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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3727-02T2

NL INDUSTRIES, INC.,

Plaintiff-Respondent,

v.

SAYREVILLE ECONOMIC AND
REDEVELOPMENT AGENCY,

Defendant-Appellant.

SAYREVILLE ECONOMIC AND
REDEVELOPMENT AGENCY,

Plaintiff-Cross-Respondent,

v.

NL INDUSTRIES, INC.,
NL ENVIRONMENTAL MANAGEMENT
SERVICES, INC.,

Defendants-Cross-Appellants,

and

MARSULEX, INC., NEW JERSEY
HIGHWAY AUTHORITY, THE CITY OF
PERTH AMBOY, MIDDLESEX COUNTY
SEWERAGE AUTHORITY, CONRAIL
(successor-in-interest to
Raritan River Railroad), FAITH
FELLOWSHIP MINISTRIES, INC.,
JERSEY CENTRAL POWER AND LIGHT
COMPANY (d/b/a GPU Energy),
NATIONAL AMUSEMENTS, INC.,
PRAXAIR, INC., PUBLIC SERVICE
ELECTRIC & GAS COMPANY,

UTILITY SERVICE AFFILIATES,
INC., VERIZON COMMUNICATIONS,
BOROUGH OF SAYREVILLE AND
THE STATE OF NEW JERSEY,

Defendants.

Argued September 21, 2004 - Decided DEC 28 2004

Before Judges Skillman, Parrillo and Grall.

On appeal from Superior Court of New Jersey, Law Division, Middlesex County, Docket Nos. L-6018-02 and L-6130-02.

Gage Andretta argued the cause for appellant/cross-respondent (Wolff & Samson, attorneys; Mr. Andretta, of counsel; Thomas Sabino, on the brief).

Christopher R. Gibson argued the cause for respondents/cross-appellants (Archer & Greiner, attorneys; Mr. Gibson, of counsel; Patrick M. Flynn, on the brief).

PER CURIAM

In 1996, the governing body of the Borough of Sayreville adopted a recommendation of the Borough's planning board that it designate a 937-acre area as an "area in need of redevelopment" pursuant to the Local Redevelopment and Housing Law, N.J.S.A. 40A:12A-1 to -49. This area, which is located along the Raritan River, has a long history of heavy industrial and manufacturing uses and is now mostly vacant.

The largest property in the area is an approximately 450-acre tract owned by NL Industries, Inc. (NL). From 1935 to

1982, NL operated a plant for the production of titanium dioxide on the property. After NL discontinued this operation, it leased a small part of the property to companies that conducted sulfuric acid manufacturing operations until 1997. The remainder of NL's property has remained vacant since 1982.

NL did not challenge the 1996 designation of its property as part of the Sayreville waterfront redevelopment area. Subsequent to that designation, NL demolished the vacant buildings on the property.

In 1999, Sayreville adopted an ordinance that approved a redevelopment plan for this area and rezoned it for mixed commercial uses. This ordinance also designated the Sayreville Economic and Redevelopment Agency (SERA) to act as the municipality's redevelopment agency. NL did not challenge the ordinance approving this redevelopment plan.

The most significant impediment to implementation of Sayreville's redevelopment plan is environmental contamination caused by industrial and manufacturing operations formerly conducted by NL and other property owners in the redevelopment area. NL has taken some steps to remediate the contamination on the property, but it still contains substantial areas that are highly contaminated.

Around the same time Sayreville approved the redevelopment plan for the waterfront area, SERA and NL entered into a cooperation agreement under which they agreed to join in formulating proposals for redevelopment of NL's property and selecting developers. However, SERA subsequently became disenchanted with this joint approach to redevelopment, particularly due to the slow pace of NL's environmental remediation, and determined to acquire the property by eminent domain.

In October 2000, the Middlesex County Board of Freeholders authorized the sale of $19 million in bonds to provide funding for SERA to acquire property within the redevelopment area, including the NL property.

On December 8, 2000, SERA extended an offer to NL to acquire its property for $10.6 million. This offer was accompanied by an appraisal prepared for SERA as well as reports by an engineer and environmental consultant.

NL rejected SERA's offer, and the parties and their consultants subsequently met in a negotiation session. At this meeting, NL pointed out certain alleged errors in the appraisal prepared for SERA.

