

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

**THE HENRY STREET SETTLEMENT
DAYCARE CENTER**

Index No. 401660/01

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

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DeGrasse, J.:

Fee claimant, Eastside Corp., moves for an order pursuant to EDPL 701 granting an additional allowance for actual and necessary costs it has incurred in this proceeding. The statute permits such an allowance where the condemnation award is substantially in excess of the amount of the condemnor's proof and the court deems the additional allowance necessary to achieve just and adequate compensation. Condemnor, the City of New York, concedes that this court's revised award of \$10, 239, 700 is substantially in excess of the amount of its proof. Eastside's request is for the following costs:

attorneys' fees	\$725, 790. 80
appraisal	44, 469. 21
developmental consulting fee	4, 000. 00
trial transcript	3, 564. 30
disbursements	3, 930. 66

Total - \$781, 754. 97

Eastside calculates the requested attorneys' fees at "10% of Gross Recovery plus interest up to \$10, 000, 000 and 15% over \$10, 000, 000." Accordingly, the requested legal fee amounts to

\$485, 955 on the principal recovery without interest and \$239, 835. 80 on the interest portion of the condemnation award. Citing *Matter of the City of New York (Ishlington Pond Park)* (1 Misc 3d 911 [A] [2003]), the City asserts that the calculation of attorneys' fees should not be based in any way on the interest portion of the condemnation award. On the other hand, Eastside relies upon *Carbone v State of New York* (13 Misc 3d 1246 [A] (2006) in which the court approved a fee based upon a percentage of the difference between the condemnor's advance payment and the condemnation award with accrued interest. There is no appellate authority on the issue of whether interest can be considered in calculating the amount of attorneys' fees allowable under EDPL 701. Cases which predate the statute's enactment provide guidance. *New York State Urban Development Corporation v Goldfarb* (54 AD2d 1099 [1976]) involves an application for an additional allowance under Condemnation Law § 16 (2), the precursor of EDPL 701. The Court observed that "[t]he purpose of the allowance is to make the owner whole, that is, to pay his necessary and reasonable legal expenses in obtaining fair compensation for his property so that his award will not be reduced thereby." (*id.*) Nevertheless, in keeping with that purpose, the Court found that it was error to compute an additional allowance "upon the interest of the award as well as upon the award itself." The *Goldfarb* Court cited *Westchester County v Baruch* (247 NY 398 [1928]), another Condemnation Law case, in which the Court of Appeals held that the statutory allowance was "to be figured upon the award and not the award plus the interest" (*id.* at 401). Therefore, in keeping with these precedents, Eastside's additional allowance for attorneys' fees should not be based to any extent on the interest portion of the award.

During the trial, Eastside's appraiser valued the subject premises at \$13, 500, 000 using the income capitalization method and at \$13, 000, 000 using the sales comparison method. In

rendering its decision, this court rejected the income capitalization method and found the sales comparison method to be more reliable. The City contends that Eastside should be allowed only one half of the \$485,955 fee on the condemnation award because of the court's rejection of the income capitalization approach. Such a reduction is unwarranted inasmuch as the rejected theory did not significantly affect the amount of time necessarily expended or skill exercised by counsel. Moreover, this is not a case in which a significant portion of Eastside's efforts were expended to develop evaluation theories to support a claim substantially in excess of what the court awarded (*compare Application of the City of New York*, 254 AD2d 210 [1998]). The court rejects the City's argument that the fee charged by Eastside's appraiser is excessive.

For the foregoing reasons, the motion is granted to the extent that the court awards Eastside an additional allowance as follows:

attorneys' fees	\$485,955.00
appraisal	44,469.21
developmental consulting fee	4,000.00
trial transcript	3,564.30
disbursements	3,930.66

Total - \$541,919.17

Settle order.

Dated: July 13, 2007

J. S. C.