SUPERIOR COURT OF NEW JERSEY
ESSEX VICINAGE

PATRICIA K. COSTELLO
ASSIGNMENT JUDGE

50 W. MARKET STREET
ESSEX COUNTY COURTS BUILDING
NEWARK, NJ 07102
(973) 693-6470

October 11, 2006

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Re: City of East Orange v. Kason Associates, Inc., et al.
Docket No: ESX-L-8278-05

Dear Counsel:

This matter comes before the Court by way of a Motion filed by the City of East Orange to fix the valuation date and methods of valuation for just compensation. Defendant filed opposition. I have reviewed the papers submitted. Counsel waived oral argument.

Procedural History

The procedural history and the undisputed facts are as follows:

On April 1, 2004, the City of East Orange ("Plaintiff") issued the "City of East Orange Lower Main Street Redevelopment Plan" which impacted the Dr. Martin Luther King, Jr./Lower Main Street Area ("Lower Main Street Area"). On April 12, 2004, the City Council of the City of East Orange ("City Council") adopted Resolution 1-101, designating the Lower Main Street Area as an area in need of redevelopment and enacted Ordinance No. 7-2004 which adopted the Redevelopment Plan for the area. On February 21, 2005, the City Council enacted Ordinance No. 6-2005, which permitted the acquisition of properties within the Lower Main Street Area.

Kason Associates, Inc. ("Kason") is the owner of 62 Walnut Street and is a principal in the sole tenant, Comm-Unity, Inc. ("Comm-Unity"), a partial adult treatment center. On May 9, 2005, Plaintiff offered Kason $280,000 to purchase the property located at 62 Walnut Street. This offer was subsequently rejected by Kason.

On October 18, 2005, Plaintiff filed a Complaint naming Kason as the owner of the property. On October 21, 2005, Plaintiff filed an Amended Verified Complaint, naming Comm-Unity as the tenant on the property. On February 1, 2006, Plaintiff filed a Declaration of Taking and deposited $285,000.00 with the Court. A hearing was held on March 14, 2006. During the hearing, testimony was heard in regard to the appraisal report prepared on behalf of Kason. This appraisal established a value of $480,000.00, which included a valuation of the going concern of the center operated by Comm-Unity. Testimony pertaining to the going concern value was also provided.

The Commissioners held that the just compensation for the taking of the property was $420,000.00. The parties have appealed this valuation.

Plaintiff is requesting that this Court set a valuation date of April 12, 2004, the date the City declared the Lower Main Street Area in need of redevelopment. Kason is requesting a valuation date of October 21, 2005, the date the City filed its Amended Verified Complaint. Plaintiff also requests that Defendants be barred from introducing any appraisal which discusses the going concern value.

A. Date of Valuation

The blight date is the appropriate date of valuation because it is the earliest date under N.J.S.A. 20:3-30 and because just compensation can be achieved by applying this statute to the facts of this matter.

As set forth in N.J.S.A. 20:3-30:

> Just compensation shall be determined as of the date of the earliest of the following events; a) the date possession of the property being condemned is taken by the condemnor in whole or in part; b) the date of the commencement of the action; c) the date on which action is taken by the condemnor which substantially affects the use and enjoyment of the property by the condemnee; or d) the date of the

declaration of blight by the governing body upon a report by a planning board . . . .

The objectives of N.J.S.A. 20:3-30 are to "protect the condemnee from a diminution in value resulting from 'the cloud of condemnation' being placed on the property by a potential condemnor" and "to insulate the condemnor from 'the ravages of an inflationary spiral.'" Township of West Windsor v. Nierenberg, 150 N.J. 111, 129 (1997) (citing New Jersey Sports & Exposition Authority v. Giant Realty Associates, 143 N.J. Super. 338, 348 (Law Div. 1976)). To achieve these purposes, the earliest date that the condemnation substantially affected the value of the property will be applied. See e.g., Mount Laurel Township v. Stanley, 185 N.J. 320 (2005) (setting the date of the commencement of the action as the valuation date because it was the earliest date that substantially affected the owner's use and enjoyment of the property); see e.g. Township of West Windsor v. Nierenberg, supra, 150 N.J. 111 (establishing the valuation date as the date the municipality issued a letter informing the property owner of a potential condemnation action as opposed to the date of the commencement of the action); see e.g., New Jersey Sports & Exposition Authority v. Giant Realty Associates, supra, 143 N.J. Super. 338 (Law Div. 1976) (setting the date of the denial of a development permit as the valuation date because it has a substantial affect on the value of the property).

