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Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D69032
T/htr

___ AD3d ___ Submitted - March 18, 2022

BETSY BARROS, J.P.
ANGELA G. IANNACCI
CHERYL E. CHAMBERS
DEBORAH A. DOWLING, JJ.

2018-03325
2019-04529

Pacific Carlton Development Corp., et al., appellants, v New York State Urban Development Corporation, etc., respondent.

(Index No. 1693/12)

DECISION & ORDER

(Filed Jun. 22, 2022)

Biersdorf & Associates, P.A. (Dan Biersdorf and Joseph Muallem, New York, NY, of counsel), for appellants.

Applebaum Katz Brodsky, PLLC, New York, NY (Charles S. Webb III, Kenneth J. Applebaum, Judith Z. Katz, and Adam H. Brodsky of counsel), for respondent.

In a claim pursuant to EDPL article 5 for compensation arising from the condemnation of real property, the claimants appeal from (1) a judgment of the Supreme Court, Kings County (Wayne Saitta, J.), dated December 13, 2017, and (2) an order and amended

judgment (one paper) of same court dated January 31, 2019. The order and amended judgment, insofar as appealed from, upon a decision of the same court dated November 15, 2017, made after a nonjury trial, and a decision of the same court dated March 19, 2018, in effect, denied that branch of the claimants' motion which was, in effect, pursuant to CPLR 4404(b) to set aside so much of the decision dated November 15, 2017, as determined their award and for a new trial, and is in favor of the claimants and against the condemnor in the principal sum of only $22,206,000.

Motion by the respondent, inter alia, to dismiss the appeal from the judgment on the ground that it was superseded by the order and amended judgment. By decision and order on motion of this Court dated August 2, 2019, that branch of the motion which is to dismiss the appeal from the judgment on the ground that it was superseded by the order and amended judgment was held in abeyance and referred to the panel of Justices hearing the appeals for determination upon the argument or submission thereof.

Upon the papers filed in support of the motion and the papers filed in relation thereto, and upon the submission of the appeals, it is

ORDERED that the branch of the respondent's motion which is to dismiss the appeal from the judgment on the ground that it was superseded by the order and amended judgment is granted; and it is further,

ORDERED that the appeal from the judgment is dismissed; and it is further,

ORDERED that the order and amended judgment is affirmed insofar as appealed from; and it is further,

ORDERED that one bill of costs is awarded to the respondent.

On March 1, 2010, as part of the Atlantic Yards project, the Empire State Development Corporation (hereinafter the ESDC) condemned several adjoining parcels of real property (hereinafter collectively the condemned property) located at Block 1129, Lots 4, 5, 6, and 13, at the intersection of Pacific Street and Carlton Avenue in Brooklyn. Lot 13 was owned by the claimant Pacific Carlton Development Corp., and improved by an office building with six aboveground levels, one subterranean level, and a separate one-story garage. The claimant 535 Carlton Realty Corp. owned Lots 4, 5, and 6, which fronted Carlton Avenue. Lots 4, 5, and 6 were minimally improved and used for either parking or refuse storage. The condemned property was located in an M1-1 manufacturing district, which allowed light commercial and manufacturing uses.

The claimants thereafter commenced this claim pursuant to EDPL article 5 for compensation for the condemnation. At a nonjury trial on the issue of compensation, the claimants proffered experts who opined that there was a reasonable probability that the condemned property would have been rezoned to C6-2A, which permits commercial uses up to a floor area ratio (hereinafter FAR) of six along with residential and

community facility uses, and that the highest and best use of the condemned property was a mixed-use structure spanning all four lots. The ESDC, by contrast, proffered an exert opinion that it was unlikely that the condemned property would have been rezoned to C6-2A, and that the highest and best use of the condemned property was an office building on Lot 13 with adjoining parking on Lots 5 and 6, and holding Lot 4 for future use, which did not require a rezoning from its current M1-1 designation. The ESDC contended in the alternative that, if any portion of the condemned property were to have been rezoned, it would have been more likely that Lot 13 would have been rezoned to C4-4A, which permits commercial uses up to a FAR of four, than that the condemned property as a whole would be rezoned to C6-2A. The parties also disagreed, among other things, as to whether the subterranean level of the existing structure on Lot 13 qualified as a "basement" under the New York City Zoning Resolution (hereinafter the Zoning Resolution) (*see* NY City Zoning Resolution § 12-10 ["Basement," "Cellar"]), the degree to which the claimants' proposal required adjustments to account for the time, cost, and risk associated with obtaining a rezoning, and the value added by fixtures on the fifth and sixth floors of the existing structure on Lot 13.

After a nonjury trial, the Supreme Court determined in a decision dated November 15, 2017, inter alia, that it was more reasonably probable that the entirety of the condemned property would have been rezoned to C4-4A, rather than to C6-2A as advanced by

the claimants, and that the subterranean level of the existing structure on Lot 13 was a "cellar" rather than a usable basement. The court determined just compensation for the condemned property to be $21,935,384, rounded off to $21,935,000, and a judgment dated December 13, 2017, was entered in favor of the claimants and against the ESDC in the principal sum of $21,935,000 less the ESDC's total advanced payments.

