STATE OF NEW YORK
SUPREME COURT : COUNTY OF NIAGARA

In the Application of Petitioner/Condemnor New York State Urban Development Corporation d/b/a Empire State Development Corporation to acquire in fee simple Certain real property currently owned by Fallsite, LLC and Know as:

232 Sixth Street, City of Niagara Falls
700 Rainbow Blvd., City of Niagara Falls
231 Sixth Street, City of Niagara Falls
626 Rainbow Blvd., City of Niagara Falls
701 Falls Street, City of Niagara Falls,

situated in the County of Niagara, State of New York and having, respectively, the following Tax Sections, Blocks, and Lots:

159.09-2-25.122
159.09-2-25.112
159.09-2-25.121
159.09-2-25.111
159.09-2-25.211

together with all Compensable Interests Therein Currently owned by Fallsite, LLC, Fallsville Splash, LLC and Any other Condemnees Who are Currently Unknown.

DECISION

Index No. 126578

Appearances: Harris Beach PLLC
Attorneys for Petitioner/Condemnor

Kramer Levin Naftalis & Frankel LLP
Attorney for Claimants Fallsite LLC and
Fallsville Splash, LLC

KLOCH,A/J.S.C.

This matter involves the award of just compensation for the Claimant's fee interest in premises which will be commonly referred to as Niagara Splash. The trial of this matter took seventeen (17) days and over three-hundred (300) exhibits were received in evidence. Counsel for the parties were marvelous, professional and it was a treat to be in the same courtroom with them.

The following issues were delineated prior to trial and reaffirmed during it:

1. Is the taken property speciality?
2. What is the highest and best use of the property?
3. What valuation modality is to be employed?
4. Are there compensable fixtures?

In issuing this decision, the Court has reviewed trial testimony, the submitted appraisals and post-trial memoranda.

HISTORY OF SUBJECT PROPERTY

In 1987, the property was developed and opened as an outdoor water park. Development costs at trial was testified to as $18 million, which included large amounts of municipal development grants and loans. In 1991 the development closed having never turned a profit. At time of closure there existed unpaid water and sewer bills and default on grant payments. From 1992 to 1998 the City of Niagara Falls operated the park. Though financial information was not available from that period, the park closed in 1998 and was inactive until 2005. In 2004, after litigation with the City of Niagara Falls and with the prospect of a casino coming to Niagara Falls, the claimants, who was the original operator of the water park, acquired the park from the City for $3 Million settling the litigation. Despite announcing a 2004 and 2006 season, the park opened again only in 2005 and had 60,000 attendance. It appears from testimony that more free admissions were granted to the park than paid attendees. Claimant Fallsville tax return for 2005 shows property taxes exceeded revenues by a factor of four. Claimant contends that it committed substantial funds in 2004 -2005 to re-open the park since the property was substantially cannibalized between 1998 and 2003. Claimant contends the park was viable despite the numerous failures.

In 1991, a feasibility analysis [Petitioner's Ex 12] was performed to determine the reasons for the park's failure to achieve anticipated revenues. The report, which was commissioned by claimant, as the earlier operator of the park, found the park to be inadequately staffed and insufficiently advertised. A pertinent part of the reports conclusion stated:

> "The projected attendance would have been achieved if the appropriate permanent staff had been put in place and the projected advertising/promotion cost had been expended. Generally, the poor performance may be directly attributed to these two factors and the caretaker attitude of the park's owner."

The report went on to recommend that additional recreational activities be added to the water park for a successful business plan. Specific recommendations were to add miniature golf and amusement rides. Mr. John Bartolomei, a principal of claimant, testified that the report's recommendations were never accomplished.

The validity of this feasibility report was confirmed by several witnesses including Mr. David Sangree, who testified for claimant. The Court's notes from his testimony indicate, "Very qualified witness. Good report. Exactly the type of guy and analysis that was needed by the Claimant to make the park workable."

Mr. Sangree testified that the water park was feasible assuming: (1) competent management which could properly market and operate the park; (2) an annual investment of $1 Million Dollars in new rides for the park for the first three years; (3) strong advertisement and marketing plan. Again, none of this occurred or, in some cases, appeared even feasible. Mr. Sangree also indicated the water park suffered from a "negative image in the market" due to multiple lawsuits.

