

A Summary of Condemnation-Related Matters Recently Decided by the New Jersey Superior Court Appellate Division

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Court Holds Condemnee Liable for Pre-existing Contamination Unless Able to Prove an Innocent Purchaser Defense in Subsequent Cost Recovery Action - *New Jersey Schools Development Authority v. Joseph Marcantuone, et al.*, decided October 29, 2012, approved for publication.

The Appellate Division determined that a property owner whose property was taken in condemnation must prove an innocent purchaser defense in the subsequent cost recovery action in order to avoid liability under the New Jersey Spill Compensation and Control Act (the Spill Act) for contamination that pre-dates the condemnee's ownership of the property.

The chlorinated solvent contamination at issue in this case was the result of dry cleaning operations conducted prior to the condemnee's purchase of the property in 1985. There was no evidence of a discharge of hazardous substances during the period of the condemnee's ownership. The contamination was not discovered until after the condemnor had acquired title to the property in the condemnation action.

In the separate post-condemnation environmental cost recovery action, the plaintiff sought to recover from the former condemnee defendants the costs to environmentally remediate the property taken.

Relying on *White Oak Funding Inc. v. Winning*, the trial court granted summary judgment in favor of the defendants, concluding that the former condemnees were not liable under the Spill Act because there was no discharge of a hazardous substance during their period of ownership. The trial court further determined that the defendants' failure to have conducted due diligence at the time of purchase did not render them "in any way responsible" for the pre-existing contamination.

The Appellate Division disagreed with the trial court's ruling, concluding that its earlier ruling in *White Oak Funding* was superseded by the innocent purchaser defense for property purchased prior to September 14, 1993, N.J.S.A. 58:10-23.11g(d)(5), which became effective after the *White Oak Funding* case had been decided. The Court stated that "Although it may seem counterintuitive to infer liability from legislation establishing an affirmative defense, logic dictates that this is the case."

The Appellate Division concluded that the defendants would be liable for the contamination prior to their purchase of the property, unless they could prove they had an innocent purchaser defense that, at the time of purchase, they did not know or have reason to know of the contamination by having undertaken the due diligence applicable to a pre-1993 purchase of property.

The defendants had also argued that, because the condemnor owned the property at the time the contamination was discovered, they could not be held liable because they were not the current owners (the innocent purchaser defense provision refers to “a person . . . who owns real property . . .”). The Appellate Division rejected this argument, concluding it was contrary to the intent of *Housing Auth. v. Suydam*, which determined that in condemnation contaminated property is to be valued as if remediated with an escrow established from such amount for the estimated remediation costs. The Appellate Division also referred to the qualified immunity that condemnors have from Spill Act liability.

Marcantuone answers some questions which *Suydam* did not specifically address. The innocent purchase defense provisions imply Spill Act liability on a condemnee who purchased contaminated property and did not undertake environmental due diligence at the time of purchase. Also, notwithstanding that title has vested in the condemnor, a condemnee is nonetheless deemed the current owner in the post-condemnation cost recovery action and subject to Spill Act liability, unless having an innocent purchaser defense, or another Spill Act defense, or is otherwise not responsible in fact for the contamination at issue.

Court Denies Temporary Taking Claims Resulting From Abandonment of Condemnation Actions - *Lee Hoagland, et al. v. City of Long Branch*, decided October 11, 2012.

Subsequent to the City of Long Branch having abandoned its condemnation actions for redevelopment purposes and having paid the property owners’ litigation expenses, certain property owners who had not released their claims in condemnation actions filed inverse condemnation claims alleging temporary takings of their properties by the City. The matters were consolidated, and the trial court granted the City’s motion for summary judgment dismissing the complaints, and the Appellate Division affirmed.

The plaintiffs alleged temporary takings of their properties from the time of the filing of the condemnation actions in 2005 and 2006, up to the settlement of the condemnation litigations in 2009.

The Court addressed the plaintiffs’ claims as follows:

- In condemnation, the filing of the complaint does not constitute a taking; rather the condemnor has to file and record and serve a declaration of taking to effect a taking, which the City did not do.
- The plaintiffs misconstrued the prior ruling of the trial court as concluding that a taking had occurred, when the ruling was instead that the City had the right to exercise its power of eminent domain.
- Plaintiffs’ claim of property value loss and of the inability to mortgage, develop or sell their properties lacked any factual support. To the contrary, the evidence indicated that a plaintiff estate was able to

sell its property. As a matter of law, loss of land value or impairment of marketability do not constitute a taking, even as a result of a blight declaration. Further, the City took no action to prevent plaintiffs from improving their properties. The Court concluded that the City did not substantially destroy the beneficial use of the properties and therefore there were no temporary takings.

Court Rejects Owner's Challenge to Condemnation Based on the Failure to Conduct Bona Fide Negotiations - *State of New Jersey, by Comm'r of Transportation v. St. Mary's Church Gloucester*, decided October 10, 2012.

The property owner in this case challenged the partial taking of its property on the basis of the State of New Jersey's failure to conduct pre-complaint bona fide negotiations and to reasonably disclose the manner in which the amount of the State's offer was calculated as required by N.J.S.A. 20:3-6. The trial court denied the owner's motion to dismiss the condemnation complaint and the Appellate Division affirmed.

Among other things, the defendant contended that in addition to two appraisal reports by different appraisers that the State did provide, the State should also have provided during pre-complaint negotiations the following: 1) the "addendum memo" identified in the appraisal report on which the State based its offer referring to revisions and modifications, in response to the State's review appraiser; and 2) the State's "review appraisal".

As to the addendum memo, the trial court concluded that, as this did form the basis of the State's offer, it should have been provided as part of pre-complaint bona fide negotiations. However, the court characterized the State's failure as a "de minimis" infraction and observed that, with limited exceptions, the information contained in the addendum memo was contained in the offer appraisal report provided to the owner. The Court did order the State to produce the addendum memo and allowed time for additional post-complaint negotiations, and concluded that the State had displayed "a good faith process of disclosure."

As to the review appraisal, the trial court described it as not related to the manner in which the amount of the offer was calculated, but rather that it confirmed that the manner was valid. The court also ordered the State to produce post-complaint the review appraisal. The owner had described the review appraisal as a certified opinion of fair market value of the subject property, whereas the State described it not as an appraisal report, but as part of its internal deliberative process.

Relying substantially on the factual record and the trial court's reasoning, the Appellate Division affirmed the judgment of the State's proper exercise of eminent domain, stressing that the statute requires "reasonable" disclosure.