The claimants moved, inter alia, in effect, pursuant to CPLR 4404(b) to set aside so much of the decision dated November 15, 2017, as determined their award and for a new trial on the grounds, among others, that the Supreme Court failed to consider the value added to Lot 13 by fixtures on the fifth and sixth floors that had been left by a former tenant, failed to consider evidence showing that the condemned property would have been rezoned to C4-4A but for the announcement of the Atlantic Yards project, and erroneously omitted the area of the existing structure's subterranean level from the value of Lot 13. In a decision dated March 19, 2018, the court determined that the claimants' motion should be granted only to the extent of correcting a mathematical error in the decision dated November 15, 2017, and otherwise denied, and determined just compensation for the condemned property to be $22,206,083, rounded off to $22,206,000. The court thereafter entered an order and amended judgment dated January 31, 2019, which, inter alia, in effect, denied that branch of the claimants' motion which was, in effect, pursuant to CPLR 4404(b) to set aside so much of the decision dated November 15,

2017, as determined their award and for a new trial, and is in favor of the claimants and against the ESDC in the principal sum of $22,206,000 less the ESDC's total advanced payments. The claimants appeal.

"'In condemnation cases, the authority of this Court to review findings of fact after a nonjury trial is as broad as that of the trial court'" (*Matter of Village of Haverstraw [Ray Riv. Co., Inc.]*, 191 AD3d 994, 995, quoting *Matter of Mazur Bros., Inc. v State of New York*, 97 AD3d 826, 828). "'This court may render the judgment it finds warranted by the facts, taking into account that in a close case the trial court had the advantage of seeing and hearing the witnesses'" (*Matter of Village of Haverstraw [Ray Riv. Co., Inc.]*, 191 AD3d at 995, quoting *Matter of Mazur Bros., Inc. v State of New York*, 97 AD3d at 828 [internal quotation marks omitted]). "The measure of damages in a condemnation case 'must reflect the fair market value of the property in its highest and best use on the date of the taking, regardless of whether the property is being put to such use at the time'" (*Matter of 730 Equity Corp. v New York State Urban Dev. Corp.*, 142 AD3d 1087, 1088, quoting *Chester Indus. Park Assoc., LLP v State of New York*, 65 AD3d 513, 514 [internal quotation marks omitted]; *see Matter of Village of Haverstraw [Ray Riv. Co., Inc.]*, 191 AD3d at 995-999). "The determination of highest and best use must be based upon evidence of a use which reasonably could or would be made of the property in the near future" (*Matter of 730 Equity Corp. v New York State Urban*

Dev. Corp., 142 AD3d at 1088; *see Matter of City of New York [Broadway Cary Corp.]*, 34 NY2d 535, 536).

"'In determining an award to an owner of condemned property, the findings must either be within the range of expert testimony or be supported by other evidence and adequately explained by the court'" (*Matter of 730 Equity Corp. v New York State Urban Dev. Corp.*, 142 AD3d at 1089, quoting *Matter of City of New York [Reiss]*, 55 NY2d 855, 886; *see Matter of Village of Haverstraw [Ray Riv. Co., Inc.]*, 191 AD3d at 995-999). "Where the parties offer inconsistent highest and best uses and their experts appraise only their own proposed uses, the award must be based upon the evidence offered by the party prevailing on the use question 'with such adjustments as the evidence will support'" (*Matter of 730 Equity Corp. v New York State Urban Dev. Corp.*, 142 AD3d at 1089, quoting *Crosby v State of New York*, 54 AD2d 1064, 1065; *see Matter of City of Long Beach v Sun NLF Ltd. Partnership*, 124 AD3d 654, 655-656).

Here, the Supreme Court's calculation of damages based upon its determination that the condemned property was more reasonably likely to be rezoned to C4-4A and not C6-2A fell within the range of expert testimony and was supported by the record. "'The potential uses the court may consider in determining value are ordinarily limited to those uses permitted by the zoning regulations at the time of taking'" (*Matter of 730 Equity Corp. v New York State Urban Dev. Corp.*, 142 AD3d at 1088-1089, quoting *Matter of Town of Islip [Mascioli]*, 49 NY2d 354, 360). "However, when there is

a reasonable probability of rezoning, some adjustment must be made to the value of the property to reflect that fact" (*Matter of 730 Equity Corp. v New York State Urban Dev. Corp.*, 142 AD3d at 1089). Contrary to the claimants' contention, the evidence did not support their expert's opinion that the condemned property would be upzoned to the FAR permitted under a C6-2A designation given the City of New York's pursuit of transit-oriented development in Brooklyn. Rather, the court, in its discretion, properly credited the testimony of the ESDC's expert, who opined that rezoning actions around the condemned property show that the City would have prioritized other policy preferences over a desire for density near transit hubs and was more reasonably likely to limit upzoning of the condemned property to the density and height limits of a C4-4A district (*cf. Matter of 730 Equity Corp. v New York State Urban Dev. Corp.*, 142 AD3d 1087).

