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EMINENT DOMAIN - NEW YORK

Matter of New Creek Bluebelt, Phase 3

Supreme Court, Appellate Division, Second Department, New York - January 9, 2019 - N.Y.S.3d - 168 A.D.3d 745 - 2019 WL 138632 - 2019 N.Y. Slip Op. 00128

After vacant, unimproved property owned by condemnee, the majority of which was designated as wetlands after condemnee acquired title, was acquired by condemnor by eminent domain as part of its stormwater management project, condemnee commenced condemnation proceeding, seeking compensation for the taking.

Following nonjury trial, the Supreme Court, Richmond County, awarded condemnee \$3.5 million as just compensation for the taking, based on finding that condemnee was entitled to increment above the regulated value of the property on the day of the taking and that 75% formula for calculating increment was appropriate. Condemnor appealed.

The Supreme Court, Appellate Division, held that:

- Condemnee was entitled to increment above value of property under reasonable probability—incremental increase rule, but
- Increment formula provided by condemnor's appraiser applied when determining appropriate increment above regulated value of property.

After property was acquired by condemnor by eminent domain as part of its stormwater management project, condemnee was entitled to increment above the value of its property, the majority of which was designated as wetlands after condemnee acquired title, under the reasonable probability—incremental increase rule, since condemnee established that there was a reasonable probability that the imposition of wetlands regulations on the property would be found to be constitute a taking; parties agreed that the imposition of the regulations diminished the value of the property, which was zoned for commercial development, by approximately 95% and that there was virtually no chance that Department of Environmental Conservation would issue a permit allowing property to be developed.

Increment formula provided by condemnor's appraiser, rather than increment evaluation provided by condemnee's appraiser, applied when determining what increment above the regulated value of vacant, unimproved property taken in condemnation was required to be added to the regulated value of the property based on finding that there was a reasonable probability that the imposition of wetlands regulation on the majority of condemnee's property, which was zoned for commercial development, would be found to constitute an unconstitutional taking; formula provided by condemnor's appraiser was based upon market data and provided a reasonable explanation of the conclusions reached.