FEASIBILITY OF WATER PARK

The gloomy history of the park leads to the pertinent question - was the Niagara Splash water park a feasible business? The history would indicate it was not. The Court, however, places additional reliance on the testimony of John Gerner. Mr. Gerner is a leisure industry expert. His consulting company, Leisure Business Advisors, LLC (LBA) was retained by Petitioner to evaluate the potential future market and financial performance of the water park. Its report is attached as Exhibit G of Petitioner's appraisal.

The bottom line of the report by LBA indicates the market in the Niagara Falls, New York area has remained static since the last operating period. Therefore, the park should perform the same as during operating periods indicating financial infeasibility. Worse, Mr. Gerner indicated that Niagara Splash now has increased competition from other water parks in the geographical area. Both Darien Lake and Fantasy Island, full amusement parks, offer water parks. Additionally, there are three indoor water parks in nearby Canada.

Mr. Gerner indicated four factors for a successful water park:

1. Location
2. Lack of competition
3. Attractions in park are top-rated
4. Good management - including marketing and community-based

On all four factors, Gerner gave Niagara Splash a poor grade which has already been noted. Additionally, Mr. Gerner indicated Niagara Falls, NY is a poor location because of the difficulty of attracting development. In fact, Niagara Falls, NY is largely a dead city with a non-existent downtown business district.

Based on the credible testimony and the actual history of the park, the Court finds that Niagara Splash was an infeasible water park. It never returned a profit and never could. The Court finds Claimant's reopening in 2005 nothing more than a feigned attempt to create the appearance of feasible operation. Its goal was apparently to solely service this valuation process.

ISSUE : SPECIALTY PROPERTY

Claimants argue that the land and improvements must be separately valued because the Splash Park qualifies as a "speciality " property. To establish a "speciality" property, Claimants must establish:

1. The use of the improvement must be economically feasible.

2. The improvement must be unique.

3. There must be no market for the type of property.

4. There must be a special use for which the improvement was designed

Matter of Suffolk County v. Van Bourgondien Nurseries, 47 NY2d 507; County of Nassau v. Colony Beach Club, 43 AD2d 45.

A failure to satisfy one of the four factors is fatal to a claim of specialty. See, Colony Beach Club, supra, 43AD2d at 51-52. The burden is further on the Claimant to establish the higher damages accorded specialty property. In this case, the Court need not go beyond the first factor. Niagara Splash was a financial failure. There was no apparent, realistic expectation it would ever obtain profitability. Accordingly, the Court finds the subject property was not specialty.

HIGHEST AND BEST USE OF SUBJECT PROPERTY

Petitioner claims the highest and best use ("HBU") of the property is as vacant land. Claimant claims the HBU is a water park. As discussed above, the property was inappropriate and impractical for a splash park - simply not feasible. During testimony, Mr. Bartolomei also raised the issue of casino gambling as the HBU. This claim is dismissed summararily by the Court quoting a decision of Hon. Vincent E. Doyle, JSC in a decision dated September 26, 2005 affirmed by the Fourth Department Appellate Division in
In Re Niagara Development Corp., 32 AD3d 1169:

> "Claimant failed to demonstrate a reasonable probability that the property would or could have been used as a casino within the foreseeable future. City of New York [Broadway Cary Corp.], 34 NY2d 535 (1974); Pritchard v. Orchard County Industrial Development Agency, 248 AD2d 974 (4th Dept.,1998). The ability of the subject property to be considered "Indian Lands" and hence, eligible for casino use is, at best, hopeful speculation. As admitted by Claimant's appraiser Mr. Sciannameo, a casino use would require a variety of Federal and State approvals, which Mr. Sciannameo acknowledged may not

> have been obtained, and Claimant failed to show that such approvals were likely to be obtained. Claimant also failed to establish that the proposed casino use was legally permissible. See, In re Acquisition of Real Property by Village of Marathon, 174 Misc2d 800 (1997)."

The case decided by Justice Doyle dealt with property in close proximity to the subject property. The same argument that the HBU is for a casino must be rejected as Justice Doyle and the Fourth Department did previously.