The Supreme Court also properly excluded the square footage of the subterranean level of the existing structure on Lot 13 from its calculation of damages upon its determination that it was a cellar and not a basement. Although the certificate of occupancy for the existing structure designated the subterranean level as a "basement," this designation need not be relied upon where, as here, the condemned property had no residential uses as of the vesting date (*see* Multiple Dwelling Law § 301[5]; *see also P. O.K. RSA v Village of New Paltz*, 157 AD2d 15, 19; *Sextone v City of Rochester*, 32 AD2d 737, 737). Moreover, the court properly measured the mean curb height along Lot 13's Pacific

Street frontage alone in concluding that the subterranean level was a cellar rather than a basement (*see* NY City Zoning Resolution § 12-10 ["Basement"; "Base plane"; "Cellar"; "Curb level"; "Lot, corner"; "Lot, interior"]).

The claimants' further contention that the Supreme Court improperly reduced its calculation of damages by the time and cost incurred in obtaining a rezoning to C4-4A because the condemned property would have been rezoned anyway is without merit. There is no evidence in the record that the City denied an application regarding the use of the condemned property prior to the announcement of the Atlantic Yards project. Rather, the uncontroverted evidence at trial demonstrated that a tenant occupying the fifth and sixth floors of the existing structure on Lot 13 considered pursuing a rezoning to C4-4A prior to the condemnation, but abandoned those efforts without ever submitting a rezoning application.

The Supreme Court providently granted the ESDC's motion in limine to preclude the claimants from introducing a fixture appraisal and offering related testimony at trial. The appraisal and proposed testimony concerned only the sound value of the fixtures installed on the fifth and sixth floors of the existing structure on Lot 13. Sound value is the "reproduction cost less depreciation" (*Matter of Mazur Bros., Inc. v State of New York*, 97 AD3d at 829). It is generally used to compensate owners and tenants for the resources they invested to obtain and install fixtures when those parties would "suffer a significant loss if awarded

compensation only for the value of the fee on the open market" (*Matter of USA Niagara Dev. Corp. [Settco, LLC]*, 51 AD3d 377, 381). Here, the claimants did not make a separate fixtures claim, and they failed to show that the sound value of the subject fixtures bore any relationship to the value those fixtures added to Lot 13. Contrary to the claimant's contention, the ESDC did not waive this issue when it withdrew its objection to the claimants making an untimely fixtures claim (*see* EDPL 503[A], [C]; *see also* 22 NYCRR 202.61[d]), since, despite the nature of the evidence, the claimants did not make a separate fixtures claim.

The Supreme Court otherwise properly accounted for the value the fixtures added to Lot 13 in determining the claimants' damages. An " 'appropriation of land . . . is an appropriation of all that is annexed to the land, whether classified as buildings or fixtures. . . . The value of the fixtures ought, therefore, to [be] considered in estimating the total value of the property appropriated by the State' " (*Matter of City of New York [Kaiser Woodcraft Corp.]*, 11 NY3d 356, 359, quoting *Jackson v State of New York*, 213 NY 34, 36). Here, the portions of the ESDC's appraisal adopted by the court made deductions to the value of Lot 13 equal to the cost of bringing the first through fourth floors into rentable condition. With limited exception, the valuation did not include similar deductions for the fifth and sixth floors. The court thus considered the value added to Lot 13 by the fixtures on the fifth and sixth floors insofar as they obviated the need to make further deductions to bring the fifth and sixth floors into rentable condition.

The parties' remaining contentions either are without merit or need not be reached in light of our determination.

BARROS, J.P., IANNACCI, CHAMBERS and DOWLING, JJ., concur.

ENTER:

/s/ Maria T. Fasulo
Maria T. Fasulo
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CIVIL TERM: PART 89

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PACIFIC CARLTON
DEVELOPMENT CORP., and

535 CARLTON REALTY CORP.,
(Block 1129, Lots 4, 5, 6 and 13)

Claimants,

-against-

NEW YORK STATE URBAN
DEVELOPMENT CORPORATION,
D/B/A EMPIRE STATE
DEVELOPMENT CORPORATION,

Condemnor.

Index No. 1693/2012

DECISION

(Filed Apr. 2, 2018)

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Claimants PACIFIC CARLTON DEVELOPMENT CORP., and 535 CARLTON REALTY CORP., move to set aside this Courts' decision dated November 15, 2017, and Order and Judgment dated December 13, 2017, pursuant to CPLR 4404.