Thereafter, SERA retained another expert, Norman I. Goldberg, to value NL's property. Goldberg concluded that the

property would be worth $32.075 million if the environmental contamination were fully remediated. SERA's environmental consultant determined that it would cost $28.1 million to complete such remediation. Goldberg deducted these remediation costs from his valuation of the property if fully remediated and appraised the property at $3.975 million. SERA extended an offer to NL to acquire the property for this amount, which NL rejected. The parties subsequently held a negotiation session, at which they were unable to reach agreement on a purchase price for the property.

In anticipation of SERA filing an eminent domain action accompanied by a declaration of taking, NL filed an action on June 27, 2002, seeking a declaratory judgment that (1) SERA's declaration of taking must include a deposit into court of the full value of the property as if remediated without any deduction for remediation costs; and (2) NL must be allowed unfettered access to the property to continue its remediation efforts even after the eminent domain action was filed.

On July 1, 2002, SERA filed an eminent domain action for acquisition of NL's property. Although SERA submitted a proposed declaration of taking and order for the deposit into court of its $3.975 million appraised value, the trial court declined to sign the order because of the dispute between the

parties as to whether SERA could deduct costs of remediation of the site in calculating the amount of the deposit. As a result, SERA did not record its declaration of taking and did not make a deposit of its $3.975 million estimate of just compensation. NL filed an answer that denied SERA's authority to condemn the property and also claimed that the action should be dismissed because SERA had failed to negotiate in good faith for voluntary acquisition of the property.

The trial court consolidated NL's declaratory judgment action and SERA's eminent domain action and heard argument on September 20, 2002. The court deferred issuance of an opinion until this court decided Hous. Auth. of New Brunswick v. Suydam Investors, L.L.C., 355 N.J. Super. 530 (App. Div. 2002).

After our decision in Suydam, the trial court issued a comprehensive oral opinion that rejected NL's challenge to the right of SERA to acquire the property by eminent domain as well as its claim that SERA's action should be dismissed because it had failed to negotiate in good faith for voluntary acquisition of the property. The court also determined that SERA could not simply deduct the full cost of remediation in valuing NL's property for purposes of acquisition by eminent domain, and that if it wished to file a declaration of taking, SERA had to deposit into court the full value of the property as if

remediated. Accordingly, the court entered a judgment that authorized SERA to acquire the property by eminent domain and appointed condemnation commissioners to value the property. The judgment also provided in paragraph four that "appraisal evidence of environmental contamination affecting the fair market value of the Property is admissible on the issue of value at the Commissioners' hearing and if necessary at the trial in the Condemnation Action." The judgment further provided in paragraph six that if SERA wishes to file a declaration of taking, it must deposit the "as clean" $32.075 appraised value of the property into court.

SERA filed a notice of appeal from the parts of the judgment relating to the valuation of NL's property and the deposit required to file a declaration of taking. NL filed a notice of cross appeal from the parts of the judgment that determined that SERA's proposed taking is for a proper public purpose and that SERA had satisfied its statutory obligation to engage in bona fide negotiations for the voluntary acquisition of the property.

We conclude that the trial court correctly determined that SERA's taking of NL's property was for a proper public purpose and that the eminent domain action was not brought in bad faith. We also affirm the trial court's determination that SERA

satisfied its obligation to engage in bona fide negotiations for the voluntary acquisition of the property. However, we reverse the part of the judgment relating to the method of valuation of the property, because our decision in Suydam, upon which the trial court relied, was reversed by the Supreme Court during the pendency of this appeal. We modify and affirm the part of the judgment relating to the deposit required to file a declaration of taking.

I

The Local Redevelopment and Housing Law (the Law) confers authority upon a redevelopment agency such as SERA to "[a]cquire, by condemnation, any land or building which is necessary for the redevelopment project." N.J.S.A. 40A:12A-8(c). NL has not challenged Sayreville's adoption of a redevelopment plan for its waterfront area or the inclusion of NL's property in the redevelopment area. Thus, NL does not dispute that redevelopment of its property in accordance with the Law constitutes a proper public purpose.

