owner on how to protect its interests. The consultant may also aid the property owner in addressing any areas of concern prior to the commencement of the condemnation action so that it may retain control over a cleanup.

**C. Considerations in Determining the Appropriate Costs Estimates**

**1. Highest and best use**

The highest and best use underlying the value of the condemned property as if remediated will be an important consideration when assessing a property owner's responsibility for remediation costs. For example, an industrial property requiring a cleanup may be condemned for redevelopment as a residential development. The question presented is whether the property owner is responsible for the cleanup to the level required for an industrial use or a residential use. Although no case specifically has ruled on this issue, just compensation should require a property owner's liability be limited to the amount necessary to clean the property to the use underlying the property's valuation as if remediated. Accordingly, if the property is valued as an industrial

property, then the cost of cleanup should be determined to remediate the property for an industrial use. If the property owner were required to pay the cost to clean the property to the more stringent residential standard, the property owner would in essence be required to pay a portion of the project cost.

Alternatively, the property is valued for a residential use and needs to only be remediated to a lesser non-residential standard. In this situation, the actual cost of cleanup could be less than the cost of cleanup to the property's highest and best use. The question would be whether the property owner should be assessed the lower actual cost of cleanup as opposed to the higher estimated cost of cleanup the residential standard.

**2. Segregating remediation costs for a parcel which is part of a larger remediation project**

Many times a condemned property is cleaned as part of a larger cleanup for an assembled group of properties condemned for the same project. The issue is how to segregate the costs associated with each property's remediation and prove the appropriateness of the segregation. It may be necessary to review work records, disposal logs, remedial action workplans and details of the overall area remediation in order to ascertain the appropriate remediation cost.

**3. Determining appropriate cost to clean**

In some cases, a property owner may have had the right to perform a remediation over time whereas a condemnor may be required to perform the cleanup all at once. In this situation, discounting the projected cashflows for the remediation may be the most appropriate means to ascertain the property owner's liability which would result in it receiving just compensation. The use of discounted cash flows, however, has been considered speculative and an impermissible valuation technique in condemnation proceedings. Use of this technique will likely be determined on a case-by case basis to determine the appropriate amount of the property owner's environmental liability. See Metuchen I, L.L.C. v. Borough of Metuchen, 21 N.J. Tax 283, 295 (Tax Ct. 2004).

**4. Cost estimates prepared by private redevelopers**

Responsibility for certain testing in conjunction with redevelopment may be delegated by the municipality to the private redeveloper. Having private redevelopers conduct the environmental testing and prepare the cost estimates could create a conflict of interest. Private redevelopers generally are seeking profits which would include acquiring property for the lowest cost. It is not difficult to foresee private redevelopers using their own experts to provide inflated environmental remediation cost estimates. This may be a factor for a property owner to consider when being asked to grant preliminary entry pursuant to N.J.S.A. 20:3-6.

**5. Withholding for contingencies**

Generally the condemnor's environmental remediation cost estimates include additional amounts for contingencies. An issue for the court is whether the condemnor may secure an amount for the contingencies as part of the environmental trust-escrow. If so, to what extent should the withholding of contingencies be permitted?

**6. Contamination of property used as comparable sales**

Condemned property is often valued using the “comparable sales approach”. This valuation method uses sales of similar properties to calculate the condemned property’s fair market value. The appraiser analyzes the sold property to derive a value for the condemned property. When considering sales of similar properties, the appraiser should also consider whether the comparable sales have similar environmental contamination issues as the condemned property. For example, an appraiser may use sales of gasoline service stations to value a gasoline service station. Remediation of gasoline service stations is not uncommon. Therefore, the terms of the sale may be impacted by the remediation. If the appraiser does not investigate whether environmental contamination may have impacted the terms of the sale, his or her valuation of the property as if remediated may in reality be for the property as if contaminated. Notwithstanding, the property owner could still be held liable for the cost to remediate its property. This would result in the property owner’s ultimate compensation being unjustly reduced twice by the impacts of environmental contamination.

**D. Relevant Legislation**

In December 2005, the New Jersey Legislature enacted P.L.2005, c.355 of the Public Laws of 2005 (introduced as Senate Bill 2851/Assembly Bill 4588) which permits a condemnor to replace a property owner who is performing a remediation of the condemned property. The condemning authority may do so upon demonstrating to the New Jersey Department of Environmental Protection (“DEP”) that it has sufficient resources to perform the remediation and “at the time the condemnation action is filed, more than four years have elapsed since the person performing the remediation first entered into an oversight document for the site with the [DEP] and the person has not begun implementation of the remedial action workplan for each area of concern on the property.” See N.J.S.A. 58:10B-1 et seq. The condemning authority must also enter into an oversight document with the DEP before being permitted to take over the remediation. Id.

**E. Recent Cases of Interest<sup>1</sup>**

Casino Reinvestment Development Authority v. Teller, 384 N.J. Super. 408 (App. Div. 2006). In this case, the condemning authority, Casino Redevelopment Authority (“CRDA”), and the City of Atlantic City had competing interests in the estimated just compensation deposited into court pursuant to N.J.S.A. 20:3-18. The estimated just compensation deposited into court was \$55,200 whereas the estimated cost to remediate the property was between \$130,000 and \$200,000. CRDA’s interest in the deposited funds was for approximately \$257,000 in environmental remediation costs. The City’s interest was for approximately \$39,000 in unpaid municipal taxes and liens. The Court decided that following Suydam, CRDA had a priority in the funds over the City of Atlantic City.

Sayreville Economic and Redevelopment Agency v. NL Industries, et als. Docket No. A-3727-02T2 decided December 28, 2004. In this decision, the Appellate Division ruled the Suydam decision applied to Brownfields sites and all condemnations regardless of the purpose. Slip Opinion at page 19-20.

NL Industries v. New Jersey Department of Environmental Protection, Docket No. MER-C-09-05, decided June 2, 2005. In NL Industries v. New Jersey Department of Environmental Protection, the court held that a condemnor did not have the right to substitute a property owner

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<sup>1</sup> Copies of the unreported opinions can be found on Carlin & Ward’s website <http://carlinandwardpc.lawoffice.com/Seminars.shtml>

who was in the process of properly completing an approved remediation. See N.J.S.A. 58:10B-3(g).

New Jersey Transit Corporation v. Mecca Trucking, et als., Docket No. A-5643-03T3, decided September 29, 2005. In Mecca Trucking, the court would not permit the introduction of testimony concerning the environmental remediation and New Jersey Transit's appraiser's unsupported opinion concerning a reduction in value due to the "stigma" associated with the environmental contamination. Slip Opinion at 7-8.

**F. Conclusion**

Suydam and Cat in the Hat are the first of what will likely be a series of court decisions and potential legislation which further address the treatment of environmental contamination in condemnation. There remain many issues to address in determining liability and the creation of the environmental trust escrow. Most situations where there are open and inclusive investigations and sharing of information should be resolved by compromise without extensive court intervention. In those cases where a compromise cannot be reached, court decisions will continue to address many of the unanswered questions to resolve these matters.