Claimants, PACIFIC CARLTON DEVELOPMENT CORP., (Block 1129 Lot 13), and 535 CARLTON REALTY CORP., (Block 1129, Lots 4, 5 and 6) are the owners of the subject property, located at 750-754 Pacific Street, Brooklyn New York (Block 1129 Lot 13), and 543-7 Carlton Avenue (Block 1129, Lots 4, 5, and 6) which were taken by condemnation by NEW YORK STATE URBAN DEVELOPMENT CORPORATION, D/B/A EMPIRE STATE DEVELOPMENT CORP.,

(hereinafter "ESDC"), who took title on March 1, 2010, (the vesting date), in connection with the Atlantic Yards project. A non-jury trial was held on June 6-24, 2016, and October 18-20, 2016, and the Court issued a decision dated November 15, 2017, valuing the building at $21,935,000, and an Order and Judgment, entered December 26, 2017, awarding Claimants $5,701,000, representing the value of the property set forth in the Decision, minus the advance payment previous made by the Condemnor.

Upon reading the Notice of Motion of Dan Biersdorf, Esq., Biersdorf & Associates, P.A., Attorneys for Claimants, dated December 15, 2017, the Affirmation Supporting Claimants' motion for Extension of Time of Dan Biersdorf Esq., dated December 15, 2017, the Affirmation Supporting Claimants' Motion for Amended Findings of Dan Biersdorf, Esq., dated December 15, 2017, and exhibits annexed thereto; the stipulation extending the Claimants' time to file its motion, dated January 9, 2018; the Affirmation Supporting Claimants' Motion for Amended Findings of Dan Biersdorf, Esq., dated February 1, 2018; the Affirmation in Opposition of Adam Brodsky Esq., Berger and Webb, LLP, attorneys for Condemnor, dated February 15, 2018, and the exhibits annexed thereto; and after argument of counsel and due deliberation thereon, Claimants' motion is granted in part and denied in part for the reasons set forth below.

Claimants originally moved for an extension of time to move pursuant to CPLR 4404 and the time to move was extended until February 1, 2018. Claimants

did not serve a new notice of motion but did serve a new affirmation, dated February 1, 2018 in support of its motion pursuant to CPLR 4404.

Claimants argue that the Court made several errors in its decision of November 15, 2018, that should be amended.

Claimants argue that the Court erred in excluding the Fixture Appraisal of Mitchel T. Wolfe. Wolfe, an appraiser retained by Claimants, prepared an appraisal of the value of various fixtures which Claimant PACIFIC CARLTON DEVELOPMENT CORP. claimed it installed in the building located on lot 13.

ESDC made a pretrial motion to preclude the fixture appraisal on the grounds that PACIFIC CARLTON DEVELOPMENT CORP. never made a trade fixture claim.

The Court granted that motion on the record on March 10, 2016. The Court held that because no fixture claim was filed, Claimant was only entitled to recover the value of the fixtures to the extent that they increased the value of the property, and that the fixture appraisal did not address the extent to which the fixtures contributed to the value of the property. The Court also noted that Claimants' fee appraiser was not going to testify at trial that the fixtures contributed to the value of the property.

Claimants state that its appraiser did not testify that the fixtures would increase the value of the building because he believed that the fixtures were not

consistent with the highest and best use of the building, which he believed was to rezone the property and redevelop the building as a mixed residential, commercial and community facility building. Claimants argue that because the Court found the highest and best use of the lot to be its existing use as an office building, and the fixtures were not inconsistent with such use, that the Court should have admitted the fixture report as evidence of the value those fixtures added to the building used as offices.

ESDC counters that the fixture appraisal asserts the sound value of the fixtures, not the amount they contribute to the building as an office building. ESDC also argues that its appraiser did take the value of the fixtures into consideration when he valued the building as a fully fit out office building.

The Court's decision to preclude the fixture appraisal was correct because the report measures the sound value of the fixtures not the extent that the fixtures added to the value of the building. This is not simply a matter of semantics. The appraisal measures a different value than what Claimant PACIFIC CARLTON DEVELOPMENT CORP., is entitled to recover as part of its fee claim. The owner of a trade fixture is entitled to the sound value of the fixture, which is measured by the reproduction cost of the fixture less depreciation. *Marraro v State of New York*, 12 NY2d 285, 239 NYS2d 105 (1963).

The owner of the fee is entitled to the value by which the fixtures increased the value of the fee. The

value by which a fixture may increase the value of a property is not strongly related to its sound value. The extent to which a fixture increases value to a building is dependent on the suitability of the use which the fixture supports, to the location of the real property. A fixture will most often have the same sound value no matter where it is located, while its impact in enhancing the value of a building will be affected by the characteristics, layout and location of the building.

The sound value $3,990 of a glass door, or $1,825 of a toilet, as listed in the fixture appraisal, is of no utility in determining how much value those fixtures have added to the building.

In sum, the sound value of a fixture is of minimal probative to determining the value the fixture adds to a building.

Additionally, ESDC's appraiser, Robert Von Ancken, MAI, CRE, FRICS, did take into account the value that the fixtures added to the building. Von Ancken derived the rent per square foot that he used in his income capitalization approach by analyzing leases of comparable properties, all of which were fully finished.