Nevertheless, NL contends that SERA's decision to file a condemnation action to pursue this public purpose was made in bad faith because SERA's real objective in bringing the action was to "seize control" of the cleanup of NL's property to

decrease the property's value. NL also contends that SERA's acquisition of the property will interfere with the "[Department of Environmental Protection] supervised cleanup" of the site.

"It is well-established that a reviewing court will not upset a municipality's decision to use its eminent domain power 'in the absence of an affirmative showing of fraud, bad faith or manifest abuse.'" Township of West Orange v. 769 Assocs., 172 N.J. 564, 571 (2002) (quoting City of Trenton v. Lenzner, 16 N.J. 465, 473 (1954), cert. denied, 348 U.S. 972, 75 S. Ct. 534, 99 L. Ed. 757 (1955)). "Courts will generally not inquire into a public body's motive concerning the necessity of a taking. . . ." Borough of Essex Fells v. Kessler Inst. for Rehab., Inc., 289 N.J. Super. 329, 337 (Law Div. 1995). A party asserting that a government agency has improperly invoked the power of eminent domain bears a heavy burden. See Township of West Orange v. 769 Assocs., supra, 172 N.J. at 571-72.

In concluding that NL had not shown that SERA's decision to file this action was the product of fraud, bad faith or manifest abuse of the power of eminent domain, Judge Longhi stated:

> NL's 400 plus acres of land are located in an area along the Borough's waterfront. That land has been classified as being a Brownfield. These lands are contaminated from prior usage. They have lain fallow and unproductive for a long period of time. Local governments in cooperation with each other are seeking to restore these lands to

> productive use. It is for that reason that the NL property was included in an area deemed to be in need of redevelopment and SERA was created. Economic redevelopment agencies are given the power of eminent domain. Condemnation thus is a part of the redevelopment purpose or scheme to reclaim areas that have long remained unproductive. The proposed taking in this matter is clearly for a public purpose.
>
> . . . The record before the Court supports a finding that SERA and NL disagreed on the pace and scope of the cleanup and that cooperative efforts at redevelopment did not work out. The parties were too far apart. SERA has decided to condemn the property and the attempt to get D.E.P. cleanup approval together with the filing of the precondemnation declaratory judgment action can be viewed as an attempt by SERA to speed up the cleanup process and to get some guidance from the court. On this record I cannot find that these actions constituted bad faith.

We conclude substantially for the reasons stated by Judge Longhi that SERA's initiation of eminent domain to acquire NL's property was for a proper public purpose and that NL has not made any showing of fraud, bad faith or manifest abuse of discretion in SERA's exercise of the power of eminent domain. We add the following supplemental comments.

The essential theme of NL's cross appeal is that SERA brought this eminent domain action solely to take over the environmental remediation of its property and that this is not one of the purposes of the Law. However, the remediation and

redevelopment of NL's property are inextricably linked, because the most efficient and economical method of remediating the contamination of substantial portions of NL's property is to "cap" the contaminated areas by construction of the roads, parking lots and building slabs that will be required in connection with redevelopment. This remediation, as a component part of a redevelopment plan, will not intrude upon the DEP's discharge of its responsibilities for cleanup of the site. In fact, the DEP has approved SERA's assumption of responsibility for the cleanup by a letter dated August 6, 2002 from the Assistant DEP Commissioner for Site Remediation to SERA:

> [I]t is the Department's policy to encourage redevelopment of contaminated properties such as this site. Therefore, should SERA acquire the NL Industries site by condemnation or otherwise, the Department will enter into a Memorandum of Understanding/Memorandum of Agreement or other appropriate oversight document with SERA and permit it to take over remediation of this site under the supervision of the Department and in compliance with all regulatory requirements.

In addition, we reject NL's argument that SERA's filing of this condemnation action is simply a strategic maneuver to acquire the property for less than fair market value. "[W]hen a municipality or other public agency acquires private property by eminent domain, the property owner is constitutionally entitled to receive 'just compensation,' which is defined as 'the fair

market value of the property as of the date of the taking, determined by what a willing buyer and a willing seller would agree to, neither being under any compulsion to act.'" Deland v. Township of Berkeley Heights, 361 N.J. Super. 1, 21 (App. Div.) (quoting State, by Comm'r of Transp. v. Silver, 92 N.J. 507, 513 (1983)), certif. denied, 178 N.J. 32, 179 N.J. 185 (2003). We must assume that the valuation stage of this condemnation action "will result in an award that complies with this constitutional mandate." Ibid.

