

EMINENT DOMAIN

State of New York

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Recent Developments:

As a result of *Kelo v. City of New London*, the New York State Bar Association created a special committee to study the substantive and procedural law of the State of New York and make recommendations. The Committee has recommended that the legislature create a commission to study New York's eminent domain law.

Who Is Eligible To Condemn?

The State of New York and all government subdivisions such as Cities, Towns and Villages. The State's power is inherent. Government subdivisions have their authority set forth in specific State law such as the Municipal Law, the Town Law and Village Law.

Utilities, Industrial Development Agencies, (I.D.A.S,) have the power to condemn in their jurisdictional borders.

A frequent condemnor is the New York State Urban Development Corporation, a New York State Public Benefit Corporation authorized by statute to exercise the power of eminent domain. Often, a subdivision is further created for a specific project within U.D.C.

What Can Be Condemned?

Any, interest in property can be condemned in New York State, including real property, leaseholds, trade fixtures, personal property, leases and even specific clauses in a lease, easements and waterways. See *Kaufman's Carousel v. City of Syracuse Industrial Development Agency*, 301 AD2d 292, 750 NYS 2d 212. See

Sec. 103(F) of the Eminent Domain Procedure Law (EDPL). A historic carousel can be condemned. See *Nunley v. County of Nassau*, 266 AD2d 292, 698 NYS2d 505 (2nd Dept 1999). Also see *EDPL Sec. 708*. Going concerns public property can be condemned. Property condemned for urban renewal can be condemned for a school public property of a higher ranked government body cannot be condemned. No compensation need be paid for municipal property condemned by the State unless it is used for another purpose. *General Municipal Law Sec. 3*; *City of New York v. State of New York*, 49AD2d 659.

The Condemnation Proceedings

How Initiated:

There are two methods to take property by exercising the power of eminent domain. The first is by filing an appropriation map. This is the procedure followed by the State of New York. Upon the filing of an appropriation map with the County Clerk, the property set forth in the map vests in the State of New York. See *Highway Law, Sec. 30 and EDPL Sec. 402 (A)*.

Most condemnations are by commencement of a special proceeding under the eminent domain procedure law by filing a petition to condemn. *EDPL Sec. 402 (B)*.

The petition to condemn is filed in the Supreme Court (First Level Trial Court) where the property is located. At the same time, a Notice of Pendency (*lis pendens*) is filed against the property with the County Clerk.

After a petition comes on before a Supreme Court Justice on notice to all those who have an interest in the property (condemnees as defined by *EDPL Sec. 103, Subd. C*) the court will normally grant the petition. The petition seeks an Order allowing the filing of an acquisition map. Upon entry of the Order, the map will be filed. It is the filing of the map that vests title in the condemnor.

Pre-Judicial filing – is there a compensation commission or other inferior tribunal to the court? There is no inferior tribunal, commission or arbitration procedure in New York State.

If the State of New York or State subdivision, appropriated property, the claim is tried in the New York State Court of Claims by a judge. There is no jury. If the property was condemned, it will be tried by a Supreme Court Justice, again without a jury. There are no jury trials in New York State for condemnation cases.

Any requirements of negotiation prior to filing?

No. There is supposed to be a pre-vesting offer in writing but it is not jurisdictional.

Acquisition by agreement rather than formal negotiation. Rarely are there any condemnation proceedings which are by agreement. There can be a friendly condemnation to resolve outstanding title issues for condemnation would remove all title objections upon vesting.

Initiating condemnation only by the condemnor initiated by serving a Notice of Petition or by the State filing an appropriation map EDPL Sec. 402.

Compensation Commission does not exist in New York.

Just compensation is determined by a non-jury trial before a Supreme Court Justice or if the property was taken by the State of New York by a Court of Claims Judge which is again non-jury.

Discovery:

Discovery is very limited in New York. Pre-vesting discovery is set forth in EDPL 302 which provides that prior to acquisition; the condemnor may request financial records, leases, expenses, etc.