Von Ancken, with one exception, did not deduct any costs for finishing or equipping the fifth or sixth floors, which were the floors on which the fixtures were located. Von Ancken did make several deductions for additional work beyond typical tenant installations, which were necessary to put the first through fourth floors in a rentable condition. The only deduction taken for work to the fifth or sixth floor was to install a

legally required economizer for the fifth floor air conditioning units. Similarly, Von Ancken made no deductions for work letters, rent concessions, or brokers allowance for the fifth or sixth floors.

Thus, Von Ancken's analysis did account for the value the fixtures added to the fifth and sixth floors of the building.

The second error asserted by Claimants is that the Court did not attribute any value for the story below the first floor of the building on lot 13 in considering the value of the building, either as redeveloped as a mixed-use building, or with its current use as offices.

Claimants argue that the Court's conclusion that the value of the building, as rezoned to C4-4A and redeveloped as a mixed-use building, was less than the value of $15,100,000 that ESDC's appraiser attributed to it as offices, is incorrect because the Court attributed no value to the partially below ground story.

The Court concluded that the building had an adjusted value per square foot of $210 as a potential conversion to mixed use, and applied that adjusted value to the 72,335 square feet of the above grade stories of both the 6 story and the 1 story buildings on lot 13.

Claimants also argue that Von Ancken's income capitalization analysis is flawed because he attributed no income to the below grade story.

Central to Claimants' argument on this point is its contention that the below grade story is a basement and not a cellar.

The New York City Zoning resolution defines a basement as a story partly below curb level that is at least one half of its height, as measured from floor to ceiling, above the curb level, or base plane. The Zoning Resolution defines a cellar as a space wholly or partly below curb level or base plane with more than one half of its height, as measured from floor to ceiling, below curb level base plane. NYC Zoning Resolution Section 12-10.

The curb level and is the elevation at the curb. The base plane is the mean of the elevations at the curb and at the street wall.

The Court in this case will use the curb level because the exterior topographic survey by BBV (exhibit QQ), which is the best evidence of the elevations of the street and floors of the building, records measurements at the curb level, rather than the base plane. Additionally, the curb level is lower than the base plane and thus more favorable to Claimants' position.

Pacific Street slopes downward from the building to Carlton Avenue so the curb level must be calculated as the mean level of the portion of the curb adjoining the zoning lot. Thus, the average level must be calculated from the curb in front of the building rather than the entire length of lots 13 and 6. The Silberstang Lasky report calculates the average of the elevations of both Pacific and Carlton Streets because it was reviewing the Claimants' proposal to develop all the lots together, and thus used the formula that would apply to a corner lot. Also since lot 13 is valued separately

from lots 6, 5, and 4, the curb level of Carlton Avenue should not be factored into the calculation.

According to the BBV survey (p 1 of 3) the curb level slopes from an elevation of 70.26' (above Brooklyn Highway Datum) at the east wall of the building to an elevation of 66.92' at the west wall. This results in a mean curb level of 68.59'. The BBV survey (p 2 of 3) indicates that the top elevation of the cellar floor is 63.67', which means 4.92' of the story is below the curb level. The height of this story from floor to ceiling is slightly less than 8 feet so this story is more the one half below the mean curb level and thus it is a cellar, not a basement.

It was proper not to consider the cellar in valuing the buildings on lot 13 as suitable for conversion and redevelopment as a mixed-use district.

The 83,200-square foot figure used by Sciannameo exceeds the above grade floor area of the building. However, it is unclear from Sciannameo's appraisal whether the price per square foot of his comparable sales included cellar space in the gross building area of the comparable buildings. None of the descriptions of the comparable sales mention cellar space.

More significantly, even if the cellar is included in the gross building area, and valued at the full $210 per square foot determined by the Court, the resulting value of the building shell would still be less than the $15,637,596 that the Court determined to be the value of the existing buildings on lot 13, based upon Von Ancken's income capitalization approach. This is true

even if one uses the 86,150 square feet claimed by Claimants in this motion, or the 83,200 square feet used by Sciannameo.

Multiplying 86,150 square feet by $210 per square foot results in an adjusted value for the building of $18,091,500. However, one must deduct from that figure 5% to account for risk in seeking a rezoning, and apply the present value discount factor of .85734 (for two years at 8%), which results in a value of $14,735,038.

Claimants also argue that Von Ancken should have attributed rental income to the cellar space in his income capitalization analysis. However, there was no evidence adduced at trial as to what rent a cellar would generate, or that the cellar space has any rental value as part of the existing office building.

In his rebuttal appraisal Sciannameo raised several objections to Von Ancken's income capitalization analysis. While Sciannameo stated that Von Ancken should have attributed rent from the rooftop cell tower, he did not claim that Von Ancken should have attributed rental income to the cellar space nor did he offer any evidence at to what rent the cellar could produce.