II

We turn next to the question whether SERA complied with its obligation to engage in bona fide negotiations for the voluntary acquisition of the property. N.J.S.A. 20:3-6 provides in pertinent part:

> [N]o action to condemn shall be instituted unless the condemnor is unable to acquire such title or possession through bona fide negotiations with the prospective condemnee, which negotiations shall include an offer in writing by the condemnor to the prospective condemnee holding the title of record to the property being condemned, setting forth the property and interest therein to be acquired, the compensation offered to be paid and a reasonable disclosure of the manner in which the amount of such offered compensation has been calculated, and such other matters as may be required by the rules. . . . In no event shall such offer be less than the taking agency's approved

> appraisal of the fair market value of such property.

If the condemnor does not conduct the pre-complaint negotiations required by this statute, "the condemnation complaint will be dismissed." State, by Comm'r of Transp. v. Carroll, 123 N.J. 308, 316 (1991).

The bona fide negotiations requirement of N.J.S.A. 20:3-6 is designed to encourage public entities to acquire property through voluntary action if possible, saving the delay and expense of court action, and allowing the property owner to receive its full value. County of Morris v. Weiner, 222 N.J. Super. 560, 565 (App. Div.), certif. denied, 111 N.J. 573 (1988). "Consistent with the concern for fairness to the property owner, [N.J.S.A. 20:3-6's] requirement of bona-fide negotiations has been strictly construed. . . ." State, by Comm'r of Transp. v. Carroll, supra, 123 N.J. at 317. However, N.J.S.A. 20:3-6 does not require a condemnor to engage in any particular form of negotiations. In fact, our Supreme Court has held that the "one-price offer" practice of the Department of Transportation does not violate the "bona fide negotiations" requirement. Id. at 318-19.

NL claims that SERA failed to meet the bona fide negotiations requirement by submitting a first appraisal that artificially reduced the estimated fair market value of NL's

property through exaggeration of anticipated development costs and by submitting a second appraisal that valued the property at a lower amount than the first appraisal, based on the deduction of remediation costs from the property's appraised value and an instruction to its appraiser to ignore the current zoning of the property.

In rejecting NL's argument that SERA had failed to discharge its good faith negotiating obligation under N.J.S.A. 20:3-6, Judge Longhi stated:

> [T]he Court cannot find that SERA deliberately low-balled fair market value. It relied on its appraisers and experts to inform SERA as to the fair market value and cost of remediation or it relied on legal counsel to attempt to clarify the law in an unsettled area. With respect to the first estimate the parties were miles apart as they were also with respect to the second appraisal report. The prelitigation negotiations merely reflect a wide disparity between the two parties in their approach to valuation. The wide disparity was recognized by NL who wrote SERA and in part stated that NL saw little prospect of a settlement and that SERA ought to go ahead with the condemnation. I cannot find that SERA violated the prelitigation good faith requirements of the statute. I do not find that it is a requirement of the statute that the condemning authority continue endlessly to make efforts to "settle" when it is apparent that the parties are getting nowhere. In that situation it is enough that the condemning authority make its offer based upon the estimate of its appraiser and gives a time limitation for the condemnee as

> to when to make its decision as to whether it accepts the offer.

Judge Longhi also rejected NL's argument that the deduction of remediation costs from the appraised value of the property, as remediated, in SERA's second appraisal manifested bad faith:

> NL also claims that SERA's attempt in the condemnation action to deduct SERA's estimated remediation cost from just compensation also constitutes bad faith and that it is merely SERA's continuing attempt to use remediation cost as a means of lowering the cost of compensation, all contrary to law. I also disagree with this contention. The issue of how to treat contamination of land and/or the cost of remediation in a condemnation setting was not the subject of any reported decisions in New Jersey until December of 2002, [when the Appellate Division decided] New Brunswick versus Suydam Investors LLC, 355 N.J. Super. 530. . . .
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> . . . .
>
> . . . The law in New Jersey being unsettled NL had a good faith basis to make an argument to the court that such estimated costs of remediation could be deducted from fair market value and that evidence of contamination could be presented in a condemnation proceeding on the issue of value.