The condemnor may also enter the property for purposes of making surveys, test pits and borings for environmental inspection and demolition study. EDPL § 404.

Discovery is disfavored in a condemnation case because it runs contrary, indeed is the antithesis to the legislative purpose of the EDPL which requires the establishment of rules to reduce litigation and expedite payments to property owners. EDPL §101.

The stated policy of the EDPL set forth in §301 confirm the necessity of the condemnor to make every reasonable and expeditious effort to justly compensate persons for such real property by negotiation and agreement. The condemnor is also required to file a Note of Issue after the last date to file a claim, EDPL §506 or, more practically, after the last appraisal is exchanged.

There is another reason why discovery is unnecessary in a condemnation and that is “The Appraisal Rule” which will be discussed later.

Pre-trial disclosure was originally considered by the New York State Commission on Eminent Domain. In an early draft of the proposed EDPL, the Commission envisioned full pre-trial discovery as set forth in CPLR Article 31. (Proposed § 610). Examinations before trial were also provided for. (Proposed §610) However, after much deliberation, pre-trial discovery was dropped in all later reports by the Commission (see 1972, 1972 and 1974 Reports of the State Commission on Eminent Domain). The final version of the EDPL adopted by the legislature as Chapter 839 of the Laws of 1977 does not provide for pre-trial discovery.

A condemnation proceeding, like a tax certiorari proceeding, is a special proceeding. Under CPLR 408, leave of the court is required for disclosure in all special proceedings. The Advisory Committee notes to CPLR 408 indicate that the requirement of an Order for Disclosure is designed to preserve the summary nature of a special proceeding. Nevertheless, a court may allow discovery on a showing of special circumstances.

Appeal:

New York State is divided into four appellate departments based on a geographically division. An appeal from an award of a Supreme Justice or Court of Claims Judge to the appropriate Appellate Division may be taken of right. Although the appellate court may make Findings of Fact based on the record, it is rarely done. The earlier determination of “just compensation” will be directly reviewed upon appeal. An Appellate Court normally consists of five judges, no jury. Discovery is not available on appeal and the parties may not refer to anything that is not in the record of the trial court on appeal.

Further appeal to New York’s highest court, the Court of Appeals is possible. An appeal to the Court of Appeals may be taken if the appeal involves a constitutional issue. Otherwise, further appeal is by permission which is rarely given.

Procedure to Challenge Condemnation

In New York there is only one method to challenge a Findings and Determination to condemn (EDPL Sec.204) which is made by a condemning authority following a public hearing held pursuant to Article 2 of the EDPL.

A petition pursuant to EDPL Sec. 207 must be filed directly in the Appellate Division within 30 days.

There are only four grounds for challenge.

1. The proceeding was in conformity with the Federal and State Constitutions;
2. The proposed acquisition is within the condemnor's statutory jurisdiction or authority;
3. The condemnor's determination and findings were made in accordance with procedures set forth in article 2 and with article 8 of the environmental conservation law, and,
4. A public use, benefit or purpose will be served by the proposed acquisition.

The scope of review is extremely narrow. It is not a de novo hearing. Generally, the Appellate Division reviewing the determination will hold that the decisions made by the condemnor are legislative in nature and will not review the decision to condemn if it was rationally related to conceivable public purpose. *West 41st Street Realty, LLC v. New York State Urban Development Corp.*, 298 AD2d 1, 744 NYS2d 121 (1st Dept 2002).

Generally, in New York it is extremely difficult to stop a condemnation proceeding. Public purpose has been defined to include purely economic benefit. A private landowner's benefit will also not preclude a condemnation where there is some incidental public benefit. *Waldo's, Inc. v. Village of Johnson City*, 74 NY2d 718, 544 NYS2d 809, 543 NE2d 74 (1989).

Inverse Condemnation

Who files it and where a property owner would commence an inverse condemnation action in Supreme Court for the County in which the property is located.

