

Matter of City of New York (Coney Is. Plan - Stage 1)

2023 NY Slip Op 33933(U)

October 31, 2023

Supreme Court, Kings County

Docket Number: Index No. 517650/2016

Judge: Wayne Saitta

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

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In the Matter of the Application of THE CITY OF
NEW YORK relative to Acquiring Title in Fee Simple
Absolute to certain Real Property known as,

Index No. 517650/2016

BLOCK 7074, PARTS OF LOTS 4, 23 AND 105
in the Borough of Brooklyn, City and State of New York,

DECISION

Required to establish New Streets and Parkland in
connection with the Coney Island Plan – Stage 1.
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At issue in this condemnation proceeding is the just compensation to be awarded to Claimant Wantanabe Realty Corp., for the taking of part of the subject property, located on the block bounded by Surf Avenue, West 15th Street, the Coney Island Boardwalk and West 16th Street in Coney Island. The Condemnor, CITY OF NEW YORK, took title on December 6, 2016 (the vesting date). The Court viewed the property on October 28, 2019, and a non-jury trial was held on August 2, 3 and 4 and September 6, 9, 20 and 22, 2022.

Claimant appeared by Kramer, Levin, Naftalis, & Frankel LLP, James G Greilsheimer Esq., and Cynthia L. Siderman Esq., of counsel, 1177 Avenue of the Americas New York, New York 10036. The CITY appeared by the Corporation Counsel, Meagan Keenan Esq., Adam Dembrow Esq., and Emily Keyes Esq., of counsel, 100 Church Street, New York, New York 10007.

The property in question is vacant land that fronts both the Coney Island Boardwalk and Surf Avenue and occupies almost the entire block between West 15th and West 16th Street, with the exception of the frontage along West 15th Street where the Thunderbolt roller coaster is located. The CITY took part of the property, largely consisting of the portion fronting the Boardwalk.

This partial taking presents three preliminary questions. First, what lots make up the larger parcel. Second, whether the property should be valued based on the zoning in place at the time of the taking. Third, whether compensation for the part of the property taken by the CITY should be offset by any increase in value of the remainder property after the taking.

Identity of the Larger Parcel

The term larger parcel means the whole property before part of it is taken. Damages in a partial taking are determined by comparing the value of the larger parcel before the taking to the value of the part not taken, or remainder parcel, after the taking. One must first determine what property makes up the larger parcel.

Claimant valued the property, including all of the property on the block owned by the Claimant, as the larger parcel. This included lots 4, 23, 105, 6, and 89 with a total of 128,652 square feet.

The CITY's appraiser valued the property using only lots 4, 23, and 105. The CITY took part of lots 4, 23, and 105 but did not take any part of lots 6 or 89. The appraiser did not consider lots 6 and 89 as part of the larger parcel on instruction from the CITY.

In determining whether two or more lots should be evaluated together as a larger parcel, the Court must look to whether the lots have contiguity, unity of ownership, and unity of use. "To establish the propriety of valuing two separate parcels of property as a single economic unit for the purpose of awarding condemnation damages, the property owner must show that the subject parcels are contiguous, and that there is a unity of use and of ownership" (*Matter of Town of Oyster Bay* 156 AD3d 704, 706-7, [2d Dept 2017], quoting *90 Front St. Assoc., LLC v. State of New York*, 79 AD3d 708, 709 [2d Dept 2010]).

In this case all five lots are contiguous, had common ownership, and shared a unity of use.

The CITY had its appraiser do an analysis of value based on the five lots as the larger parcel in its rebuttal appraisal, and in its post-trial brief stated that it did not dispute that the appropriate larger parcel included all five lots.

Therefore, the Court adopts lots 4, 23, 105, 6, and 89 as the larger parcel.

Which zoning should apply

The subject properties were rezoned by the CITY in 2009, when the City created the Special Coney Island District. The subject properties are in the Coney Island East Subdistrict of that District. The rezoning raised the permissible Floor Area Ratio (FAR) of lots 4,6, and 89 from an FAR of 2 to an FAR of 4.5, and of lots 23 and 105 to an FAR of 2.6. Additionally, the change in zoning allows for additional uses, most significantly hotel use.

Claimant asserts that the property should be valued based on the 2009 rezoning which was in effect at the time of the taking. The CITY argues that the 2009 rezoning should not be applied because it was part of the same project as the taking.

In valuing a property for condemnation purposes, the property should be neither enhanced nor diminished by the impact of the project on the value of the property (*US v. Miller*, 317 US 369 [1943]).

In its decision in *US v. Reynolds*, 397 US 14 (1970), the Supreme Court elaborated on the rationale of the *Miller*, rule explaining that:

“The Court early recognized that the ‘market value’ of property condemned can be affected, adversely or favorably, by the imminence of the very public project that makes the condemnation necessary. And it was

perceived that to permit compensation to be either reduced or increased because of an alteration in market value attributable to the project itself would not lead to the 'just compensation' that the Constitution requires. On the other hand, the development of a public project may also lead to enhancement in the market value of neighboring land that is not covered by the project itself. And if that land is later condemned, whether for an extension of the existing project or for some other public purpose, the general rule of just compensation requires that such enhancement in value be wholly taken into account, since fair market value is generally to be determined with due consideration of all available economic uses of the property at the time of the taking" (*id* at 16-17).

"The first question that must be considered in deciding whether the rezoning of the subject properties falls within the project influence rule is, what constitutes the project in this case" (*Matter of City of New York [Fifth Amended Brooklyn Ctr. Urban Renewal Area, Phase 2]*, 41 Misc. 3d 1212(A) [Sup. Ct. Kings 2013]).

New York State Eminent Domain Procedure Law (EDPL) defines a "Public Project" as "any program or project for which the acquisition of property may be required for a public use, benefit or purpose" (EDPL §103[G]).

The use of the term "any program" to define a "public project" indicates that a project can include a series of related actions as opposed to being limited to a single distinct action or development. Also, the term "program" can encompass a series of planned actions where not all of the included actions may be realized. Lastly, it also includes more than physical buildings or structures.

Given the rationale of the project influence rule, a comprehensive land use plan can be considered a "program" within the meaning of the definition of "public project".

In this case, both the rezoning of the larger parcel and the condemnation of the property were part of the same project, enacted as part of the Comprehensive Coney Island Plan.

That plan, adopted by the City Council, consisted of several proposals which were listed as related actions. These actions included: zoning text and map amendments creating the Coney Island Special District, which included changes to bulk and use regulations [ULURP application N 090273(A) ARK and C 090272 ZMK], acquisition of private land, including the subject property [ULURP application C 090274 PQK], and de-mapping of existing parkland and streets and mapping new parkland and streets, including on the subject property [ULURP application C 090107 MMK].

The actions were all contained in the Coney Island Comprehensive Rezoning Plan and were reviewed pursuant to the same Environmental Impact Statement. The ULURP applications were all adopted by the City Council on July 29, 2009, and each ULURP application listed the other applications as related actions.

The NYC Planning Commission stated that "each element of the proposed amendment to the City Map is necessary for the plan to meet its goal" (ULURP application N 090273(A) ZRK).

One of the articulated goals of the plan was to revitalize the Coney Island amusement area. The changes in zoning to allow greater bulk and additional amusement and entertainment related commercial uses, such as restaurants, breweries, spas and hotels, were aimed at strengthening the viability of the area as an amusement destination. Particularly, hotels were included among the new uses to encourage activity after business hours and to allow visitors to stay in the area longer.