We affirm the rejection of NL's argument that SERA failed to discharge its good faith negotiations obligation under N.J.S.A. 20:3-6 substantially for the reasons set forth in Judge Longhi's oral opinion. We add the following supplemental comments.

NL's argument that SERA engaged in bad faith negotiations by presenting an offer based on its second appraisal that was less than half the original offer based on its first appraisal assumes that the two offers were comparable. However, SERA's first offer was accompanied by a letter which noted that the appraisal assumed the property was clean and asserted that NL would be responsible for any costs incurred to remediate the property:

> While the Chaiken appraisal report appraises the Property as though it were free of pollution, the Property is contaminated and is the subject of an outstanding NJDEP investigation. . . .
>
> It is SERA's position that, under State and Federal law, as condemnor, SERA is not liable for any costs associated with the investigation or cleanup of the Property. Conversely, NL remains obligated to perform the cleanup under several statutory schemes including, but not limited to, the Industrial Site Recovery Act, N.J.S.A. 13:1K-6 et seq. ("ISRA") and the New Jersey Spill Compensation and Control Act, N.J.S.A. 58:10-23.11 et seq. ("the Spill Act"). Pursuant to ISRA, the Spill Act, and common law, SERA would be entitled to reimbursement by NL of all investigative/cleanup costs incurred to remediate the Property.

In contrast, SERA's second offer was based on an appraisal that reflected a deduction for the full cost of remediation and did not reserve the right to proceed against NL for the costs of environmental contamination. Consequently, SERA's second offer

may well have exceeded the net amount NL would have realized if it had accepted SERA's original offer.

NL's argument that SERA manifested bad faith in its negotiations for acquisition of the property, by instructing its second appraiser to disregard the rezoning of the property in conformity with the redevelopment plan, assumes that the "project enhancement rule," under which any increase or decrease in value resulting from the announcement of a proposed public project is not considered in determining just compensation, see Jersey City Redevelopment Agency v. Kugler, 58 N.J. 374, 379 (1971), applies only to changes in value that occur after a condemnor has announced an intent to acquire the subject property. However, the case law may be read more broadly to apply whenever there is any announcement of a public project even if it is not accompanied by an announcement of an intent to acquire a particular property. See ibid.; State, by Comm'r of Transp. v. Town of Phillipsburg, 240 N.J. Super. 529, 543-45 (App. Div. 1990); see generally 4 Nichols on Eminent Domain § 12B.17[1] (3d ed. 2004). In this case, Sayreville rezoned the area where NL's property is located in order to further redevelopment, and SERA ultimately decided to acquire the property to implement the redevelopment plan. Therefore, SERA could reasonably have concluded the adoption of the

redevelopment plan, the rezoning of the redevelopment area and the attempt to acquire NL's property by eminent domain were all integrated elements of the same public project and thus the rezoning should not be considered in determining fair market value.[1]

III

When Judge Longhi decided this case, our decision in Suydam was the controlling law regarding the valuation of contaminated property in a condemnation action. In Suydam, we held that "a trier of fact may not 'simply deduct the cost of the cleanup from a putative value of the property' without contamination in determining fair market value" but that "evidence of environmental contamination is . . . admissible insofar as it affects valuation[,]" which "must be determined on the basis of expert appraisal evidence." 355 N.J. Super. at 551 (quoting Inmar Assocs. v. Borough of Carlstadt, 112 N.J. 593, 605 (1988)). Judge Longhi's decision was based on our holding. However, during the pendency of this appeal, the Supreme Court reversed our decision in Suydam and held that "contaminated property that is the subject of condemnation is to be valued as

[1] We express no view concerning the application of the project enhancement rule at the valuation hearing.

if it has been remediated" and that "the condemnation valuation scheme excludes evidence of contamination[.]" 177 N.J. 2, 7, 25 (2003). The Court also held that "where property is contaminated, the condemnor should appraise as if remediated and deposit that amount into a trust-escrow account in court." Id. at 24.