A finding of de facto appropriation or inverse condemnation is based on showing that the government has intruded onto the property from the owner. *O'Brien v. City of Syracuse*, 54 NY2d 353, 429 NE2d 1158 (1981). An example of an inverse condemnation would be the interference with a landowner's riparian rights to navigable water. *627 Smith St., Corp. v. Bureau of Waste Disposal*, 289 AD2d 472, 735 NYS2d 555(2nd Dept 2001).

In New York, for the most part, when a regulation or statute has been found to deprive the owner of its use and thereby amounts to confiscation without just compensation, the tendency has been not to declare a taking and order compensation but to invalidate the statute as unconstitutional. See *Fred F. French Investing Co. v. City of New York*, 39 NY2d 587, 350 NE2d 381 (1976).

Any physical occupancy will be enough to constitute a taking. *Loretto v. Teleprompter Manhattan CATV*, 458 U.S. 419, 102 S. Ct. 3164 (1982).

What Other Forms of Relief May Be Used?

If the property is later condemned and government is guilty of value depressing acts, the date of acquisition will be the earlier date with interest from that date. See *City of Buffalo v. J.W. Clement Company*, 28 NY2d 241. This would allow a claimant to introduce evidence of value prior to the onslaught of the affirmative value depressing acts. *City of Buffalo v. George Irish Paper Co.*, 31 AD 2d 470.

Just Compensation/Valuation Issues

At What Point does the Condemnor Need to Disclose its Estimate of Just Compensation?

New York's Eminent Domain Procedure Law provides that the condemnor shall establish an amount it believes to represent just compensation and make a written pre-vesting offer to acquire the property at no less than 100% of its highest approved appraisal EDPL Sec.303.

Must Condemnor Provide Appraisals, and When?

New York has an appraisal rule which requires the exchange of appraisal reports. After exchange, each side may file a rebuttal report within 60 days after receipt of the document sought to be rebutted. The appraisal reports are required to contain a statement of the method of appraisal relied on and the conclusions as to value reached by the expert together with the facts, figures and calculations by which the conclusions were reached. The appraisers are also required to provide specific information regarding their comparable sales, leases and photographs of the property under review. Upon the trial, expert witnesses are limited in their proof of appraised value to details set forth in their reports. Under the Rules, the Court has the ability to relieve any party of a default. It should be noted that the Rule only applies to expert witnesses who are offering opinions. No report need be filed by a fact witness. In fact, the Third Department held in *Faulkner v. State of New York*, 247 AD2d 798 (3rd Dept 1998) that an expert may be permitted to testify without first submitting an expert report if the testimony is factual and does not constitute opinion evidence. In *Faulker*, the issue concerned the testimony of a surveyor who testified as to square footage of the area taken.

The Appraisal Rule allows the parties to prepare for trial with knowledge of each other's valuations and the foundations and justifications thereof. *Parisi v. State*, 62 Misc 2d 378, 382 (Ct. Cls., 1979). As the Fourth Department stated in *Novickis v. State of New York*, 44 AD2d 508, 512 (4th Dept 1974) "[s]imply expressed, the Rule attempts to require full

disclosure, to take the game aspect out of the case, to prevent surprises, to permit the court to determine just compensation based solely upon the facts unhindered by gamesmanship.” In *Matter of White Plains Properties Corp. v. Tax Assessor of City of White Plains*, 58AD2d 871 (2nd Dept 1977), aff’d 44 NY2d 971 (1978), the Second Department affirmed the trial court’s preclusion of expert testimony when no appraisal report was exchanged. However, this does not mean that a trial court will automatically preclude expert testimony or strike a defective appraisal if it lacks the level of detail indicated by 22 NYCRR 202.59(g) (2). In *Guilo v. Semon*, 265 AD2d 656 (3rd Dept 1999), the Court held that although the petitioner’s appraisal lacked the requisite facts, figures and calculations upon which the appraiser’s opinion was based, there was sufficient evidence to establish a prima facie case that the assessment was erroneous. The Court searched the appraisal and found enough facts, figures and calculations regarding the comparable sales despite the deficiency which would allow respondent to cross-examine.