Similarly, the acquisition of land by the CITY to create an open amusement park fronting the boardwalk, running from MCU Stadium to the Cyclone, was intended to strengthen viability of the area as an amusement destination. The Planning Commission stated that having the CITY take ownership of the land and mapping it as a park was the

best way of ensuring that amusement uses survived. The Planning Commission noted “that zoning alone was not an adequate tool to protect amusements against disinvestments and demolition”, and cited public ownership of the Cyclone roller coaster.

The rezoning of the subject property together with its acquisition by the CITY and its mapping as a park, were part of the same comprehensive plan to revitalize Coney Island as an amusement area, even though the actual vesting took place some years after the rezoning. Also, the decision to de-map parkland west of the MCU Park and replace that parkland by mapping the property taken and adjacent land to the east was part of the same plan and were adopted together, even though the de-mapping of the parkland could not take place until it was approved by the State Legislature in 2011.

Claimants argue that even if the rezoning and the acquisition of their property were part of the same project, the property should be valued based on the rezoning because the property would have been rezoned absent the rezoning as part of the Coney Island Comprehensive Plan.

The fact that the Claimant had not sought a rezoning before the decision to acquire and rezone the subject property is not dispositive. The burden for Claimant is to show that it is probable that absent the rezoning, an owner or purchaser of the property would have paid a premium on the expectation that it could be rezoned (*Matter of City of New York [No. 7 Subway Extension--Hudson Yards Rezoning & Dev. Program]*, 33 Misc. 3d 1202(A) [Sup Ct NY Cty 2011]).

Claimant’s zoning expert Richard Bass AICP,PP, stated that the CITY recognized that the zoning covering Coney Island was outdated and restricted growth and expansion. Bass noted that the existing C7 zoning limited the property to warm weather uses. Bass

further testified that where the CITY recognizes that the zoning of an area is old and outdated, it is open to changing the zoning.

Bass concluded that had there been no rezoning in 2009, there was a strong likelihood that the CITY would have granted a private application to rezone the subject property before the date of vesting.

The situation in this case differs from the standard case where a claimant must demonstrate that absent the taking, a property would have been rezoned because here the rezoning was part of the project. Thus, the Claimant has the burden of demonstrating that the rezoning would have occurred in the absence of the comprehensive plan of which the taking and the rezoning were a part.

Claimant has demonstrated that had an owner sought a rezoning of the subject property, the CITY under the Bloomberg administration would have most probably granted one. However, that is only part of the burden. Claimant must also demonstrate that absent the project it was reasonably probable that a potential purchaser of the subject property would have paid a premium for the property that reflected a probable rezoning consistent with the highest and best use used by Claimant's appraiser.

Bass cited six developments as evidence of development activity in the area that demonstrated that a buyer of the subject property would probably have had sought a rezoning absent the project.

Only one of the cited developments involved a private rezoning. The first listed project "Ocean Dreams" involved a change in zoning from R5 to R6. However, it was a residential development located between West 35th and West 37th Street, outside of the Special Coney Island District and was 20 blocks away from the subject property.

All but one of the other developments were CITY developments or CITY subsidized developments.

The second development cited, 1709 Surf Avenue, was a CITY project in which the CITY conveyed land to a Housing Development Fund Corporation (HDFC) conditioned on the HDFC building affordable housing on the site.

The third development cited, a commercial and retail development at 626 Sheepshead Bay Road and 532 Neptune Avenue, was a private development. However, it is outside of the Special Coney Island District and was built as of right, without a rezoning.

The fourth development cited, Coney Island Commons was located on Surf Avenue between West 29th Street and West 30th Street, outside of the Special Coney Island District and involved a change in zoning from R6 to R7. However, it was a CITY project built on land conveyed by the CITY to a developer it selected, and the CITY was the applicant on the rezoning application.

The fifth development cited by Bass, was an expansion of the NYC Aquarium that was financed largely with CITY funds.

The sixth development, Luna Park, was a CITY project located in the Special Coney Island District. The CITY purchased the property in 2009 to create Luna Park, after the rezoning, and put out a request for bids to develop an amusement park in accord with the goals of the Coney Island Comprehensive Plan.

With the exception of the Ocean Dreams project, which was outside of the Special Coney Island District, and 626 Neptune Avenue, which did not involve a rezoning, all the development cited by Bass were initiated or funded by the CITY.

The Claimant has failed to demonstrate that private developers were seeking rezonings to develop property in the area of the Special Coney Island District and thus

failed to show that absent the rezoning by the CITY, that at the time of vesting a prospective buyer would have paid a premium for the probability of rezoning the subject property to an FAR of 2.6 or to allow the mixed-use hotel development.

For these reasons the value of the larger parcel before taking should be based on the C7 zoning that existed before the adoption of the Special Coney Island District. The highest and best use for the property under the pre project zoning was for development of amusement uses permitted under the C7 district.

As the pre project zoning must be used to value the parcel before taking, the Court need not resolve the dispute between the parties as to what was the permissible FAR for the property taken under the project rezoning.

Special Benefits to the Property from the Project

Generally, the measure of damages in a partial taking is the difference in value between the larger parcel before taking and the remainder parcel after taking (*Diocese of Buffalo v. State of New York*, 24 NY2d 320 [1969]; *Chester Industrial Park Assoc v. State*, 103 AD3d 827 [2d Dept 2013]; *Village of Dobbs Ferry v. Stanley Avenue Properties*, 95 AD3d 1027 [2d Dept 2012]).

This measure of damages includes the direct value of the property taken and indirect damages to the remainder of the parcel caused by the taking. The term indirect damages include severance damages and consequential damages. Severance damages are damages suffered by the remainder parcel caused by the loss of the taken parcel. Consequential damages are damages to the remainder caused by the use to which the taken property is put.

However, changes to the remainder parcel caused by the project can result in an increase in value rather than a decrease.

Here the CITY claims that the remainder parcel has increased in value because of the rezoning that was part of the project. Claimant argues that the remainder has suffered severance damages caused by the loss of the boardwalk frontage.

New York law allows benefits to the remainder parcel caused by the project to be offset against any indirect damages to the remainder but not against the direct damages, that is the value of the property taken.

While the general rule is that the measure of damages in a case of partial taking is the difference between the before and after value of the property (*see Acme Theatres v. State of New York*, 26 NY2d 385, 388 [1970]), that rule does not apply where it would have the effect of using any benefits to the remaining land as a result of the condemnation to offset the damages caused by the State's actual taking," (*Chiesa v. State*, 36 NY2d 21 [1974]; *Matter of City of New York [Consolidated Gas Co.]*, 190 NY 350; *Lerner Pavlik Realty v. State*, 98 AD3d 567 [2d Dept 2012]; *Done Holding Co. v. State* 144 NY 2d 528, [2d Dept 1988]).

"In no case should an award be made for less than the value of the property actually taken by [the] condemnation" (*Chiesa v. State of New York*, 36 NY2d 21 [1974]).

While the CITY contends that its valuation is in accord with the holding in *Chiesa*, its valuation does in fact offset the value of the parcel taken by an increase in value of the remainder parcel due to the project rezoning.

Claimant argues that the CITY's final valuation is less than the value of the parcel taken, even using the CITY's adjusted comparable values.

In the "Before" analysis, the CITY's appraiser valued the parcel taken at \$94 per square foot of buildable area based on the pre-project zoning which allowed an FAR of 2. The CITY took 55,346 square feet of land, which at a 2.0 FAR, allowed for 110,692 square feet to be developed. At \$94 per square foot of developable area, the total value for the land taken was \$10,405,048.

The CITY's appraiser however did not calculate the direct damages by using the entire 110,692 square feet of developable buildable area taken by the CITY; but instead used what they termed the "Effective Zoning Floor Area" (Zoning Floor Area is equivalent to buildable or developable area). The CITY's appraiser calculated the "Effective Zoning Floor Area" by subtracting the developable area of the remainder parcel from the total developable area of the larger pre-taking parcel, and concluded that the CITY took only 13,259 square feet of developable area from the Claimant.