Additionally, the six-story building on lot 13 would be a non-complying building if the area was rezoned C4-4A as its existing floor area exceeds the allowable floor area ratio (FAR) of 4. Pursuant to the Zoning Resolution, unfinished cellar space does not count as floor area. If the cellar was converted from storage to rentable space that would increase the degree of the

building's non-compliance and would not be permitted under the Zoning Resolution. Therefore, the renting of the cellar space would not be a legally permissible use if the lot were zoned C4-4A.

Claimants also argue that the Court undervalued the rental income of the buildings because while the Court found the rental building area to be 83,200 square feet, it adopted Von Ancken's income capitalization value, which was based on a rentable building area of only 82,026 square feet, a difference of 1,174 square feet.

In his analysis Sciannameo, used 83,200 square feet as the gross building area of the buildings, based on City records. He also stated in his appraisal that the "gross/rentable area" of the buildings was 83,200 square feet.

Von Ancken stated that the gross building area was 72,335 square feet, based on the survey conducted by BBV. The Court adopted 72,335 square feet indicated in the survey as the gross building area.

Von Ancken also testified that because of the manner in which rental space is calculated, the rental building area of a building often exceeds the gross building area significantly.

In his appraisal, Von Ancken used both 83,200 square feet and 82,026 square feet as the rental building area of the buildings on lot 13. Von Ancken used 83,200 square feet as the rental square footage of the buildings in his grid of comparable office leases.

The Court found the rental building area to be 82,300 square feet, a figure used by both Von Ancken and Sciannameo. Although Sciannameo cited the 83,200-square foot figure as both the "gross building area" and "gross/rentable area", the rentable building area is larger than the gross building area. Thus, to adopt 83,200 square feet as the gross building area would necessarily imply a rental area larger than 83,200 square feet, which is not supported by the evidence.

However, the Court should have calculated the potential gross income (PGI) of the buildings, for income capitalization purposes, by multiplying the rental of $27 per square foot by 83,200 square feet not 82,026 square feet. This is a difference of 1,174 square feet which when multiplied by $27 per square feet results in additional potential gross income (PGI) of $31,698. When this PGI is reduced by 8% for vacancy and credit loss, it results in an additional effective gross income (EGI) of $29,162.

The expenses deducted from the EGI by Von Ancken, with the exception of real estate taxes, were based on an expense per square foot which totaled 21.9% of the EGI. When the additional EGI of $29,162 is reduced by 21.9%, the additional net operating income (NOI) is $22,776. This additional NOI, capitalized at 6.85%, produces an additional capitalized value of $332,496.

Also, the adjustments made by Von Ancken for free rent, work letter, brokerage, and cost reset, for the bottom four floors, were based on 54,684 square feet,

which represents four sixths of 82,026 square feet. These adjustments should be based on four sixths of 83,200 square feet, which is 55,466 square feet, an additional 782 square feet. This results in an additional deduction of $10,557 for free rent, $17,869 for work letter, $6,756 for brokerage, and $10,557 for cost reset, for a total of $45,739. When this is subtracted from the additional capitalized value of $332,496, the result is $286,757.

Lastly, Von Ancken estimates the value of the parking to the capitalized rental value of the building was $900,000, or 5.6% of the total value of $16,000,000. When the additional capitalized value is reduced by 5.6%, the total additional capitalized value of the buildings without parking is $270,699. This additional value raises the total value of the subject property from $21,935,384 to $22,206,083 or $22,206,000 rounded. The Decision and the Order and Judgment should be amended to reflect this additional value.

The third error asserted by Claimants is that the Court used evidence from another proceeding in arriving at the cost of obtaining a rezoning. In its decision, the Court cited Sciannameo's testimony that he did not make a separate deduction for the cost and time it would take to obtain a rezoning, but included it in his 5% reduction for risk, as well as the testimony of Von Ancken that the rezoning would cost approximately $1,000,000.

The Court rejected both those estimates and determined that the probable cost would have been

$400,000. In explaining its rationale, the Court cited an opinion of ESDC's zoning expert as to the costs of a similar rezoning of a property a block and half away from the subject property, which was cited in a decision in another proceeding. [*730 Equity Corp., v New York State Urban Development Corp.*, 43 Misc3d 1226(A), 992 NYS2d 151 (Su Ct Kings, 2014)]. It was well within the discretion of the Court to determine that the cost of rezoning fell between the estimates of the two appraisers in this case.

The Court in its decision did overlook the fact that on cross-examination Sciannameo estimated the cost of obtaining a rezoning at between $200,000 and $500,000. The Court also overlooked the fact that while Von Ancken estimated the cost of rezoning the subject property to C6-2A at $1,000,000, in rebuttal he stated that the cost of rezoning the property to C4-4A would be $400,000. While, overlooked by the Court, both these opinions, which are part of the record in this case, are consistent with the Court's determination.

The fourth error alleged by Claimants is that the Court should have valued the property as if it had already been rezoned C4-4A by the date of vesting. On the date of vesting, the property was still zoned M1-1. Claimants argue that it is only because of the announcement of the project that the property had not already been rezoned, and therefore the project influence rule requires the Court to value the property as if it had already been rezoned.