Can Condemnor Offer Less Than Appraisal of Just Compensation?

No, a condemnor must offer 100% of its highest approved appraisal. But, condemnors may change appraisers or correct errors in the appraisal. EDPL 303.

When Does Title Pass?

Title passes in a State appropriation when an appropriation map is filed in the County Clerk’s Office.

In a condemnation proceeding, title passes when the acquisition map is filed in the County Clerk’s Office pursuant to an order upon the granting of a petition to condemn.

Valuation Issues

Can increase in value resulting from the project be considered in compensation?

Generally, New York adopts the holding of *United States v. Miller*, 317 U.S. 369 (1943). The United States Supreme Court noted if a distinct tract is condemned, in whole or in part, other lands in the neighborhood may increase in market value due to the proximity of the public improvement erected on the land taken. Should the Government, at a later date, determine to take these other lands; it must pay their market value as enhanced by this factor of proximity. If, however, the public project from the beginning included the taking of certain tracts but only one of them is taken in the first instance, the owner of the other tracts should not be

allowed an increased value for his lands which are ultimately to be taken any more than the owner of the tract first condemned is entitled to be allowed an increased market value because adjacent lands not immediately taken increased in value due to the projected improvement. The question then is whether the respondents' lands were probably within the scope of the project from the time the Government was committed to it. If they were not, but merely adjacent lands, the subsequent enlargement of the project to include them ought not to deprive the respondents of the value added in the meantime by proximity of the improvement. If, on the other hand, they were, the Government ought not to pay any increase in value arising from the known fact that the lands probably would be condemned. The owners ought not to gain by speculating on probable increase in value due to the Government's activities. Id at 376-277.

The Fifth Circuit noted, in *United States v. 320 Acres of Land*, 604 F2d 762, that compensation is required and just where the increment in value attributable to the government project is instead an element of fair market value inherent in the property's proximity to the government project. The court also stated: Whether or not that increment in value is attributable more to the Government's special demand for the property or more to a private market demand for benefits conferred upon the property by its proximity to the Government project is largely a function of reasonable expectations. Id at 792.

In *815 Associates, Inc. v. State of New York*, 271 AD2d 398 (2nd Dept 2000) a trial court's consideration of an earlier findings and determination lead to a reversal. The Second Department noted, "in the absence of any evidence to support the application of the 'scope of the project' rule or the State's theory. The Claimant is entitled to compensation for the enhancement in value which resulted from the 1964 appropriation of the *** property. We, therefore, adopt the valuation of the Claimant's expert for the purpose of determining just compensation.

May Zoning be used to Devalue in Anticipation of Acquisition?

No, generally project zoning cannot be used in the condemnation property cannot be down zoned in anticipation of a condemnation to devalue the property.

Even though project up zoning is not to be considered, a Claimant is entitled to prove a reasonable probability of rezoning the property based on the normal criteria to be considered on such a contention. See *Matter of Town of Islip (Mascioli)* 49 NY2d 354.

Is Property Owner Penalized by Decrease in Value Due to Lack of Maintenance in Anticipation of Condemnation?

This is a factual issue. If a proposed condemnation has created a cloud of condemnation over the property, generally a court will disregard the failure to do ordinary maintenance.

Is Compensation Calculated as One Step or Two? (Part taken and loss of value in remainder)?

Yes, as a general proposition, the measure of damages in partial taking cases is the difference between the value of the whole before the taking and the taking. See *Diocese of Buffalo v. State of New York*, 24 NY2d 320.

What is the Date of Valuation?

The date of valuation is the date that title vests which is when an acquisition map is filed with the County Clerk's Office. Unless there has been an earlier de facto taking.

What Specific Elements of Loss of Value May/Not be Considered?

