

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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In the Matter of the Application of the CITY OF NEW YORK,
relative to acquiring title in fee simple and other interests in
certain real property where not heretofore acquired for

INDEX NO.
401660/01

DECISION

**THE HENRY STREET SETTLEMENT DAY CARE
CENTER**

Located at 710-712 East 9th Street, in the Borough of
Manhattan, City and State of New York.

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DeGrasse, J.:

Upon the OBJECTIONS TO TENTATIVE DECREE of the condemnor, City of New York, dated September 27, 2006 and upon the appearance at a hearing, on October 24, 2006, of Mr. Fred Kolikoff, Esq. for the said City of New York, and Mr. M. Allan Hyman, Esq. for the condemnee, Eastside Corporation, the court decides as follows:

Objection (1) on the grounds that the award to the claimant is excessive, Objection (2) on the grounds that the award to claimant is contrary to the weight of the credible evidence, and Objection (4) on the grounds that the Court erred in placing equal weight on the sales of both parties, are overruled inasmuch the determination of all of these issues are well within the court's discretion.

Objection (3) on the grounds that the court erred with respect to the number of square feet used to value the subject property is sustained. The court has inspected the record and finds that the highest value for gross building square footage contained therein is 32,404 square feet.

Therefore the court erred in calculating the award based on the stated figure of 34,404, a comput-

ational or typographical error.

Accordingly, the Tentative Decree, signed on September 19, 2006 and filed on September 22, 2006, is vacated, and the court's decision of September 24, 2006 is recalled, and the following is substituted in its place:

This is a proceeding under Article 7 of the Eminent Domain Procedure Law to determine the compensation to be awarded to the claimant/fee owner for property taken in condemnation.

The property is a four story and basement, brick constructed school building built in 1876 (Exhibit "C", p.2). It contains a gross building area of 32,404 square feet as per New York City tax records (Exhibit "11", "Summary of Salient Facts") with a net rentable area of 46,598 square feet if a finished roof top play area is included (*Id*). The structure is erected on a lot of approximately 10,000 square feet (Exhibits "C", *supra* and "11" *supra*) at 710-712 East 9th Street in New York County. The expert witnesses valued the property as of May 14, 2001, the date of title vesting in the City of New York (Exhibits "C", p.3 and "11", *supra*). Both appraisers agreed that the highest and best use of the property as improved was its current use as a school building (Exhibits "C" p.2 and "11", "Summary of Salient Fact").

The Claimant's appraiser, Matthew C. Mondanile, opined a value of \$13,000,000, or approximately \$400.00 per square foot of gross building area (32,404 sf) based on the sales comparison approach (Tr.68). Mondanile's comparables consisted of four sales, all of which were school buildings or day care centers in Manhattan. The locations of these sales were, respectively, 22 East 95th Street, 20 West End Avenue, 56 East 93rd Street and 152 Waverly Place. (Exhibit "11", p.34, Tr.68). Although the locations of these proffered comparable sales are concededly superior to that of the subject property, Mr. Mondanile has made reasonable adjustments for

such variance in his appraisal report (Exhibit "11", p. 35, Tr. 90-95).

Claimant's appraiser also opined a value pursuant to the income capitalization approach (Tr.95), which first required that he arrive at an opinion of market rent for the property and then multiply by a market rate of expected capital return (Exhibit "11" pp.39-48). Mr. Mondanile has set forth five proposed comparable rentals from which he has developed an average per square foot market rental of \$22.50, which he multiplies, not by the gross building are of 32,404, but by the gross rentable area of the subject property—which includes the play roof—of 46,598 sf. (*Id.*) This produces a base rental revenue of \$1,048,455, from which a stabilized one percent vacancy and collection loss is deducted (\$10,485) yielding an effective gross revenue of \$1,037,970 (*Id.*, p.45). Mr. Mondanile assumes a triple net lease for all comparables inasmuch as that is the most current lease for the subject property, and therefore, no expenses need to be deducted except management fees and capital reserves (*Id.*). Mondanile's deductible expenses total \$27, 219, netting an operating income of \$1,010,751, which he capitalizes at an overall capitalization rate of 7.50 percent. This is derived from the New York City Long Term Bond Yield of 5.05% plus a real estate risk premium of 2.50 percent. The resulting value conclusion by the income capitalization method is a rounded \$13,500,000.00.