The flaw in this analysis is that it reduces the 110,692 buildable square feet that the CITY actually took by the amount that the developable area on the remainder parcel was increased by the project rezoning.

Employing, for illustrative purposes, the CITY's five lot analysis, the larger parcel before taking was 128,652 square feet which allowed 257,304 developable square feet. The CITY took 55,346 square feet leaving the remainder parcel with 73,306 square feet which under the project zoning allowed for 244,045 developable square feet.

It is only by including the extra developable floor area that the remainder parcel gained by the project rezoning, that the CITY can argue that the Claimant lost only 13,259 square feet of developable area.

However, offsetting the 110,692 developable square feet that the CITY took by the extra square feet that the remainder parcel gained from the project rezoning is exactly the

type of benefit from the project that cannot be used as an offset to direct damages pursuant to *Chiesa*.

The Claimant is entitled, at a minimum, to the value of the direct damages of 110,692 square feet of buildable area that the CITY took. Any increase in value in the remainder resulting from the increase in zoning can only be used to offset any diminution in value to the remainder parcel caused by the severance.

The Court declines to adopt the final valuation of both the Claimant and the CITY, as the Claimant's valuation based on the project rezoning is barred by the project influence rule and the CITY improperly offset from the direct damages, the special benefits that accrued to the remainder parcel from the project rezoning.

However, while the Courts rejects the final valuation of both appraisers, many of the components of the appraisals are valid. Additionally, in rebuttal, the appraisers provided valuations in the alternative addressing the problems identified with their initial valuations.

There is sufficient data in the appraisals for the Court to make a determination of the before value based on the five lots at the pre-project zoning of 2 FAR, and determining the after value without offsetting the direct damages by the increase in value of the remainder attributable to the project rezoning.

Before Value of Larger Parcel

In this case, both Claimant and the CITY used the same five comparable sales, except that Claimant used a sixth comparable sale that the CITY did not use.

In order to compare the different valuations reached by the appraisers for these properties, one must first adjust for the different zoning each attributed to the subject property. Due to the fact that the comparable sales all occurred after the project rezoning, their sales prices reflected the project zoning of an FAR of 2.6 or 4.

The Claimant's appraiser based his valuation on the project zoning in effect at the time of the vesting and did not make any adjustment to the comparable sales for zoning.

The CITY's appraiser determined the value of the property before taking based on the pre-project zoning, and made a 10% downward adjustment to the comparable sales to account for the project zoning in effect at the time of those sales.

As discussed above, the project influence rule requires that the larger parcel before the taking must be valued using the pre-project zoning.

In his rebuttal, Claimant's appraiser argues that instead of using post rezoning sales and adjusting them for the pre-project rezoning, one should use pre-rezoning sales and then adjust those sales for market conditions over time. Claimant's appraiser stated that he believed that analyzing pre-rezoning sales and adjusting them for time is more appropriate because there is more market support for the time adjustments.

Claimant's alternative, while logical on its face, produces an implausible result. His adjusted values for the pre-project zoning sales were on average almost double the average value of Claimant's comparable sales at the higher project rezoning. His average adjusted value for the 18 pre-rezoning sales was \$266 per square foot of developable area as opposed to his original average adjusted value of \$138 per developable square foot for the larger parcel at the higher project rezoning.

Claimant's appraiser does not adopt the mean \$266 a square foot value but then separates out seven of these sales that he identifies as oceanfront properties and calculates

their average value as \$197 a square foot and adopts \$200 a square foot of developable area as the value of the larger parcel before taking.

However, the analysis finds the sales of the oceanfront properties worth some \$197 a square foot on average, while the average of all the pre-zoning sales is \$266 per square foot. This contradicts his 30% upward location adjustment to non-boardwalk properties.

The more reliable approach is to adjust the values Claimant's appraiser found for the post rezoning sales analyzed in his original appraisal, to account for the fact that the subject property must be valued based on the pre-project zoning.

There are two basic differences between the pre-project zoning and the rezoning; the first is a higher allowable FAR, and the second is a greater number of allowable uses.

The CITY's appraisal states that because "the comparable sales were analyzed on a price per buildable area basis, no adjustments were considered for maximum FAR in the zoning adjustment category". By comparing value per square foot of developable floor area, rather than lot area, one has already accounted for any increase in value due to an increase in FAR.

The CITY appraiser's 10% downward adjustment for zoning was based on the additional uses allowed under the Special Coney Island East Subdistrict. The significant additional uses allowed in the Coney Island East Subdistrict are hotels, water parks, and eating establishments under 2,000 seats.

The CITY's appraiser did not go into any detail as to how he determined that 10% was the appropriate adjustment for the additional uses allowed by the rezoning.

The photos and maps of the comparable sales 2 and 3, show that hotels and water parks are not probable uses for which they would be developed. Even under the project, zoning sales 2 and 3, which abut the elevated subway line, would have a maximum FAR

of 2.6. Given the unlikelihood of hotel development on sales 2 or 3, a 10% adjustment is too large.

However, eating establishments under 2,000 seats, retail, or amusements are probable uses for which a developer would purchase sales 2 and 3. In fact, the purchaser of sale 2 filed a new building permit in May of 2016, under the project zoning, to build a two-story amusement arcade. A downward adjustment for zoning of 5% is more appropriate for sales 2 and 3.

Sales 1, 4, and 5 are situated between the southside of Surf Avenue and the Bowery and are suitable for mixed use hotel, restaurant, retail, as well as amusement related development. The CITY appraiser's downward 10% adjustment for zoning is appropriate for comparable sales 1, 4, and 5.

Additionally, in its rebuttal, the CITY's appraiser made an analysis based on the five lots that Claimant's appraiser used as the larger parcel. As discussed above, the proper larger parcel consists of all five lots. Therefore, the Court will compare the CITY appraiser's five lot parcel revised comparable sales analysis to the Claimant's analysis.

The land area of the five lot larger parcel is 128,652 square feet. At an FAR of 2, this allows a total buildable area of 257,304 square feet.

As both appraisers used the comparable sales approach to value the property and the five sales were used by both appraisers, an analysis and comparison of the adjustments made to each of those five comparable sales is appropriate.

Sale 1

Comparable sale 1 is located at 1105, 1205, and 1207 Bowery and had a maximum buildable area of 80,024 square feet. Although the appraisers differed as to whether the