- Medians

The loss of access to a street will create substantial damage. The property will be deemed landlocked. *Ereger v. New York Cent. & Hudson R.R.* 130 NY 108

- Circuitous Route

Mere circuitry normally will not give rise to damages unless it changes the highest and best use of the property, example a service station. See *Cousins v. State of New York*, 42 AD2d 1016. On a factual basis, proximity damages may be awarded for placing a highway next to a remainder which can be said to disturb the peace and tranquility of the remainder. There must be, at least, a partial taking. See *Dennison v. State of New York*, 22 NY2d 409, 239 NE2d 708 (1968).

Consequential damages may also be awarded because of the use that the direct taking is being put to, for example, a partial taking for a high voltage line. See *Crisuola v. Power Authority of the State of New York*, 81 NY2d 649, 621 NE2d 1195 (1993).

Temporary Loss of Access

Temporary loss of access generally provides damages for only the rental value of the temporary easement unless Claimant can establish permanent damage resulting from the loss of access.

What if a Large, Multi-Use Tract?

May it be Valued as Several Parcels or Must it be Valued as a Unit?

The measure of damages 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 condemnee is so using the property all the time. See *Matter of City of New York (Franklin Record Ctr.)*, 59 NY2d 57. If the property as broken down in parcels results in greater damages, it will be allowed.

May Tax Valuation be used as Evidence?

Generally, tax valuation is irrelevant in a condemnation proceeding as are any application filed by an owner to reduce taxes. In New York, property must be valued on its highest and best use in condemnation. But, for tax purposes, land may only be assessed at actual use. See *Matter of City of New York (Lincoln Square Slum Clearance Project)* 15 AD2d 153 (1st Dept. 1963).

Who May Testify as to Value?

- Owner?

An owner may always testify to value. It is for the court to weight the credibility of the testimony.

- Experts other than appraiser?

Any expert qualified on a relevant issue may testify provided that there is first provided an expert report setting forth the sum and circumstances of the testimony and the basis for same. In condemnation cases, it is not unusual to have architects, zoning experts, attorneys, land use consultants, builders, feasibility, experts, brokers, trade fixture appraisers, professional engineers, soil engineers, real estate marketing specialists, etc.

Access Issues – To Streets

- Nature of access right

A property owner with access to a street cannot be deprived of access. Changing a major highway will not create damages provided the property owner still has access unless there has been a change of the highest and best use of the property as set forth above.

How Decided?

This is a factual issue to be determined by the trial court.

Appraisal Rules/Limitations

- Use of income approach

If the subject property is income-producing, it should be valued by the income capitalization approach. Simply put, this approach finds the present value of real property based on its future income. In condemnation, the property is valued as if it is free and clear of all liens, encumbrances and leases. *41 Kew Gardens Road Associates v. Tyburski*, 70 N.Y.2d 325; *Matter of City of New York (Franklin Record Center, Inc.)*, 59 N.Y. 2d 57.

The appraiser makes an extensive market study and estimates the economic rent of the property. Actual rents must be considered. *Matter of City of New York (Maxwell)*, 15 A.D. 2d 153, aff'd, 12 N.Y. 2d 1086; *Marjal Realty Corp. v. State of New York*, 23 A.D.2d 941. Actual rents provide the best indicator of fair market rental, especially if there is no indication that the actual rental is too high or too low. *Matter of City of Albany (A.D. Johnson)*, 136 A.D.2d 818.

The appraiser then estimates the expenses of the property. The net income is then applied to a capitalization rate which, itself, is determined by a study of various economic factors including the returns on other investments, taking into account mortgage, equity components and risk. The rate of capitalization should be a reflection of the market, i.e., what an investor would require from an investment in a property of similar age, kind and condition.

The resulting "cap" rate is then divided into the net income to indicate a value for the property, while care must be taken not to capitalize a speculative or hypothetical income stream from a non-existent structure. *Matter of City of New York (Shore Front High School- Rudnick)*, 25 N.Y. 2d 146. However, a property with an existing lease and in development may certainly be valued on a capitalization approach, for that is exactly what a buyer would do when purchasing the property. *Sparkhill Realty Corp. v. State of New York*, 254 App. Div. 78, aff'd 279 N.Y. 656.