N.J.S.A. 20:3-30 must be read in conjunction with N.J.S.A. 20:3-38. Housing Authority of City of Newark v. Ricciardi, 176 N.J. Super. 13,18 (App. Div. 1980). N.J.S.A. 20:3-38 provides that "[t]he value of any land or other property being acquired in connection with development or redevelopment of a blighted area shall be no less than the value as of the date of the declaration of blight by the governing body upon a report by a planning board." As the Court noted, "the motivation of the Legislature in providing this alternate valuation date was its perception that the ordinary and natural consequence of a declaration of blight is to trigger a decline in value." Id., see Jersey City Redevelopment Agency v. Kugler, 58 N.J. 374, 381-383 (1971); Lyons v. Camden, 52 N.J. 89, 99 (1968). By implementing this statute, the Legislature prescribed a minimum base for compensation. Housing Authority of City of Newark v. Ricciardi, supra, 176 N.J. Super. at 18. This would provide landowners with the assurance that they would receive at least the value the property had when it was declared blighted rather than with its diminished value when it was finally taken for redevelopment purposes years later. Id.

Conversely, a landowner who has not been negatively impacted by the depreciating effect of a previous announcement of a proposed taking is not entitled to reap a windfall. State, Dep't of Environmental Protection v. Nalbone Trucking Co., Inc., 128 N.J. Super. 370, 377 (App. Div. 1974), certif. denied, 65 N.J. 575 (1974).

The statutory date of taking as date of valuation must yield to constitutional considerations. City of Ocean City v. Mafucci, 326 N.J. Super. 1 (App. Div. 1999); see also Desai v. Board of Adjustment Town of Phillipsburg, 360 N.J. Super. 586 (App. Div. 2003), certif. denied 177 N.J. 492 (2003), (noting that the valuation of the property should comport with the facts and circumstances of the case, so as to assure the property owner just compensation, as contemplated by the Constitution). The "[a]rbitrary application of this statute governing the valuation date . . . is not required where it would result in unjust compensation to the property owner." City of Ocean City v. Mafucci, supra, 326 N.J. Super. at 16 (quoting Uvodich v. Arizona Bd. of Regents, 9 Ariz. App. 400 (Ariz. 1969)).

Accordingly, an alternative date or time period is permissible only if it the application of the statute will not provide just compensation. This affords judicial discretion in setting a valuation date in situations where it would be unconstitutional to abide by the statutorily prescribed dates. For instance, deviation may be warranted when a redevelopment designation lingers for many years without any acquisition activity taking place.

Here, only 18 months have passed between the date of the declaration of blight and the commencement of the action. Plaintiff declared the area in need of redevelopment on April 12, 2004 and filed the Amended Verified Complaint on October 21, 2005. A substantial amount of time did not lapse and there was no extraordinary or inexcusable delay in pursuing the condemnation process. The cases cited by the Defendant reflect situations where a substantial time period had elapsed and where constitutional implications were raised by the use of a significantly earlier date of value. For instance, in Utah State Road Commission v. Friberg, 687 P.2d 821 (Utah 1984), approximately eight years had elapsed between the date of the service of process and the condemnation process. In Jersey City Redevelopment Agency v. Kugler, supra, 58 N.J. 374, approximately nine years had elapsed between the declaration of blight and the commencement of action.

No facts have been provided to support a deviation from the statutory requirement set forth under N.J.S.A. 20:3-30[1]. Therefore, the proper date of valuation is the date the City of East Orange declared the Lower Main Street Area in need of redevelopment as provided under N.J.S.A. 20:3-30(d).

Kason should not be given a windfall as a result of the declaration of blight, or of the minor time lapse between the blight and the filing. The increase in value either as a result of and subsequent to the declaration or as a result of other market factors does not mean that Kason should reap that benefit.

B. Use of Going Concern Value

The condemnor is required to pay just compensation to the property owner when private property is condemned for public use. City of Trenton v. Lenzner, 16 N.J. 465 (1954); Town of Montclair v. D'Andrea, 138 N.J. Super. 479, 485 (App. Div. 1975). The fair market value of the property taken is the basis for determining just compensation and this value "may be ascertained by a price which would be agreed upon voluntarily by a hypothetical owner willing to sell to a willing hypothetical buyer." Id. Damages incidental to the taking are ordinarily excluded from the analysis because of the difficulty in the measurement. State v. Gallant, 42 N.J. 583, 586 (1964). Going concern value of the business incidental to the taking has been found non-compensable. Id.; City of Trenton v. Lenzner, supra, 16 N.J. at 476; State v. Williams, 65 N.J. Super. 518 (App. Div. 1961); New Jersey Highway Auth. v. Rue, 41 N.J. Super. 385 at 387 (App. Div. 1956); Town of Montclair v. D'Andrea, supra, 138 N.J. Super. at 485.