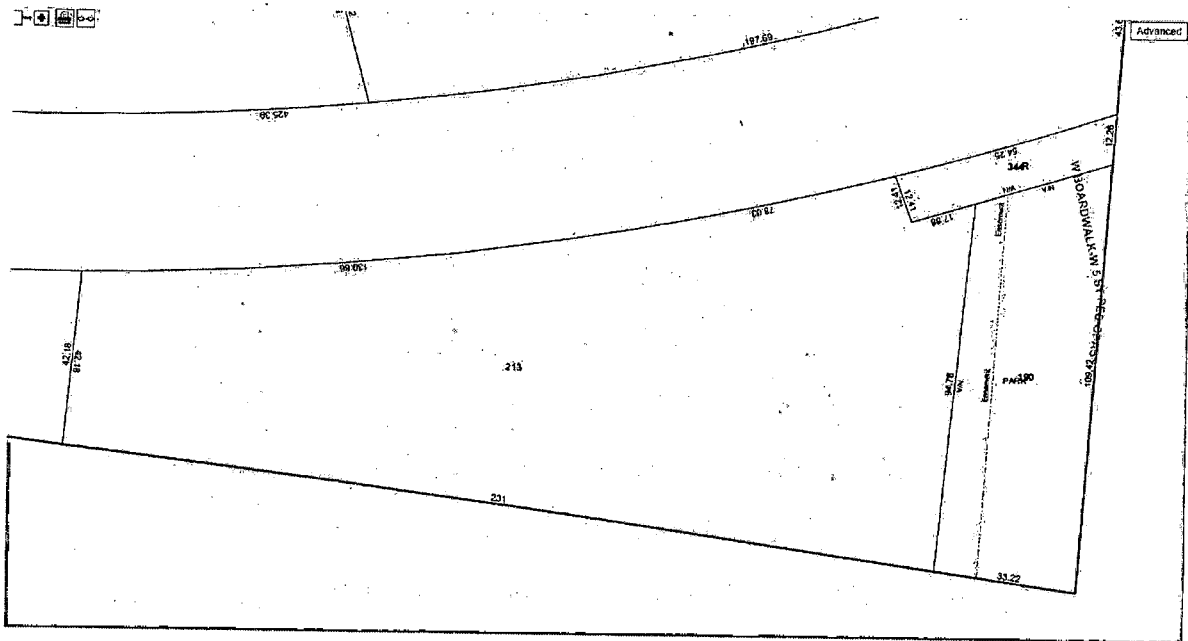
demolition costs should be calculated as a transactional adjustment or a property adjustment, and some of their individual property adjustments differed, both appraisers' adjusted value for sale 1 were almost identical. The CITY's appraiser found an adjusted value of \$110 per square foot and the Claimant's appraiser found an adjusted value of \$109 per square foot. The Court adopts \$109.50 per square foot as the adjusted value of sale 1.

Sale 2

Comparable sale 2 is located at 805-809 Surf Avenue between West 8th and West 12th Streets. It is an irregular midblock parcel that fronts the north side of Surf Avenue, with a rear lot line abutting the elevated subway. The CITY's appraiser gives it an adjusted value of \$70.44 per square foot of buildable area, while the Claimant's appraiser gives it an adjusted value of \$112 per square foot of buildable area.

To begin with, the parties differ on the size of the lot. The CITY contends that the lot is 17,057 square feet and Claimant contends that the lot is 15,369 square feet.

The dimensions of the lot are 42.18 feet on its west lot line, 231 feet along Surf Avenue, 94.76 feet on its east lot line, with a cut out approximately 12 feet from the rear lot line, and then a curved rear lot line of 217.89 feet.



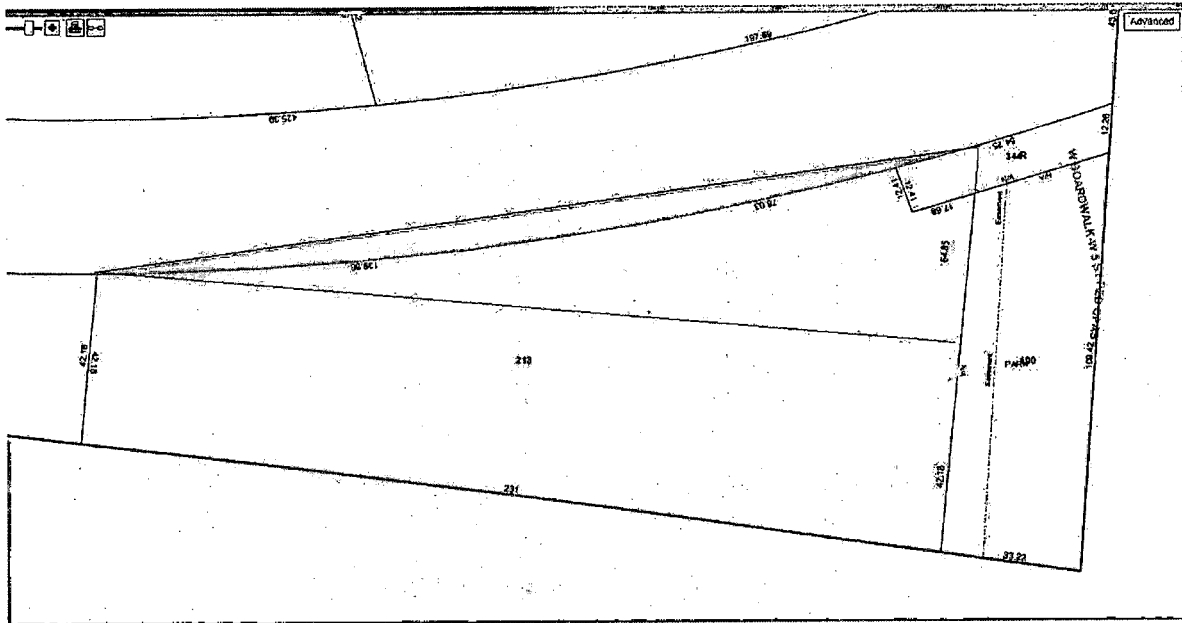
NYC Tax Map of 805-809 Surf Avenue

The Claimant's appraiser based his figure from an application filed by the owner of the property with the NYC Department of Buildings.

The CITY's appraiser based its figure on OASIS, which he said was a search engine maintain by CUNY. He also testified that one can approximate the lot area of sale 2 using the dimensions on the map by dividing the lot into a rectangle and a triangle.

One can only approximate the area from the maps with the dimensions given, because the rear lot line is an arc.

The CITY's appraiser then drew a rectangle 42.18 feet by 231 feet which totaled 9,743 square feet, and a triangle 64 feet by 231 feet which he stated totaled 7,458 square feet. He added that to the 9,743 square feet and deducted 150 square feet for the northeast cut out and he testified the total was 17,129 square feet.



NYC Tax Map of 805-809 Surf Avenue with the CITY's appraisers calculations

As the rear lot line is a concave arc in relation to the area of the lot, the hypotenuse of the triangle will encompass some land outside of the lot, so it will be larger than the actual lot.

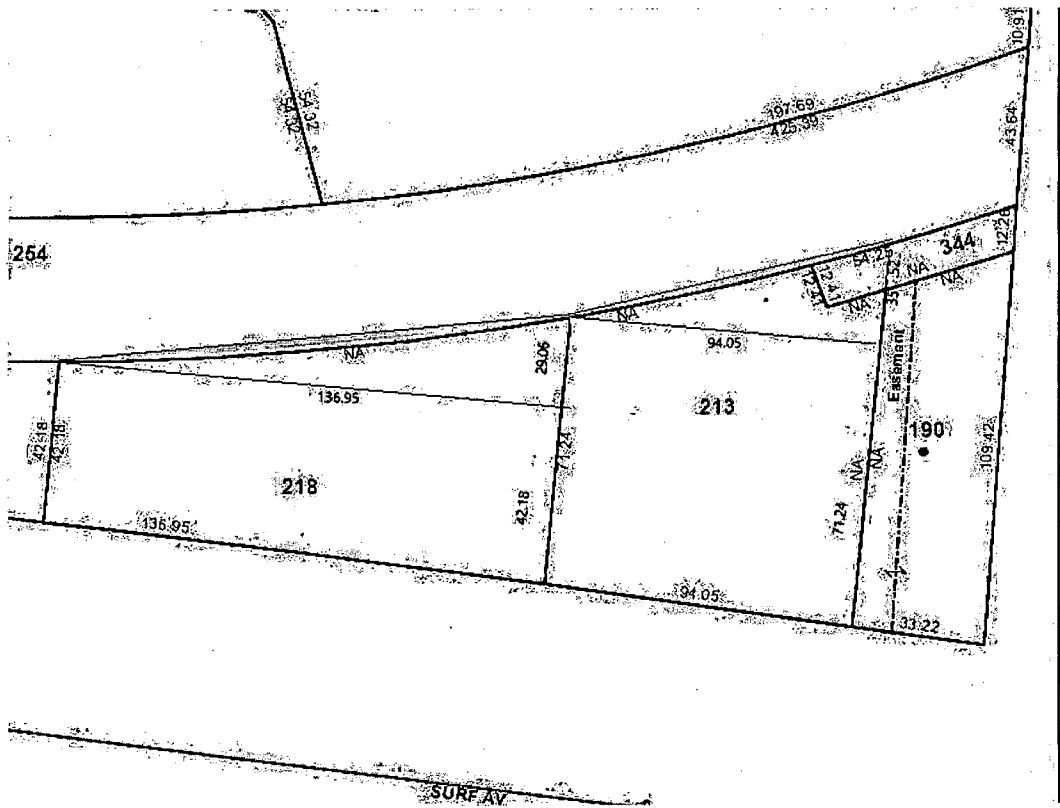
The CITY's appraiser conceded that the triangle included area outside of the lot [shaded gray] but did not calculate how much outside area it included.