- Market data approach

The market data, or comparable sale approach is used when the subject property is similar to other properties which have been sold, or perhaps are currently for sale in the subject property neighborhood. This method works well for residential properties and is always used for vacant land. The appraiser will analyze the sales by making a grid to show the expert's adjustments for location, size, time, zoning, marketing factors, view and other factors that a buyer would consider, all with the idea that the comparable sales, as adjusted, will indicate a value of the subject.

In reviewing an appraiser's adjustment factors, one must be alert for any large adjustment since the greater the adjustment, the less reliable the sale. Sometimes a condemned parcel, often denominated as a "damage parcel" (an archaic description that survives), may have been recently purchased. The Court of Appeals has held that a recent sale, if not explained away as abnormal in any fashion, is evidence of the "highest rank" to determine the true value of the property at that time. *Plaza Hotel Assoc. v. Wellington Assoc.*, 37 N.Y. 2d 277. However, while the best evidence of value may be a recent sale of the subject property between a seller, under no compulsion to buy, (*Matter of Allied Corp. v. Town of Camillus*, 80 N.Y. 2d 351, 356) a recent sale of such property is not relevant to the question of value if it is established that such a sale was "abnormal" and, therefore, not reflective of market value. *Gold-Mark 35 Associates v. State of New York*, 210 A.D.2d 377.

- Unique or no market properties

The cost approach is rarely used in condemnation cases, as real property must constitute a "specialty" for the cost approach to be employed. A "specialty" has been defined as a building designed for a unique purpose. *People ex rel. New York Stock Exchange Building v. Cantor*, 248 N.Y. 533. For a building to be a "specialty," it must be truly unique so that only the owner would have use for it and the sole way to replace it would be by its reproduction.

The cost approach requires the appraiser to find a value of the land and then add the estimated value of the improvements. The value of the improvements is found by finding the current cost of constructing a reproduction of the valuation subject and then subtracting depreciation. All incremental costs are also considered and added to value. *Matter of City of New York (Salvation Army)*, 43 N.Y.2d 512. While the cost approach is rarely used in a condemnation real property case, it is always used in a trade fixture case. *Matter of City of New York (Fulton Park U.R. - Kerievsky)*, 57 A.D. 2d 954, aff'd. 44 N.Y. 2d 974.

- Property in the process of development

If on the date of condemnation the property was in development, the owner is entitled to a far greater return than mere acquisition costs. Since an owner is entitled in condemnation to be fully indemnified, that owner should be entitled to recover not only the fair market value of the land, but all costs expended and an entrepreneurial return on the investment.

If the use is specific – for example, the construction and operating of a new funeral parlor or self-storage facility which was well advanced when condemned – that claimant is entitled to receive exactly what the owner would have received in a fair market sale. In other words, the property increased in value substantially because of the owner’s money, knowledge and hard work. Every step that was taken to advance the project would provide an incremental and, perhaps, geometrical increase in value. This is because “a sagacious and experienced prospective purchaser on the day of the taking would undoubtedly have paid a substantial premium for the property since it could have been developed so much sooner. See *Levin v. State of New York*, 13 N.Y. 2d 87.

- Trade fixtures

“New York takes a broad view in evaluating what improvements are to be regarded as [separately compensable] fixtures” (*Rose v. State of New York*, 24 NY2d 80, 86 [1969]). Machinery is “deemed a fixture” where it is installed in such manner that its removal will result in material injury to it or the realty, or where the building in which it is placed was specially designed to house it, or where there is other evidence that its installation was of a permanent nature” (*Matter of City of New York [Whitlock Ave.]*, 278 NY 276, 281-282 [1938]). Additionally, the term fixtures includes “those improvements which are used for business purposes and would lose substantial value if removed” (see *id.* at 86).