Accordingly, the Court finds the HBU for the subject property is as vacant land for commercial / tourist development.

VALUATION

Having determined the issues of specialty and highest and best use, the Court must consider the more difficult issue of valuation of the taking. There was agreement by the parties that the sales comparison approach was the correct method to value the subject premises. The Court concurs and will accordingly employ that modality in valuing the taking.

Using comparable sales from the downtown Niagara Falls area raises some concerns as to reliability. Many of the comparables employed by Claimant's appraiser involve property that is owned by Niagara Falls Redevelopment, LLC ("NFR"). NFR owns a 50% interest in Fallsite, LLC, the entity holding title to Niagara Splash (ESDC ex #4). Ten of the 23 comparables employed by Claimant's appraiser are so owned. Additionally 6 comparables employed by Claimant's appraiser were recent purchases by unknown New York City-based LLCs. The Court views these sales skeptically as to their reliability. The remainder of Claimant's appraisal includes property acquired by the Seneca Nation for its casino operations and only one (1) true arms-length, uninvolved transaction (Comparable Sale #3). Comparable #3 from Claimant's appraisal indicates a price per square foot at $16.30 ($16.94/sf w/demolition).

The use of NFR purchases or Seneca Nation acquisitions in this action would taint the valuation process. NFR could successfully control the valuation process by acquiring small, abandoned homes near the downtown area. To a large extent, this is the nature of the comparables Claimant relies on. Seneca Nation purchases, on the other hand, have included successful, operating, income-producing businesses. This Court has employed the income capitalization approach on the other properties being taken by condemnation in Niagara Falls. This valuation approach for thriving businesses is inappropriate in this case. Where the Seneca Nation paid a premium to involve litigation for expediency or to avoid the results of a different, more generous valuation approach, it should not affect this valuation process.

Petitioner's appraisal includes more comparable sales not affected by casino development, NFR activity, or this condemnation process. The comparables selected

by Petitioner - Petitioner Comparable #2, #4, #6 - #8 are more reliable and comparable than the Claimant's. These sales result in an unadjusted price per square foot of $17.22.

The Court also found Petitioner's Comparable Sale #10 to be a good, reliable sale. This sale involved a purchase by Jay Ram, Inc, to develop a Hampton Inn. It is relatively recent in time to the taking and located across the street from the subject property. Reliance can be given to a bona fide company with a proven business plan acquiring land and developing a hotel. Although not an assemblage of land similar to the subject property, Claimant's appraiser similarly believed that Petitioner Comparable Sale #10 was a "good comparable". The following testimony was obtained from Mr. Daniel F. Sciannameo , Claimant's appraiser, when questioned by the Court:

The Court:	This is also not encumbered, because of the time frame, you would agree with me, with any considerations about either duress or distress in regard to a pending condemnation proceeding or any individual in preparation for the same gobbling up parcels of property; do you agree with me on that?
The Witness:	Correct
The Court:	Would you agree with me, as well, Jay Ram, Inc, if I were to tell you that entity which is part of . . which was operating or developing or building a Hampton Inn, so this was being used for a Hampton Inn purpose, so you would see that there's some - - Hampton Inn, is a pretty successful outfit, that there would be some business know-how and some commercial sense in regard to those people purchasing that?
The Witness:	Yes
The Court:	And since it's going to be for a hotel purpose similar to the tourist-centric industry that you're talking about, again, it has a lot of - of value when you think of it in relation to the subject property.
The Witness:	It should be under the similar locational influences

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The Court:	. . . other than the adjustment for the land size as being inferior, it's a fairly good comparable?

The Witness: Yes

Trial testimony of Daniel F. Sciannameo pp 762-764

The Unit Price for Petitioner Comparable Sale #10 was $17.41/sq. foot. The Court would apply a 20% adjustment to arrive at an appropriate valuation on Petitioner #10 of $20.89/sq. ft. This figure is higher than that obtained from Petitioner's appraisal and will be accepted by the Court as its final value. The Court finds that the property had a fair market value of $20.89 /sq foot, or $17,179,486.45.