Compensable property does not include the value of the business because the fair value of the realty taken has been generally established as a reasonable basis for just compensation. State v. Gallant, supra, 42 N.J. at 587. In State v. Gallant, supra, 42 N.J. at 587, the Court emphasized that just compensation:

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[1] William J. Ward, Esq., an attorney representing Kason offered anecdotal information in the form of a certification about unknown cases and unknown facts where courts have used the date of the Complaint as opposed to date of the declaration of blight when setting a valuation date. While neither side has offered facts to explain the valuation difference in this case, I infer from their positions both sides would agree the property appreciated between the blight declaration and the filing of the Complaint. The extent of appreciation is unknown to the Court.

> . . . ordinarily excludes compensation for other damages incidental to the taking, such as the loss to or destruction of good will, expense of moving to a new location, profits lost because of the business interruption, or inability to relocate. Denial of such alleged losses has been judicially justified upon the reasoning that they are too difficult, remote and uncertain to measure accurately . . . . (emphasis added).

Kason argues Comm-Unity's nontransferable license to operate on the site as a partial treatment center provided the property with intrinsic value that should be considered in determining just compensation. To support this argument, Kason refers to Michigan, Pennsylvania and Minnesota case law. Kason notes that under City of Detroit v. Michael's Prescriptions, 373 N.W.2d 219, 224-25 (Mich. Ct. App. 1985), going concern value should be awarded where the business derives its success from a location not easily duplicated or where relocation is foreclosed for reasons relating to the condemnation. This would run contrary to the Court's reasoning in State v. Gallant, supra, 42 N.J. 583 and would result in the potential for speculative damages. Just compensation for the property should not include any value for Comm-Unity's going concern enterprise.

Plaintiff argues that the adult partial treatment center does not meet the functional unit test. In Town of Montclair v. D'Andrea, supra, 138 N.J. Super. at 485-486 (citing State v. Gallant, supra, 42 N.J. at 590), the Court set forth the proposition that:

> Where, therefore, a building and industrial machinery housed therein constitute a functional unit, and the difference between the value of the building with such articles and without them, is substantial, compensation for the taking should reflect that enhanced value. This, rather than the physical mode of annexation to the freehold is the critical test in eminent domain cases.

The functional unit test does not apply to the facts of this case. There is nothing to indicate that tangible machinery or equipment is being utilized that would warrant application of this test. Good will and profits alone are not sufficient to meet the standard.

Plaintiff argues that the tenant's use of the property as an adult partial treatment center does not qualify it as a special purpose property. In order to qualify as a special purpose property, the characteristics of the property would be such that the price of the property on the open market would be virtually meaningless. Ford Motor Co. v. Edison, 127 N.J. 290 (1992); Transcontinental Gas Pipeline Corp. v. Bernards Township, 111 N.J. 507, 518 (1988). The property in question must be uniquely adapted in a way where the property can only be practically used for a specific purpose. Inmar Associates, Inc. v. Borough of Carlstadt, 112 N.J. 593 (1988); Hackensack Water Co. v. Old Tappan, 77 N.J. 208, 223 (1977). Here, there are no facts proffered to suggest that the sale of the property on the open market would result in a price that is meaningless. Additionally, the property is not uniquely adapted in a way where the property can only be used for a particularized purpose.

Accordingly, the valuation date is set at April 12, 2004, the date of the declaration of blight. The motion to exclude evidence of going concern value is granted[2]. An Order is attached.

The expert report deadline is extended to November 20, 2006. Rebuttals of the appraisals shall be submitted on or before December 20, 2006. The trial date is extended to January 16, 2007 before the Honorable Eugene Codey, Presiding Judge of the Civil Division. All adjournment requests are to be made to this Court.

Very truly yours,

Patricia K. Costello

PATRICIA K. COSTELLO, A.J.S.C.

PKC:ksd
Cc: File

[2] Harold Katz, the Executive Director of Comm-Unity notes in his Certification that additional time should be granted to find a relocation site or the City should be forced approve the use of the North Arlington Site as a temporary location. This is unsupported by notice of motion. Accordingly, Mr. Katz's notation will not be considered by this Court.