However, excluded from the category are items that have become an integral part of the real property (see *Marraro v. State of New York*, 12 NY2d 285, 291 [1963]). Such installations as electric wiring and plumbing connections are ordinarily an integral part of the real estate, and therefore not separately compensable, except to the extent installed solely to service fixtures that were specially installed for the occupant’s particular purpose (see *id.* at 296-297, citing *Whitlock Ave.*, *supra*).

As the Court of Appeals observed in *Rose*, this formulation of the rules of just compensation for trade fixtures “signifies a recognition of the obvious realities confronting the business community,” since “[m]odern business, in order to produce goods and services, invests heavily in cumbersome and

complicated machinery which, because of the manner of its installation, can only be removed with difficulty” (24 NY2d at 86).

The courts have repeatedly emphasized that whether a claimed fixture is movable, or removable, is not the applicable criterion (see *Matter of City of New York [Merrimaker Corp.]*, 51 AD2d 147, 149 [1976], *lv denied* 39 NY2d 710 [1976]). “[A]nnexation, adaptability, and intention of permanence convert machinery into a fixture, regardless of removability” (*id.*, quoting *Matter of City of New York [Lincoln Sq. Slum Clearance Project]*, 24 Misc 2d 190, 202 [1959], *mod. on other grounds* 15 AD 2d 153 [1961], *affd* 12 NY2d 1086 [1963]). As Judge Friendly explained in *United States v Certain Property, etc.* (344 (F2d 142 [2d Cir 1965])), even asphalt tiles cemented to the floor by the tenant would only be viewed as having been integrated in the real property, so as to preclude separate entitlement to compensation for their value, “*if the asphalt became the only floor or integral with it,*” but not if the asphalt tiles were “removable without damage to the basic structure” (at 49 [emphasis added]).

Trade fixtures are valued on their sound value which is calculated by subtracting from the reproduction value a depreciating factor. In addition, increments are added for overhead (contractor expense), profit, permits, architect, etc. fees, sales tax, finance charges and rent paid during construction.

Treatment of Ownership Interests

- Tenant and owner divide “fee simple value of the property”

Most leases in New York have a condemnation clause which bars a tenant from making a leasehold claim. If a leasehold claim is present, the entire fee undivided is first valued on its fair market value based on the highest and best use. Then, the leasehold interest is valued based on its present value as of the title vesting date. The leasehold interest is then deducted from the value of the fee. The parties may have set another formula for valuation in their lease which must be reviewed.

- Total compensation cannot exceed fee simple value of the property

The value of the fee will always be the amount on the date of acquisition that represents the undivided fair market value. It will never increase. On the other hand, in New York, a Commercial tenant will be entitled to recover for the value of their trade fixtures which is awarded to them separately and does not come out of the landlord’s award. Trade fixture awards can be very substantial. It should

also be noted that an owner may also file a separate claim for trade fixtures if the premises are being used for business. The law of trade fixtures is set forth above.

- Reversionary and other interests

A person with a reversionary interest would meet the definition of a condemnee under New York law pursuant to EDPL 103 (c). Any holder of any right, title, interest, lien, charge or encumbrance in real property subject to an acquisition or proposed acquisition is a condemnee. The value of such interest will be determined as of title vesting and “carved out” of the fee award.

What if the Condemnation is Abandoned?

What Constitutes Abandonment?

Abandonment is defined by New York’s Eminent Domain Procedure Law as a discontinuance of the intended purposes for which the property was acquired.

The statute further provides “(A) If, within ten years after the acquisition of a fee owner condemnee’s property in fee, the condemnor shall abandon the project for which the property was acquired, and the property has not been materially improved, the condemnor shall not dispose of the property or any portion thereof for private use without first offering such former fee owner a right of first refusal to purchase the property at the amount of the fair market value of such property at the time of such offer. In the event that acquisition was a partial taking in fee, such offer need not be made unless the former fee owner condemnee as title to the contiguous remainder parcel at the time the condemnor determines to dispose of the property. A notice of the offer shall be served on the condemnee by registered or certified mail return receipt requested. The condemnee shall have sixty days after service of such notice to serve a written acceptance upon the condemnor.” (EDPL 406).