INTERIM USE

Claimant in its post-trial brief, alternatively, claims entitlement to interim use damages. Such damages are awarded on the theory that during the transition between changing highest use, the landowner is entitled to compensation for the prior use that retains economic life. The seminal case is Dann v. State of New York, 36 NY2d 858, which dealt with an operating dairy farm. It was determined that the HBU of the property was "commercial, industrial, and residential real property", but the trial court determined that "the dairy use was obsolescent but not obsolete". Id, at 860. During the transition from dairy farm to developed parcel, the trial court awarded the value of the remaining economic life of the dairy farm. The Court of Appeals ratified the trial court noting, " the dairy improvements . . still served an economic purpose" Id, at 860. Here, the water park and its improvements served no "economic purpose" and had no remaining "economic life". Claimant failed to satisfy its burden as to proof of same. Claimant's claim for interim use damages is denied.

TRADE FIXTURE DAMAGES

Claimant has asserted trade fixture damages of $27,130,000. In so doing Claimant has submitted valuation for every appliance, concrete slab, valve, block stone, door, stairway, hand rail, insulation, louver, gutter, heater, fan, duct work, water line, hose connection, drainage line, floor drain, trap, pump, desk, chair, file cabinet, telephone, tool cabinet, refrigerator, coffee machine, microwave, shelf, fire extinguisher, fax machine, lighting fixture, electrical receptacle, hose rack, circuit breaker, saw table, vending machine, locker, sign, heater, lawn mower, extension cord, mop and bucket, hand truck, ladder, hose, wheelbarrow, vacuum, shower unit, sheet rock, floor tile, mirror, urinal, generator, motor, dirt, excavation, roofing, skylight, bulletin board, carpet, hung ceiling, cash register, American flag, drinking fountain, trash can, oven, book case, walkie-talkie, tarp, picnic table, bicycle rack, decking, street lamp, boulder, paving block, tree, and yes – even the kitchen sink, located on the premises at the time of taking. This is not a novel approach by the principals of Claimant. A similar "umbrella like" approach classifying every piece of equipment as a trade fixture was tried and rejected by Claimant's principals in Settco, LLC v. USA Niagara Development Corporation, 51AD3d 377.

During the trial of this matter, the Court of Appeals handed down a seminal case on valuation of trade fixtures, Kaiser Woodcraft v. City of New York, NY Slip Op. 08157. Therein, the Court cited Matter of City of New York [Quick Serv. Laundry], 48 AD2d 634.

> "The 'umbrella like' approach classifying every piece of equipment in the plant as a trade fixture, and hence compensable - is to be rejected.
>
> To characterize everything in a well-organized industrial plant as a trade fixture is a pitfall to be avoided".

The Kaiser Woodcraft decision went on to state,

> "Kaiser's appraisal lists virtually every item in its wood shop, even the 'kitchen sink' - all indisputably used in connection with the business. But use in connection with a business is not the test of compensability in New York . . ."

The Kaiser Woodcraft Court went on to identify tests to be applied to compensability.

However, when the highest and best use of a property is as vacant land, any improvements on the subject parcel become an impediment to that use and have no value. Acme Theaters v. State of New York, 26 NY2d 385; Van Kleeck v. State of New York, 18 NY2d 897.

In the Matter of West Bushwick Urban Renewal Area [George Cho], 69 AD3d 176, it was similarly held,

> "Here it is undisputed that the improvements on the claimant's properties must be removed for the highest and best use of the properties to be realized. Thus the improvements are inconsistent with the properties' highest and best use as mixed commercial and residential properties. Accordingly, the claimants are not entitled to recover compensation for the trade fixtures".

Accordingly, this Court denies Claimant's trade fixture claim in total.

CONCLUSION

This Court further finds a unity in ownership of fee and fixtures. The Court awards Claimant $17,179,486.45, less $300,000 in demolition costs for a final award of $16,879,486.45. The Court finds Claimant has received $17,000,000 by Petitioner Ex 11 and accordingly makes no other award. Submit settled Order.

HON. RICHARD C. KLOCH, SR.
Acting Supreme Court Justice

GRANTED

APR 05 2016

BY
NICOLE SCHUG
COURT CLERK