Mr. Mondanile's rental comparables, on which his income capitalization method is ultimately grounded, are less than compelling in their reliability. The first of these, 605 East 9th Street, impressive as a comparable because of its nearby location, loses nearly all credibility in that no meeting of the minds nor lease agreement was ever reached regarding the seventeen dollar per square foot asking price asserted as a market indication by claimant (Tr. 144-148). Mr. Mondanile unabashedly maintains that its purpose as a comparable is to show "rental activity"(Tr. 148),

but himself admits that it is not a reliable source of market comparison (*Id.*).

As to claimant's rental comparable number 2, at 99 Suffolk Street in Manhattan, credibility as a comparable is severely compromised by the disproportionate size; i.e., a space that is one-twentieth the size of the subject property (Exhibit "11", p.40, Tr. 162). Moreover, this particular rental was subject to a gross lease rather than a net lease (Exhibit "11", p.40), and claimant's appraiser had no information as to actual operating expenses which the landlord would need to deduct to derive an actual net operating income (Tr. 164).

As to the remaining three rental comparables, all three are in Brooklyn, rather than Manhattan, and, even assuming that Mr. Mondanile adequately adjusted for location, in all three instances the tenant is the New York City Board of Education (Ex. "11", p.40). The court is not persuaded that an adequate market of school building rentals in Manhattan is demonstrated by five comparables of which one is an unconsummated transaction, one is a gross lease under which the net operating income cannot reliably be determined, and three involve a single public sector tenant without the same financial pressures---but possibly subject to greater public relations pressures---than private sector tenants would experience in the given situation. Even respecting the deductible expenses for the three triple net lease comparables, the management fee and capital reserve figures were pure projections, thinly founded on general appraiser experience and not on any actual experience of the comparable properties (Ex. "11", p.44, Tr.179).

The development of claimant appraiser's rental comparables is sufficiently flawed to give credence to the explanation given by the condemnor's appraiser, Mr. Albro, as to why he rejected use of the income capitalization method of valuation altogether; I . e., that a "substantially similar, verifiable and documented database" on leasehold information is not available (Tr.229).

Sales information, inasmuch as it is contained in deeds, a public record, *is* available, whereas leasehold information generally is “proprietary ”(*Id*, Tr.278, 398-400).

The claimant also relied on its negotiations with the City of New York for a renewal of its existing lease on the subject property just prior to the City’s taking of it on May 14, 2001, a lease which was never signed (Tr. 44-45). But the court found no relevance in the documentary evidence offered to support these unconsummated negotiations. Further the claimant offered business record evidence of interim rent paid by the City of New York for subject property, pursuant to a settlement of a summary dispossess proceeding brought by the claimant against the condemnor (Tr.57). The indicated rental under this agreement was \$22.50 per square foot, but, inasmuch as this figure was achieved in order to avoid eviction and further legal travail it can scarcely be evidence of meeting of the minds unencumbered by duress (Tr.55).

The court finds that the claimant’s comparable sales method is the method entitled to credence in determining the market value in this proceeding. Comparable sales was the only method offered by the condemnor’s appraiser, Mr Albro , who offered four comparables, all of which were relatively close in location to the subject property; I. e., 299 East 29th Street, 113 Chrystie Street, 149 Essex Street, and 539 East 6th Street.(Ex.“C”, p. 78). Based on the sales information obtained Mr. Albro derived an adjusted sales price per square foot of \$180.00, which he multiplied by his figure for gross building area of 30,352 indicating a value conclusion of \$5,463,360., rounded to \$5,500,000.

The court will exclude the adjusted square foot values for Mr. Albro’s comparables 3 and 4 (149 Essex Street and 539 East 6th Street) inasmuch as these properties were never used for school or public assembly functions, and, therefore, can have little value as comparables. The

court will total the adjusted square foot values of Mr. Albro's comparables 1 and 2 with the adjusted square foot values of all four of claimant's comparable sales and average them.

229 East 29 th Street	\$178.83 adjusted per square foot
113 Chrystie Street	181.14
22 East 95 th Street	326.99
20 West End Ave.	444.94
56 East 93d Street	413.67
152 Waverly Pl.	350.14

The average adjusted square foot value amounts to a rounded \$316.00 per square foot. When this is multiplied by claimant's gross building area of 32,404 square feet, the court finds that the value of the subject property is \$ 10,239,664.00, and awards the claimant a rounded \$10,239,700.00 together with such interest and expenses as are provided by law.

Settle final decree.

DEC 01 2008

Dated: _____



J. S. C.

HON. LELAND DeGRASSE