The proper method of valuation where there is a probability of a zoning change in the near future is to determine the value of the subject parcel as zoned at the time of the taking and to add an increment ascribed to the reasonable probability of the zoning change. *Masten v. State of New York*, 11 A.D.2d 370, 206 N.Y.S.2d 672 (3rd Dept 1960), aff'd. 9 N.Y.2d 796, 215 N.Y.S.2d 508 (1961).

"No matter how probable a zoning amendment may seem, an element of uncertainty remains and has its impact upon the selling price. At most a buyer would pay a premium for that probability in addition to what the property is worth under the restrictions of the existing ordinance." *Masten v. State of New York*, supra, 11 A.D.2d at 372, 206 N.Y.S.2d at 674.

A discount from the full value of the property as rezoned is necessary to reflect the fact that the rezoning has not actually been accomplished. *Masten v. State of New York*, supra; *In re Public School 223, City of New York*, 71 A.D.2d 1020, 420 N.Y.S.2d 501 (2nd Dept 1979); *Glennon v. State of New York*, 40 A.D.2d 1072, 339 N.Y.S.2d 253 (4th Dept 1972); *Yochmowitz v. State of New York*, 25 A.D.2d 930, 270 N.Y.S.2d 333 (3rd Dept 1966), *lv denied* 18 N.Y.2d 579, 274 N.Y.S.2d 1027 (1966).

However, the project influence rule requires an exception where the condemning authority has prevented the property from being rezoned or where the zoning authority has refused to rezone the property because of the project. In valuing a property for

condemnation, the property should be neither enhanced or diminished by the impact of the project on the value of the property. *US v Miller*, 317 US 369, 63 S.Ct. 276 (1943); *US v Reynolds*, 397 US 14, 90 S.Ct. 803 (1970).

In this case there is no evidence that either the Condemnor or the City of New York refused to rezone the subject property because of the plans for the project.

The evidence presented was that a tenant of the building on lot 13 sought to have the property rezoned to C4-4A but withdrew that application in 2001, before the project was announced in 2003. The tenant did not withdraw the application because of opposition by the City. Howard Goldman, Esq., an attorney representing the tenant in the rezoning effort, testified that the City supported rezoning the property to C4-4A. The application was withdrawn when the tenant decided to seek a variance to allow residential development of the property rather than a rezoning.

Goldman also testified that the tenant withdrew its application for a variance the day before the public hearing on the application which was scheduled on September 29, 2003. This was before the project was announced in December of 2003.

Goldman testified on cross examination that the variance application was withdrawn because the owner of the property sent in a letter opposing the application and that the Board of Standards and Appeals will not

approve a variance if the owner of the property opposes it.

In 2007, after the announcement of the project, the owner filed plans to convert the building on lot 13 into a hotel, a use that was permitted under the existing M1-1 zoning. However, there was no evidence that the owner ever sought a rezoning of the property.

As there was no evidence that the City did not fail approve any requests to rezone the property because of the project, no evidence that the tenant withdrew its rezoning or variance applications because of the project, or no evidence that the owner had sought a rezoning before announcement of the project, it is evident that the fact that the property had not been rezoned by the date of vesting was not the result of project influence.

The fifth error asserted by Claimants is that the Court should have considered the property's potential as an assemblage site, and the substantial probability that the property would have been rezoned C6-2A.

The Court did not ignore the possibility of all four lots being assembled for development. The Court considered Claimants' plans to develop all four lots as a mixed-use development. However, with a probable rezoning to C4-4A, the building on lot 13 was overbuilt, and thus it would be more productive the develop lots 4, 5, and 6 as an assemblage, separate from lot 13. The Court valued the property on that basis.

Additionally, the Court did not overlook the testimony of Claimants' expert Richard Bass. The Court accepted that part of his testimony that there was a reasonable probability that the subject property would be rezoned, but did not accept his opinion that it would be rezoned to C6-2A. As explained more fully in the Decision and Order, the Court found that the scale of the existing structures on the block of the subject property, as well as the rezoning of the block immediately to the west of the subject property to C4-4A, would have a greater influence on a probable rezoning, than the size of the existing Newswalk building on the rezoned block.

WHEREFORE, Claimants' motion is granted only to the extent of modifying the Court's Decision of November 15, 2017, and Order and Judgment dated, December 13, 207, to reflect that the value of the subject property on the date of vesting was $22,206,000, and is denied in all other respects. Settle order on notice.

Dated: Brooklyn, New York
March 19, 2018

ENTER:

/s/ WS
JSC
HON. WAYNE P. SAITTA
J.S.C.