After ten years, the right of first refusal expires. But New York law apparently allows the condemnation for one purpose and then the use of the property for another use. See *Vitucci v. New York City School Construction Authority*, 289 AD2d 479 (2nd Dept., 2001) allowing the condemnation of property for a school then be used as part of an urban renewal project and transfer to another private owner for use.

When Can Condemnation Be Filed Again?

If a project never moves forward and is not condemned, there is no restriction on a subsequent condemnation. Once a Determination and

Findings are adopted pursuant to EDPL 204, the condemnation is to take place within three years after the last challenge or within ten years if the project is to be staged. EDPL 401. If the condemnor does not file a petition to condemn within the allowed period, it must hold new public hearing and update its environmental reports.

Attorney And Witness Fees And Costs

If attorneys fees and/or costs are paid by Condemnor.

- What circumstances
- What amount
- Who determines

New York attorney fee reimbursement is set forth in the Eminent Domain Procedure Law.

EDPL § 701 provides as follows:

“In instances where the order or award is substantially in excess of the amount of the condemnor’s proof and where deemed necessary by the court for the condemnee to achieve just and adequate compensation, the court, upon application, notice and an opportunity for hearing, may in its discretion, award to the condemnee an additional amount, separately computed and stated, for actual and necessary costs, disbursements and expenses, including reasonable attorney, appraiser and engineer fees actually incurred by such condemnee. The application shall include affidavits of the condemnee and all parties that have incurred expenses on the condemnee’s behalf, setting forth inter alia the amount of the expenses incurred.”

The threshold test to be entitled to an additional allowance pursuant to EDPL § 701 is that the award by the trial court must be substantially in excess of the condemnor’s proof. Whether the award is in excess of the condemnor’s proof can be determined by a percentage and/or in dollar terms.

Awards which have been less than 35% over the offer have been deemed by the courts to be “substantially in excess” of the condemnor’s offer so as to qualify for an additional allowance. See *e.g. Matter of City of New York [Broadway Triangle U.R. – 513 Marcy Ave. Corp.]*, N.Y.L.J. 6/30/94, p. 35, col. 3, p. 36, col 1 (Sup. Ct., Kings Co., Scholnick, J.) [offer: \$162,800, award: \$210,000, difference: \$48,000, 29.48%]; *M.T.A. v. Ausnit*, 306 AD2d 190 (1st Dept., 2003) [offer: 43,600,000, award: \$4,871,157, difference: \$1,271,257, 35.3%]; *Dutchess County v. 285 Mill St. Inc.*, Index No. 702/88 (Sup. Ct., Westchester Co., Palella, J.), not reported [offer: \$750,000, award: \$1,010,000, difference: \$260,000, 34.67%];

Matter of Town of Islip [Sikora], 220 AD2d 434, 632 NYS 2d 160 (2nd Dept., 1995) [offer: \$503,000, award: (after appeal) \$754, 207, difference: \$250,207, 33.3%]; *Matter of Town of Riverhead [Loboze]*, N.Y.L.J. 9/15/94, p. 30, col. 3 [offer: \$124,500, award: \$172, 140, difference: \$47, 640, 38.26%]; *Matter of N.Y.C. Transit Authority [Gunhill Bus Garage]*, 142 Misc 2d 629, 538 N.Y.S. 2d 161 (1989) [trial appraisal: (standard used by the Court) \$1,860,590, award: \$2,476,500, difference: \$606,910, 32.6%]; *Daniel Shakespeare Corp. v. Inc. Village of Hempstead*, Index No. 13739/95 (Sup. Ct. Nassau Co., McCabe, J., October 30, 2002) [offer: \$500,000, award: \$676,300, difference: \$176,300, 35.26%].