Both appraisals contain tax maps showing the dimensions of the property comprising sale 2. While the map submitted by the CITY shows it as one merged lot, the map submitted by Claimant has the dimensions for both former lots 213 and 218 separately. Both maps show the same total dimensions for the two lots together.

The map submitted by the Claimant provides data which allow for a more accurate calculation of the lot's area than that performed by the CITY's appraiser. This is because since it is divided into two lots, the map contains an additional dimension that allows one

to divide the lot into two rectangles and two right triangles with known measurements, from which the area can be calculated, as opposed to the one rectangle and one right triangle used by the CITY's appraiser for his calculations.

The two right triangles possible with the Claimant's map have shorter hypotenuses than the hypotenuse of the one right triangle used by the CITY's appraiser. Pursuant to the method of exhaustion, the shorter hypotenuses follow the arc of the rear lot line more closely than the larger hypotenuse of the triangle calculated by the CITY's appraiser. Thus, the two smaller triangles include less area that is outside the lot [shaded gray below] and give a more accurate approximation of the area of the lot.



NYC Tax Map of 805-809 Surf Avenue prior to lot merger

Using the dimensions included on Claimant's map, one can divide the lots into one rectangle measuring 42.18 feet by 136.95 feet (containing 5,776.55 square feet), a second rectangle measuring 71.24 feet by 94.05 feet (containing 6,700.12 square feet), and two triangles, the first triangle with a base of 136.95 feet and a height of 29.06 feet (containing 1,989.88 square feet).

In determining area of the second triangle, one must account for a small cut out at the rear northeast corner. To do this, one must first determine the distance the eastern boundary would extend absent the cut out. While this distance is not measured on the map, the CITY's appraiser estimated it at 12 feet which is reasonable as it is close to the length of one of the sides of the cut out that is almost parallel to the eastern boundary. The 12 feet added to the 94.76 feet marked as the eastern boundary equals 106.76 feet, which is close to the 106 feet calculated by the CITY's appraiser for the east boundary.

If one then subtracts 71.24 feet (the height of the second rectangle), one can create a second triangle with a height of 35.52 feet and a base of 94.05 feet (containing 1,670.33 square feet). From this, one must subtract the area of the cut out. The cut out is irregular and there are not sufficient measurements on the map to calculate its exact area, but the area of a portion of it can be calculated. A rectangle measuring 12.41 feet by 17.68 feet (containing 219.41 square feet) encompasses most of the cut out. Because this is less than the actual size of the cut out, this leaves area in the triangle that is not part of the lot of sale 2. However, it is a relatively small area of less than 100 square feet.

When one adds the 5,776.55 square feet of the first rectangle, the 6,700.12 square feet of the second rectangle, the 1,989.88 square feet of the first triangle, the 1,670.33 square feet of the second triangle, and subtracts the 219.41 square feet of the rear northeast cut out, the result is 15,917.47 square feet. This approximation is still larger than

the actual area of the lot because the triangles include some area outside the lot. It is, however, much closer to the area contained in the Building Department application relied on by Claimants' appraiser. The Court therefore adopts Claimants figure of 15,369 square feet as the lot area of sale 2.

Sale 2 has an FAR of 2.6 which allows a total developable area of 39,959 square feet. When this is divided by the purchase price of \$3,500,000, the result is an unadjusted value of \$87.59 per square foot of developable floor area.

The first adjustment made by both appraisers is for market conditions, that is the general change in market values from the time of the sale or contract to the date of vesting.

The CITY's appraiser used an upward adjustment of 5% per year while the Claimant's appraiser used an upward adjustment of 10% a year or 0.83% per month for an adjustment of 6.7% to sale 2.

The CITY's appraiser did not specify any data on which the 5% figure was based. Claimant's appraiser stated that he based his rate of 0.83% per month (10% per year) on Property Sales Reports of Brooklyn Development Properties published by Massey Knakal.

The CITY's appraiser testified that Claimant's 10% adjustment resulted in upward adjustments of close to 50% on sales 4 and 5 and resulted in values that exceed any actual sales. The appraiser noted that the Claimant's appraiser's values for sales 1 and 2, which were close in time to the vesting, were \$109 and \$122 per square foot, which was lower than his values for sales 3, 4, and 5 after the 10% annual adjustment for market conditions.

However, the CITY's appraiser did not offer any evidence to dispute the accuracy of the Massey Knakal reports on which Claimant's appraiser based his 10% annual adjustment. Nor did he offer any data to support his 5% yearly adjustment.

While it is true that the 47% and 46% market adjustments for comparable sales 4 and 5 are large, this is a function of the fact that those sales occurred over 5 years before vesting. Both appraisers used these sales despite their early date because of the uniqueness of the property and the relative dearth of comparable sales in the neighborhood. Claimant's appraiser's market adjustment though large in the aggregate is in line with the data in the Massey Knakal reports.

In light of the above, the Court adopts Claimant's appraiser's market adjustment of 0.83% per month. Applying the market adjustment of 6.7% to the unadjusted value per square foot of developable floor area of \$87.59 results in \$93.46 per square foot.

The appraisers differed on four categories of further adjustments to sale 2: location, zoning, easement, and corner adjustments.

Both appraisers made an upward adjustment for location to sale 2 to account for the fact that it has no boardwalk frontage unlike the subject property which has 150 feet of boardwalk frontage. The CITY's appraiser made an upward 20% adjustment and the Claimant's appraiser made a 30% adjustment. Sale 2 is located on the north side of Surf Avenue just outside of its heavily-trafficked commercial corridor. It not only has no boardwalk frontage, it is also separated from the main amusement area on the blocks adjacent to the boardwalk by the wide Surf Avenue. Under the pre-project zoning, uses are limited to amusements and accessory uses. Given that fact, the lack of boardwalk frontage is more significant given the limited uses allowed under the project zoning, and thus supports an upward adjustment of 30% for location.

As discussed above, the Court finds that a downward adjustment of 5% for zoning is appropriate for sale 2.

The CITY's appraiser made a downward adjustment for the fact that sale 2 had no easements while he contended that there are encumbrances on the subject property. The CITY's appraiser states that there is an easement over what is known as Kensington Walk and a right of way over the Bowery that collectively encompassed 18,300 square feet.

The Claimant's appraiser states that the right of ways would have no impact on the value of the property because Claimant had title to Kensington Walk and the Bowery.

The evidence shows that the Claimant had title to the Bowery and Kensington Walk and that the Bowery was a mapped street but not titled to the CITY and that Kensington Walk was an unmapped street. Also, neither Kensington Walk or the portion of the Bowery on the subject property was actually open as a street or public way at the time of the vesting.