At IAS Part 89 of the Supreme Court of the State of New York held in and for the County of Kings at the Courthouse located at 360 Adams Street Brooklyn, New York 11201, on the 31 day of January 2019

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

PACIFIC CARLTON DEVELOPMENT CORP. & 535 CARLTON AVENUE REALTY CORP., (Block 1129, Lots 4, 5, 6 & 13),

Claimants,

-against-

NEW YORK STATE URBAN DEVELOPMENT CORPORATION d/b/a EMPIRE STATE DEVELOPMENT,

Condemnor.

[AMENDED]
ORDER AND JUDGMENT

Index No. 1693/12
(Saitta, J.)

The issues in the above-entitled action having duly come on to be heard before the Honorable Wayne P. Saitta, a Justice of this Court, without a jury at trial term, of this Court, held at the courthouse thereof, located at 360 Adams Street, Room 724, Brooklyn, New York on June 6-24, 2016 and October 18-20, 2016; the

Claimants, Pacific Carlton Development Corp. and 535 Carlton Avenue Realty Corp., having appeared by its attorneys, Biersdorf & Associates P.C., and the Condemnor, the New York State Urban Development Corporation, d/b/a Empire State Development ("ESD"), having appeared by its attorneys, Berger & Webb, LLP, and the issues having been duly tried, and the Court having, after due deliberation, duly made and filed a decision in writing on the 15th day of November 2017, in favor of the claimants, Pacific Carlton Development Corp. and 535 Carlton Avenue Realty Corp. in the sum of Twenty-one Million Nine Hundred Thirty-five Thousand Dollars ($21,935,000), minus the sum of the Advance Payment of Sixteen Million Two Hundred Third Four Thousand Dollars ($16,234,000), with prejudgment interest thereon at the statutory rate of nine percent (9%) from March 1, 2010 until September 1, 2011, from December 23, 2011 until January 1, 2015, from May 15, 2015 until March 1, 2016, from May 31, 2016 until November 10, 2016 and from January 17, 2017 until the date of payment, and an Order and Judgment having been entered on December 26, 2017 in the amount of $5,701,000 plus interest, and Condemnor having made payment on or about March 16, 2018 in the amount of $9,279,978 in full satisfaction of the Order and Judgment, and upon Claimants' Notice of Motion, dated December 15, 2017, the Affirmation of Dan Biersdorf, Esq., dated December 15, 2017, and exhibits thereto, the stipulation extending Claimants' time to file its motion, dated January 9, 2018, the Affirmation Supporting Claimants' Motion for Amended Findings of Dan Biersdorf, Esq., dated February 1,

2018, the Affirmation in Opposition of Adam Brodsky Esq., of Berger and Webb LLP, dated February 15, 2008, and the exhibits annexed thereto; and the Court having, after due deliberation, duly made and filed a decision in writing on the 19th day of March 2018 and entered on the 28th day of March 2018 modifying its prior Decision only to reflect a value of $22,206,000 minus the sum of prior principal payments of Twenty-one Million Nine Hundred Thirty-five Thousand Dollars ($21,956,806), with interest thereon at the statutory rate of nine percent (9%) from March 1, 2010 until September 1, 2011, from December 23, 2011 until January 1, 2015, from May 15, 2015 until March 1, 2016, from May 31, 2016 until November 10, 2016 and from January 17, 2017 until May 29, 2018.

NOW, on notice of ESD, it is hereby

ORDERED, **ADJUDGED AND DECREED**, that the Claimants Pacific Carlton Development Corp. and 535 Carlton Avenue Realty Corp., residing at Biersdorf & Associates, P.C. 150 South Fifth Street, Ste. 3100, Minneapolis, Minnesota 55402, do recover of the Condemnor, the New York State Urban Development Corporation, d/b/a Empire State Development Corporation, residing at Berger & Webb, LLP, 7 Times Square, 276 Floor, New York, New York 10036, the sum of Two Hundred Forty-Nine Thousand Nine Hundred Fourteen Dollars ($249,914) with interest at the statutory rate of interest of nine percent (9%) per annum from the 1st day of March 2010 until the 1st day of September, 2011, from the 23rd day of December 2011 until the 1st day of January, 2015, from the 15th day of

May 2015 until the 1st day of March, 2016, from the 31st day of May, 2016 until the 10th day of November 2016, and from the 17th day of January 2017 until May 29, 2018, and that the Claimant shall have execution thereof.

Judgment signed this 31 day of January, 2019.

/s/ WPS
HONORABLE WAYNE P. SAITTA
Supreme Court, Kings County

State of New York
Court of Appeals

Decided and Entered on the fifth day of January, 2023

Present, Hon. Anthony Cannataro, *Acting Chief Judge,* ***presiding***.

Mo. No. 2022-577
Pacific Carlton Development Corp. et al.,
Appellants,
v.
New York State Urban Development Corporation,
Respondent.

Appellants having moved for leave to appeal to the Court of Appeals in the above cause;

Upon the papers filed and due deliberation, it is

ORDERED, that the motion is denied with one hundred dollars costs and necessary reproduction disbursements.

/s/ Lisa LeCours
Lisa LeCours
Clerk of the Court