In a supplemental letter submitted after the Supreme Court decision, SERA argues that the Court's holding in Suydam does not apply to a condemnation for redevelopment of a "Brownfields site":

> In the context of condemnations of small parcels for public purposes, such as for highway widenings or parking lots for the New Jersey Department of Transportation or the New Jersey Transit Corporation, as in Cat In the Hat, supra, the State has the obvious ability both to post funds for the condemnation and to pay for remediation before having to seek compensation for its remediation via a cost recovery action. In the context of a redevelopment of a Brownfields site, particularly one of the size of the NL Property that is heavily contaminated, the burden on the condemning authority of posting the hypothetical value of the Property as if it were clean (which it decidedly is not) and then having to pay an additional substantial sum to remediate the property before instituting a cost recovery action suggests the need for a different methodology to apply to such cases than that applied to the fact patterns presented in the Suydam and Cat In the Hat cases. . . .

> . . . [A] fair weighing of the differences in the cases decided by the Supreme Court and this case should lead this Court to determine that in this redevelopment case SERA should be permitted to post the net value of the property and introduce evidence at the valuation hearing of the impact of contamination on the property's fair market value. To hold otherwise would be to hamper the ability of local government to effectuate redevelopment, would contradict the goals of the Redevelopment Law and would serve as a disincentive for the redevelopment of contaminated properties.

Whatever the merits of SERA's argument as a matter of policy, we perceive nothing in the Court's Suydam opinion that would warrant this court declining to apply its holding in the present case. To the contrary, it is clear to us that Suydam was intended to apply to any eminent domain action, regardless of the public purpose for which private property is being acquired. In the introduction to its opinion, the Court stated: "In this appeal, we are called on to address several questions arising out of the intersection of eminent domain and environmental law[,]" 177 N.J. at 7, without limiting its statement of issues to any particular category of eminent domain actions. Moreover, the Court's rationale for precluding a condemnor from taking environmental contamination into account in valuing property acquired for a public purpose applies to this case in the same way as in any other eminent domain action:

> When property is devalued for contamination in condemnation, landowners first receive discounted compensation in the condemnation proceeding and then are subject to the full cleanup costs, thus suffering what is colloquially denominated as a "double-take."
>
> [Id. at 23.]

If NL continued to pay the costs of remediation of its property and SERA was nevertheless allowed to deduct those same costs in determining just compensation, SERA would obtain a windfall.

The Court in Suydam was also concerned with procedural efficiency. The Court stated:

> Valuation is a relatively straightforward notion with which condemnation commissioners are familiar and experienced. Omitting the complications of contamination from the valuation process thus advances the speed and efficiency that are the hallmark of eminent domain proceedings.
>
> [Ibid.]

In addition, the court stated that delaying consideration of remediation until the cost recovery proceeding eliminates the "difficulty of estimating the value of contaminated property." Ibid. These considerations are equally applicable in any eminent domain action, regardless of the purpose for which a property is condemned.

We also note that the Suydam opinion refers to the Brownfield and Contaminated Site Remediation Act, N.J.S.A. 58:10B-1 to -31. 177 N.J. at 18-19. Although this reference

was made in the course of a discussion of Spill Compensation and Control Act immunity, N.J.S.A. 58:10-23.11 to 23.24, the Court quoted from a committee report on the bill that became the Brownfield Act, which indicated that it was intended to result in more remediation and redevelopment of Brownfields. Ibid. The Court did not indicate that the valuation of a "Brownfield" site for redevelopment might require a different approach than a valuation in connection with a property acquisition for some other purpose. Therefore, the Court's opinion in Suydam is controlling with respect to the valuation of NL's property.

Accordingly, we affirm paragraph one of the judgment, which determined that SERA's proposed taking of NL's property is for a proper public purpose and that SERA complied with the pre-complaint bona fide negotiation requirements of N.J.S.A. 20:3-6. We reverse paragraph four, which directs that the property be valued in accordance with the principles set forth in our Suydam opinion, and direct that the property be valued in the manner set forth in the Supreme Court's Suydam opinion. We modify paragraph six relating to the deposit required to file a declaration of taking to substitute "as remediated" for "as clean" in subsection one and two and as thus modified affirm that paragraph. We also note that any money deposited into

court will be subject to the "trust-escrow" procedures discussed in section V of the Suydam opinion.