The area of the Bowery and Kensington Walk would be counted towards the property's FAR, although the owner would have to obtain a de-mapping to be able to build upon either. Claimant's expert, Bass, testified that an owner would be able to obtain a de-mapping from the CITY.

In light of the fact that Claimant retained title to the Bowery and Kensington Walk, that their area would contribute to the property's FAR, and that an owner could have obtained a de-mapping from the CITY, the Court adopts Claimant's appraiser's opinion that a 5% downward adjustment for these encumbrances is not warranted.

Claimant's appraiser made a 15% downward adjustment to account for size. The CITY's appraiser made a negative 20% adjustment for the smaller size of sale 2. Sale 2 has a buildable square footage of only 39,959 square feet while the subject property has an allowable square footage of 257,304 square feet. The CITY's appraiser's adjustment of 20% for size is more appropriate.

The Claimant's appraiser made an upwards 5% adjustment to sale 2 to account for the fact that the subject property is a through block while sale 2 is an interior property. The CITY did not include an adjustment category for whether a property was an interior, through block, or corner property.

Applying an upward 6.7% adjustment for market conditions brings the unadjusted value of \$87.59 per square foot of developable floor area to \$93.46. The +30% adjustment for location, the -5% adjustment for zoning, the -20% adjustment for size, and the +5% corner adjustment result in a net adjustment of +10%. When this is applied to the purchase price of \$93.46 per square foot of developable area, the result is an adjusted value for sale 2 of \$102.80 per square foot.

Sale 3

Sale 3, located at 1019-1039 Surf Avenue, is an irregular shaped lot abutting the elevated subway line and is on the same block as sale 2. Both the Claimant and the CITY agree that the lot size of sale 3 is 9,860 square feet. Both appraisers agree that the actual sales price of sale 3 was \$3,100,000. However, the CITY's appraiser adjusted the sales price by deducting \$50 a square foot, or a total of \$570,000, as an estimated contributory value of the existing improvements on the site. This resulted in an adjusted sales price of \$2,530,000.

The Claimant's appraiser did not make an adjustment for retained improvements to the unadjusted sales price, but made a downward 15% adjustment for retained improvements, after market condition adjustments.

When one calculates the dollar amount of Claimant's appraiser's negative 15% adjustment, it is close to the CITY's appraiser's deduction to the actual sales price.

Claimant's appraiser's 15% adjustment is to the sales price of \$154 per square foot of developable area after adjustments for market conditions. That \$154 per square foot was based on 25,636 square feet of developable area, which translates to a purchase price adjusted for market conditions of \$3,947,944. A deduction of 15% of \$3,947,944 is \$592,192.

The CITY's appraiser argues that the retained improvement is a transactional adjustment which should have been performed before the location and physical adjustments, and before market condition adjustments, citing the *Appraisal of Real Estate 13th Edition*. The CITY's position that adjustments for retained improvement should be made as a transactional adjustment is correct.

The Court adopts the CITY's deduction of \$570,000, which was made as a transactional adjustment.

Deducting \$570,00 from the purchase price of \$3,100,000 brings the price to \$2,530,000. Adjusting that price by 27.7% [0.83% a month] for market conditions results in a price of \$3,230,810. Dividing that price by 25,636 square feet of developable area results in a price per square foot of developable area of \$126.03.

Similar to sale 2, the CITY's appraiser made an upward 20% adjustment for location and the Claimant's appraiser made a 30% adjustment. Sale 3 is also located on the north side of Surf Avenue just outside of its heavily-trafficked commercial corridor. It not only has no boardwalk frontage, but it is also separated from the blocks adjacent to the boardwalk by Surf Avenue. The lack of boardwalk frontage is more significant given the limited allowable uses under the pre-project zoning, and thus supports an upward adjustment of 30% for location.

As discussed above, given the location, size, and configuration of the lot, the Court finds that a downward adjustment of 5% for zoning is appropriate for sale 3.

Also as discussed above, no adjustment for the easements on the Bowery or Kensington Walk is warranted.

The CITY's appraiser made a negative 25% adjustment for size, while the Claimant's appraiser made a negative 15% adjustment for size. Sale 3 has a buildable square footage of only 25,636 square feet while the subject property has an allowable square footage of 257,304 square feet. The CITY's appraiser's adjustment of 25% for size is more appropriate.

Claimant's appraiser also made a positive 5% adjustment for the size of the plot. He explained that plots smaller than 10,000 square feet are more expensive to develop because of the difficulty in maneuvering equipment in tight spaces. However, sale 3 has a 182-foot frontage along Surf Avenue, which is a wide street. Even though the lot is slightly below 10,000 square feet, its configuration and frontage do not support a positive adjustment for plot size.

Claimant's appraiser's positive 5% corner adjustment to account for the fact that sale 2 is an inside lot is appropriate.

The +30% adjustment for location, the -5% adjustment for zoning, the -25% adjustment for size, and the +5% corner adjustment result in a net adjustment of +5%. When this is applied to the price per square foot of developable area of \$126.03 the result is an adjusted value for sale 3 of \$132.33 per square foot.

Sale 4

Sale 4, located at 1218 Surf Avenue, consists of two adjacent parcels that run from Surf Avenue to the Bowery, between Stillwell Avenue and West 12th Street, and are improved with a one-story amusement arcade.

The sales price of sale 4 was \$4,500,000. The CITY's appraiser deducted \$520,000 from the sales price for the retained improvements, while Claimant's appraiser made a negative 15% adjustment. As discussed above, a deduction for retained improvements are properly a transactional adjustment, therefore the Court adopts the CITY's appraiser's deduction of \$520,000 resulting in a purchase price of \$3,980,000.

There is a small dispute as to the lot size, with the CITY's appraiser using a figure of 10,449 square feet and the Claimant's appraiser using 10,623 square feet. Although the lot is irregular, the tax maps show that the lots together are slightly larger than 10,623 square feet.

The parcel consists of lots 14 and 33 of Block 8694. The dimensions of lot 14 are 50 feet by 90 feet which equals 4,500 square feet. Lot 33 is irregular, and its exact square footage cannot be determined. However, taking lot 33's smaller height and width, listed as 54.96 feet by 112.37, results in a square footage of 6,175.85. Adding that to the 4,500 square feet of lot 14 produces a total square footage of sale 4 of 10,676. Even though this figure slightly underestimates the size shown by maps, this is the closest estimate available from the evidence presented. Therefore, the Court adopts 10,676 square feet as the lot size of sale 4.

At an FAR of 4, sale 4 has an allowable developable square footage of 42,704 square feet. Dividing the purchase price of \$3,980,000 by 42,704 square feet results in a price per developable area of \$93.20.

For the reasons discussed above, a market conditions adjustment of 0.83% a month, or 47.2%, is warranted. That adjustment brings the price per developable square foot to \$137.19.

The appraisers differed on the appropriate adjustment for location. The CITY's appraiser made a positive 15% adjustment, while the Claimant's appraiser made a positive 30% adjustment. While sale 4 does not have boardwalk frontage, it is located in the heart of the amusement area between Surf Avenue and the Bowery and between Stillwell Avenue and West 12th Street, opposite the Coney Island subway terminal. It has an inferior location to the subject property, but a superior location to sales 2 and 3. For these reasons, a positive location adjustment of 25% is warranted.

The CITY's appraiser made a negative 10% adjustment for zoning. Sale 4 is situated to be able to take greater advantage of the project zoning than sale 2, 3, and 5. Due to its location and size, it is a more likely site for hotel development. Sale 4 has an allowable FAR of 4. The larger amount of developable area makes it more likely that a buyer could take advantage of the hotel use allowed under the project zoning. Therefore, the Court adopts the CITY's appraiser's negative 10% adjustment for zoning for sale 4.

