

## NJ Supreme Court Rules On Reasonable Probability In Condemnation Matter

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**November 2013**

In the matter of *Borough of Saddle River v. 66 East Allendale, LLC*, the Supreme Court has ruled that, in deciding the reasonable probability of a bulk variance or other zoning change in a condemnation jury trial to determine just compensation, the trial courts must conduct their gatekeeping role prior to trial and based on all of the applicable criteria.

On October 21, 2013, the Court issued a 3-2 decision that reversed and remanded for a new trial a condemnation jury award, which had considered the impact of the probability of obtaining a bulk variance on the property's value.

In *Saddle River*, the borough acquired a 2.13 acre parcel of property, improved with an old gas station, for park purposes. Both sides agreed that the highest and best use of the property was for a bank and parking lot. The dispute centered on the size of the building and whether there was a reasonable probability that a bulk variance would be granted.

The owner's valuation of \$5,250,000 was based on a 10,000 S.F. bank/office building, with parking, based on the reasonable probability of obtaining a bulk variance to exceed the 30% maximum improved lot coverage under the zoning to allow for 42% coverage. The borough's valuation of \$1,050,000 was based on a 3,312 S.F. bank branch, with parking, which did not require the bulk variance.

The Borough objected and moved throughout the trial to exclude the owner's expert testimony on the issues of the reasonable probability of the bulk variance and valuation as lacking proper foundation and constituting net opinion. The trial court ruled on the issues during the trial and allowed the owner's proofs. The jury awarded \$5,250,000. The Borough appealed and the Appellate Division affirmed.

After granting certification, the Supreme Court majority clarified two aspects of how the issue of reasonable probability is to be handled in a condemnation jury trial: 1) **Prior to trial**, the trial court, as gatekeeper to assure that the jury does not hear speculative evidence, must decide, either on the papers or in a Rule 104 hearing, whether there is sufficient evidence that the bulk variance (or the zoning change or other circumstance at issue) is reasonably probable; and 2) In deciding the threshold issue of reasonable probability, the trial court's determination is to be based on the standards, requirements and "**all of the criteria**" that would govern the approval of the bulk variance (or the zoning change or circumstance at issue).

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The Court majority concluded that the jury had improperly heard deficient evidence and that neither the owner's experts nor the trial court had adequately analyzed the positive and negative criteria, which would be the standards applicable for the bulk variance at issue under the Municipal Land Use Law. The majority reversed and remanded the matter for a new trial.

The dissent in *Saddle River* strongly asserted that the extensive record supported the trial court's determination of reasonable probability, including that the owner's experts adequately addressed both the positive and negative criteria, and that the Supreme Court should defer to the trial court's evidentiary determination that there was a reasonable probability of obtaining the bulk variance. The dissent also disagreed that the gatekeeping function must be conducted prior to trial and referred to N.J.R.E. 611 as providing the trial court with broad discretion to manage the presentation of witnesses to "avoid needless consumption of time."