NJ Appellate Division Addresses Issues of Reasonable Probability and Environmental Escrow in Reversing Condemnation Jury Award In Favor of Property Owners

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On October 19, 2016, the Appellate Division of the Superior Court of New Jersey reversed the condemnation jury award in *New Jersey Transit Corporation v. Mary Franco, et al.*, which had fixed just compensation in the amount of $8,150,000 for the entire taking of a former industrial property, portions of which are located in three municipalities. The ruling has been approved for publication.

The property in *Franco* consists of approximately 1.2 acres zoned light industrial and located in Hoboken, approximately one-half acre zoned multi-family residential and located in Union City, and approximately one-quarter acre zoned 1,2,3 family residential and located in Weehawken. The Hoboken parcel is cut off from the rest of Hoboken by light rail tracks, and the Union City parcel is cut off from the rest of Union City by the Palisades Cliffs.

At trial, the owners presented valuation testimony in the amount of approximately $9 million, based on the highest and best use of the property being for high and mid-rise apartment development on the Hoboken and Union City portions, with the Weehawken portion to be used as a cul-de-sac extending Weehawken's West 19th Street to provide access to the balance of the property. The condemnor valued the property at $1,650,000 based on development for 35 multi-family dwellings.

In pre-trial motions, the condemnor had moved unsuccessfully to exclude the owners' expert proofs on the basis that the owners had not shown that approval of the cul-de-sac by Weehawken was reasonably probable. The condemnor, however, prevailed in its post-trial motion to have a *Suydam* environmental escrow established in the amount of almost $2 million out of the proceeds of just compensation. Most of the costs would be to remediate the polychlorinated biphenyls (PCB) contamination in order to be able to use the property for residential use.

In reversing the jury award, the Appellate Division determined that the originally proposed private cul-de-sac would require a use variance from Weehawken, whether the cul-de-sac use itself was considered to be a new principal use or whether the principal use was considered to be the high and mid-rise apartment use which the cul-de-sac would serve. But the owners' experts had not addressed whether there was a reasonable probability that Weehawken would grant the use variance. Prior to trial, the owners then proposed alternatively to dedicate the cul-de-sac as a public street, which would avoid the need for the use variance. However, the owners' experts had also not addressed whether there was a reasonable

probability that Weehawken would accept the proposed dedication.

In light of these deficiencies in the owners' proofs, the Appellate Division concluded that the trial court had failed to properly perform its gatekeeping function to keep speculative evidence from being considered by the jury. Because the owners had not shown that there was a reasonable probability of the use variance or acceptance of dedication, the Appellate Division determined that the owners' proofs were legally inadequate and unreliable, reversing the jury award and remanding the matter for a new trial.

The Appellate Division did not take a position on whether the owners will be able to show reasonable probability at the new trial. The owners' experts can attempt to show (and the trial court, as gatekeeper, is to decide whether) there is a reasonable probability of the use variance or dedication. If so, such evidence of probability may then be presented to and considered by the jury.

Separately, in *Franco*, the Appellate Division affirmed the trial court's establishment of a *Suydam* environmental escrow in the amount of almost $2 million out of the proceeds of just compensation for the property, as if environmentally remediated. The Appellate Division held that the escrow is to be based on the estimated environmental remediation costs necessary to realize the highest and best use of the property, here residential development, and not upon the condemnor's proposed use of the property for public transportation purposes. The Appellate Division also concluded that withholding, by way of the escrow, the estimated transactional costs of environmental remediation to realize the enhanced value of the property's highest and best use precludes the owners from otherwise receiving a windfall. However, if the condemnor actually remediates the property for the public use at a cost less than the amount of the escrow, the owners are to receive the surplus escrow funds.

Franco is another reminder to property owners that, if the highest and best use on which the valuation of the property is based requires a variance, they must show that obtaining the variance is reasonably probable. Also, when a *Suydam* escrow is to be established when the taking involves contaminated property, *Franco* clarifies that the amount of the estimated remediation costs is to be based on the property's highest and best use.

The author of this Alert, **John J. Reilly**, concentrates his practice in civil litigation, with a particular concentration in condemnation and eminent domain matters. He chairs the firm's Condemnation & Eminent Domain Practice Group. Mr. Reilly's representation of property owners and public entities includes challenges to government takings of private property, commission hearings and jury trials to determine just compensation, allocation hearings and inverse condemnation. He has briefed and argued before the Appellate Division and Supreme Court of New Jersey, and has briefed before the United States Supreme Court, on condemnation matters.