The CITY's appraiser made a negative 20% adjustment for size, while the Claimant's appraiser made a negative 15% adjustment for size. Sale 4 has a buildable square footage of only 43,068 square feet while the subject property has an allowable square footage of 257,304 square feet. The CITY's appraiser's adjustment of 20% for size is more appropriate.

Neither appraiser made any further adjustments to sale 4.

The +25% adjustment for location, the -10% adjustment for zoning, and the -20% adjustment for size, result in a net adjustment of -5%. When this is applied to price per

square foot of developable area of \$137.19, the result is an adjusted value for sale 4 of \$130.33 per square foot.

Sale 5

Sale 5 is located at 1214 Surf Avenue between Stillwell Avenue and West 12th Street, next door to Sale 4. It is a small interior lot, 2,790 square feet in size. Under the project zoning it has an FAR of 4, which allows 11,160 square feet of developable area.

The sales price of sale 5 was \$1,300,000. The CITY's appraiser deducted \$140,000 from the sales price for the retained improvements, while Claimants appraiser made a negative 15% adjustment. As discussed above, a deduction for retained improvements are properly transactional adjustments, therefore the Court adopts the CITY's appraiser's deduction of \$140,000 for retained improvements resulting in a purchase price of \$1,160,000.

Dividing the purchase price of \$1,160,000 by 11,160 square feet results in a price per developable area of \$103.94.

For the reasons discussed above, a market conditions adjustment of 0.83% a month or 46.7% is warranted. That adjustment brings the price per developable square foot to \$152.48.

The appraisers differed on the appropriate adjustment for location. The CITY's appraiser made a positive 15% adjustment while the Claimant's appraiser made a positive 30% adjustment. Similar to sale 4, sale 5 does not have boardwalk frontage and is located in the heart of the amusement area next to sale 4. It has an inferior location to the subject property, but a superior location to sales 2 and 3. For these reasons, a location adjustment of 25% is warranted.

The CITY's appraiser made a negative 10% adjustment for zoning. Sale 5 is within the prime amusement area and fronts the southside of Surf Avenue. It is adaptable to the additional uses allowed under the project zoning. The Court adopts the CITY's appraiser negative 10% adjustment for zoning for sale 5.

The CITY's appraiser made a negative 30% adjustment for size, while the Claimant's appraiser made a negative 15% adjustment for size. Sale 5 has a buildable square footage of only 11,166 square feet while the subject property has an allowable square footage of 257,304 square feet. The CITY's appraiser's adjustment of 30% for size is more reliable.

The Claimant's appraiser made a positive 5% adjustment to account for the small size of the plot. The rationale is that plots smaller than 10,000 square feet are more difficult and expensive to develop because of the difficulty in employing large machinery. A positive plot size adjustment of 5% is warranted for a 2,790 square foot interior lot.

Claimant's appraiser's positive 5% corner adjustment to account for the fact that sale 5 is an inside lot is appropriate.

As discussed above, the CITY's appraiser's 5% adjustment for the easements on the Bowery or Kensington Walk is not warranted.

The +25% adjustment for location, the -10% adjustment for zoning, the -30% adjustment for size, the +5% adjustment for plot size, and the +5% corner adjustment result in a net adjustment of -5%. When this is applied to the price per square foot of developable area of \$152.48, the result is an adjusted value for sale 5 of \$144.85 per square foot.

Sale 6

Claimant's appraiser included a sixth sale in his analysis that was not used by the CITY's appraiser. That sale of 1223 Surf Avenue is the furthest in time from the date of vesting, having occurred in July of 2010. Given that the appraisers both examined 5 of the same sales which they agree are comparable, that were closer in time, there is little need to include this sixth sale in the analysis.

Average Adjusted Value before Vesting

Averaging the adjusted values of sale 1 at \$109.50, sale 2 at \$102.80, sale 3 at \$132.33, sale 4 at \$130.33, and sale 5 at \$144.85, results in an average adjustment value of \$123.96 per square foot.

As the larger parcel was 128,652 square feet with an FAR of 2, it had 257,304 square feet of developable area. The Court finds that the value of the larger parcel before the taking was \$123.96 per square foot of developable area which totals \$31,895,403.

After Taking Value of the Remainder Parcel

Having determined the value before the taking of the larger parcel, the Court must now determine the value of the remainder parcel.

The CITY took 55,345 square feet of the larger parcel, leaving Claimant a remainder of 73,707 square feet.

Both appraisers used the same comparable sales for the before and after analysis, but applied the project zoning to the remainder parcel for the after analysis. Claimant's argument that valuing the remainder at a higher zoning than the larger parcel before taking unfairly compares apples to oranges, is misplaced.

The purpose of comparing the after value of the remainder property to the before value of the larger parcel is to determine if the parcel has suffered any severance or consequential damage caused by the taking. Also, the Court must determine whether there were any special benefits to the property accruing from the taking.

Since the Court is looking to determine the impact of the project on the remainder, the remainder must be valued based on the project zoning.

Pursuant to the project zoning, part of the remainder had an FAR of 4.5 and part had an FAR of 2.6. The total developable square footage available on the remainder parcel was 244,045 square feet.

As a preliminary matter, in valuing the remainder parcel, the adjustments for retained improvements and market conditions were unchanged.

On the other hand, neither appraiser made an adjustment for zoning in their analysis of the value of the remainder parcel.

There was no longer a need for a zoning adjustment because the remainder property is being valued under the same project zoning as the comparable sales. While part of the remainder has an FAR of 4.5 and part has an FAR of 2.6, these differences in the densities is accounted for by valuing the properties on a square foot of developable area basis. The CITY's appraisal states that because "the comparable sales were analyzed on a price per buildable area basis, no adjustments were considered for maximum FAR in the zoning adjustment category". Further under the project zoning, the subject property has the same permitted uses as the comparable sales so there is no need to make a zoning adjustment to account for uses permitted under the project zoning.

While neither appraiser made a zoning adjustment in their analysis of the remainder value, they differed on some of the other adjustments to each comparable sale.

Sale 1

Sale 1 is located at 1105, 1205, and 1207 Bowery by West 12th Street and had a maximum buildable area of 80,024 square feet. The CITY's appraiser made a positive 5% location adjustment, while the Claimant's appraiser made none. As the remainder has no boardwalk frontage, no location adjustment is warranted for sale 1 which is in the main amusement area. Sale 1, which fronts the Bowery, is next to Luna Park and down the block from the Wonder Wheel.

After the taking, the easement relating to the Bowery and Kensington Walk were extinguished so the remainder parcel is unencumbered. The CITY's appraiser made a positive 5% adjustment to sale 1 to account for an existing easement on it. The easement on sale 1 also covers the Bowery. As the area of the easement would still contribute towards the property's FAR, the 5% adjustment for the easement is not warranted.

Both appraisers kept the same size adjustment in their after analysis as they made in their before taking analysis. Given the size of sale 1, the Court will apply the CITY's appraiser's negative 15% size adjustment.

The appraisers made no further adjustments to sale 1.

Applying the -15% adjustment for size to the price per developable square foot of \$115.80 (after market conditions adjustment) results in an adjusted value for sale 1 of \$98.43 per square foot.

Sale 2

Sale 2 is located at 805-809 Surf Avenue between West 8th and West 12th Streets. It is an irregular midblock parcel that fronts Surf Avenue, with a rear lot line abutting the elevated subway.

The CITY's appraiser made a positive 5% adjustment for location, while the Claimant's appraiser made no adjustment for location. Even after the loss of the boardwalk frontage, the remainder parcel is in a superior location to sale 2. As discussed above, sale 2 is located on the north side of Surf Avenue just outside of its heavily-trafficked commercial corridor and it is also separated from the main amusement area. The CITY's appraiser's positive 5% location adjustment is appropriate.

Claimant's appraiser made a negative 15% adjustment to account for size, while the CITY's appraiser made a negative 20% adjustment for size. As discussed above, the CITY's appraiser's 20% adjustment is more appropriate.

Claimant's appraiser made a 10% corner adjustment while the CITY's appraiser did not make a corner adjustment. While the remainder property now fronts West 16th Street, there is no room for any vehicular traffic past Surf Avenue. The west boundary of the remainder parcel actually fronts a narrow sidewalk facing the blank wall of MCU park. There are no commercial or amusement uses open to the sidewalk. The nature of this sidewalk does not justify applying a corner adjustment for the remainder parcel.

Applying a +5 % adjustment for location and a -20% adjustment for size to the price per developable square foot of \$93.46 (after market conditions adjustment) results in an adjusted value for sale 2 of \$79.44 per square foot.

Sale 3

Sale 3, located at 1019-1039 Surf Avenue, is an irregular shaped lot abutting the elevated subway line and is on the same block as sale 2.

The CITY's appraiser made the same positive 5% adjustment for location as he made for sale 2. The Claimant's appraiser made no adjustment for location.

Like sale 2, it is located on the north side of Surf Avenue outside of the main amusement area. The CITY's appraiser's positive 5% adjustment to sale 3 is justified.

Claimant's appraiser made a 15% downward adjustment to account for size while the CITY's appraiser made a negative 25% adjustment. As sale 3 is significantly smaller than the subject premises, a negative 25% adjustment for size is appropriate.

Claimant's appraiser made a 10% corner adjustment while the CITY's appraiser did not make a corner adjustment. As discussed above, the nature of the sidewalk along the west boundary of the remainder parcel does not justify applying a corner adjustment for the remainder parcel.

Claimant's appraiser also made a positive 5% adjustment for the size of the plot. As discussed above, sale 3 has a 182-foot frontage along Surf Avenue, which is a wide street. Even though the lot is slightly below 10,000 square feet, its configuration and frontage do not support a positive adjustment for plot size.

Applying a +5 % adjustment for location and a -25% adjustment for size to the price per developable square foot of \$126.03 (after market conditions adjustment) results in an adjusted value for sale 3 of \$100.82 per square foot.

Sale 4

Sale 4 is located at 1218 Surf Avenue and consists of two adjacent parcels that run from Surf Avenue to the Bowery, between Stillwell Avenue and West 12th Street.

Neither appraiser made an adjustment for location.

Claimant's appraiser made a negative 15% adjustment to account for size. The CITY's appraiser made a negative 20% adjustment for the smaller size of sale 4. As discussed above, the CITY's 20% adjustment for size is more appropriate.

Claimant's appraiser made a 10% corner adjustment while the CITY's appraiser did not make a corner adjustment. As discussed above, the nature of the sidewalk along the west boundary of the remainder parcel does not justify applying a corner adjustment for the remainder parcel.

The CITY's appraiser made a positive 5% adjustment to sale 4 to account for an existing easement on it. After the taking, the easement relating to the Bowery and Kensington Walk on the remainder parcel were extinguished so the remainder parcel is unencumbered. The easement on sale 4 is also for the Bowery. As the area of the lot which the easement covers can still contribute towards the property's FAR, the 5% adjustment for the easement is not warranted.

Applying a -20% adjustment for size to the price per developable square foot of \$137.19 (after market conditions adjustment) results in an adjusted value for sale 4 of \$109.75 per square foot.

Sale 5

Sale 5 is located at 1214 Surf Avenue between Stillwell Avenue and West 12th Street, next door to Sale 4.

Neither appraiser made an adjustment for location in their analysis of the value of the remainder parcel.

Similar to their analyses of the value of the larger parcel before taking, the CITY's appraiser made a negative 30% adjustment for size, while the Claimant's appraiser made a negative 15% adjustment for size. As sale 5 has a buildable square footage of only 11,166 square feet while the remainder parcel has an allowable square footage of 244,065 square feet, the CITY's appraiser's adjustment of 30% for size is more reliable.

The Claimant's appraiser made a positive 5% adjustment to account for the small size of the plot. As discussed above, a positive plot size adjustment of 5% is warranted for a 2,790 square foot interior lot.

Claimant's appraiser made a positive 10% corner adjustment while the CITY's appraiser did not make a corner adjustment. As discussed above, the nature of the sidewalk along the west boundary of the remainder parcel does not justify applying a corner adjustment for the remainder parcel.

Applying an -30% adjustment for size and a +5% for small plot size to the price per developable square foot of \$152.48 (after market conditions adjustment) results in an adjusted value for sale 5 of \$114.36 per square foot.

Average Adjusted Value of Remainder after Vesting

Averaging the adjusted values of sale 1 at \$98.43, sale 2 at \$79.44, sale 3 at \$100.82, sale 4 at \$109.75, and sale 5 at \$114.36, results in an average adjusted value of \$100.56 per square foot.

The remainder parcel had 244,045 square feet of developable area. Thus, at \$100.56 per square foot of developable area, the value of the remainder parcel after vesting is \$24,541,165.

The difference between the value of the larger parcel before vesting of \$31,895,403, and the value of the remainder parcel after vesting of \$24,541,165, results in total difference between the before and after values of \$7,354,238.

The Court must now calculate the direct damages and indirect damages from the taking. As the subject property is vacant land, this is done by determining the value of the land taken. The CITY took 55,345 square feet of land. The land was properly valued by

both appraisers on the basis of the square feet of developable area that could be built on the land. At the pre-project zoning of an FAR of 2, the land taken had a developable area of 110,690 square feet. At a value before taking of \$123.96 per square foot of developable area, the value of the acquired property on the date of vesting was \$13,721,132.

As discussed above, the CITY's argument that it took only 71,339 of developable square feet improperly deducts the amount of developable area gained by the remainder parcel due to the rezoning from the value of the land taken by the CITY. This is in violation of the New York rule that special benefits to a remainder parcel cannot be used to offset the direct damages of the taking (*see Chiesa v. State*, 36 NY 2d 21[1974]; *Matter of City of New York [Consolidated Gas Co.]*, 190 NY 350 [1907]; *Lerner Pavlik Realty v. State*, 98 AD3d 567 [2d Dept 2012]; *Done Holding Co. v State*, 144 NY 2d 528, [2d Dept 1988]).

The land the CITY took had a developable area of 110,690 square feet, this is what Claimant lost. If the CITY had not taken the property, Claimant would have 110,690 more developable square feet in addition to that allowed on the remainder.

The fair market value of a property in the context of an eminent domain proceeding is the price for which a property would sell if there was a willing buyer, under no compunction to buy, and a willing seller under no compunction to sell (*see Keator v. State*, 23 NY2d 337 [1968]). Here, a buyer would not expect to pay less for the parcel acquired because part of property not being sold by the seller increased in value because of rezoning. Nor would a willing buyer agree to accept less than the value per square foot of developable area for the property being sold, because adjoining property they were not selling was rezoned to permit a higher density.

When the direct damages of \$13,721,132 are subtracted from the total difference between the before value of the larger parcel and the after value of the remainder parcel of \$7,354,238 the result is -\$6,366,894 in indirect damages. This negative result reflects the fact that the benefit to the remainder parcel from the additional FAR that the project zoning allowed, outweighed the severance damages to the remainder from the loss of the boardwalk frontage.

In accord with the New York rule, Claimant is entitled to the full direct damages in the sum of \$13,721,132 or \$13,721,000 rounded.

Settle judgement on notice.

Dated: Brooklyn New York
October 31, 2023

ENTER:



JSC

HON. WAYNE SAITTA
J.S.C.