Eminent Domain Reporter

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Dear Reader:

Welcome to the inaugural issue of Pullman & Comley's *Eminent Domain Reporter*. As an individual interested in property valuation matters, you know that the subject of eminent domain has received a tremendous amount of attention since the U.S. Supreme Court's Kelo decision. Eminent domain reform has been in the headlines and the subject of legislative debate across the country. In the meantime, takings cases continue to be decided by the courts. Based on this level of activity and the interest in this issue expressed by our clients and friends, the property valuation attorneys at Pullman & Comley thought that the time was ripe to expand our coverage of this important topic from an occasional article in *Property Valuation Topics* to a separate publication.

Every quarter, the *Reporter* will bring you the latest news from Connecticut's courts and General Assembly on developments in eminent domain law. We think it is only appropriate that this inaugural issue features a brief review of Connecticut's recently enacted eminent domain reform legislation. We will strive to report these developments in the concise and reader friendly fashion you have come to expect from *Property Valuation Topics*. Please contact us if you have any suggestions for the *Reporter* or would like us to add the name of a friend or colleague to our mailing list. Thank you for your continued interest and support.

Greg Servodidio and Marge Wilder
Co-Editors

Connecticut Adopts Eminent Domain Reform Legislation

Connecticut has adopted significant new legislation relating primarily to municipal takings of private property (1) under redevelopment plans (for blighted areas), (2) under statutes concerning municipal development plans and (3) under the Manufacturing Assistance Act (MAA) (for economic development). Noteworthy provisions of Public Acts 07-141 and 07-207 include the following:

- requiring new provisions for development plans;
- adding public hearing requirements;
- requiring higher voting requirements for the municipal legislative body prior to acquiring property;
- requiring the legislative body to make certain findings prior to the taking;
- setting time limits for acquiring property identified in a plan (maximum of ten years after date the first property is acquired);
- giving the person from whom the property was acquired or his/her heirs the right of first refusal to reacquire the property if the municipality does not use it;
- specifying that an owner-occupant may apply to court to enjoin a taking if the municipal agency failed to comply with the legislative requirements for the taking;
- requiring the municipality to obtain two independent appraisals and to pay the property owner the average of the two appraised values for the taking under a redevelopment plan and 125 percent of the average for takings under the municipal development and MAA statutes;
- permitting courts to refer challenges to the amount of compensation in certain takings to judges appointed to hear tax appeals and to the Ombudsman for Property Rights for hearings;
- requiring the Ombudsman for Property Rights to study the feasibility of calculating relocation assistance for businesses displaced by eminent

domain on the basis of any loss or gain in the "good will" unique to the lost location; and
- specifying how relocation benefits should be calculated when the Commissioner of Transportation acquires an outdoor advertising structure.

Certain provisions of the new legislation do not apply to projects funded in whole or in part by the federal government.

If you have any questions or comments, please contact Greg Servodidio at 860-424-4332 or by email to gservodidio@pullcom.com, or Marge Wilder at 860-424-4303 or by email to mwilder@pullcom.com.

Important Decisions

Court Increases Award of Damages Offered by State in Partial Condemnation: The State Commissioner of Transportation took certain easements and rights of way affecting the property owner's real property. The owner appealed the Commissioner's offer of compensation. In addition to determining the value of the portion of the land taken, the court determined the diminution in value of the building on the site, which was a mixed commercial/residential use, by using the income approach to determine the before and after value. While the Commissioner had claimed that there was no impact on the building as a result of the taking, the court agreed that after the taking there would be insufficient parking on site to permit the use of one of the apartments. The court, therefore, determined that the Commissioner had awarded insufficient compensation and increased the award (plus interest on the additional award) to the property owner.

Commissioner of Transportation v. Martorelli, CV54011646S, 2007 Conn. Super. LEXIS 472 (February 13, 2007).

If you have any questions or comments, please contact Andrew McDonald at 203-324-7903 or by email to amcdonald@pullcom.com

Motion to Dismiss Condemnation Proceeding Denied as Untimely: The city of Meriden condemned certain property for a hiking trail. The city followed appropriate procedures and recorded the certificate of taking. Once the certificate was issued, the taking was complete. Subsequently, the property owner moved to dismiss the taking, claiming that the court lacked jurisdiction because the city had not negotiated with the property owner, as required by C.G.S. §48-12, prior to commencing the condemnation action. The owner had failed to move to open judgment within four months and waited 16 months after the certificate of taking was filed before bringing the motion to dismiss. As a result, the court refused to consider the motion to dismiss. The court commented on the merits of the owner's claim that the city had failed to negotiate with him. It noted that the owner had not provided the court any objective standard to measure the adequacy of the city's negotiation. Further, the court noted that the owner had ignored correspondence from the city concerning the nature and extent of the proposed taking, instead of contacting the city and attempting to discuss the adequacy of the amount offered.

Meriden v. Mencarini et al, CV054002111S, 2007 Conn. Super. LEXIS 548 (February 15, 2007).

If you have questions or comments, please feel free to contact Elliott Pollack at 860-424-4340 or by email to epollack@pullcom.com.

ATTORNEY NOTES

On March 21, 2007, Marge Wilder and Greg Servodidio addressed the Hartford area chapter of the International Right of Way Association on special considerations in the condemnation of contaminated property.

Pullman & Comley attorneys have authored the Connecticut chapter of the American Bar Association's 50 state compendium on eminent domain law and procedure.

Property Valuation Topics

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2007 Revaluations Loom

Thirty-seven Connecticut communities are scheduled to go through town-wide real property revaluations as of their October 1, 2007, grand lists. These new values will form the basis for property tax bills payable commencing July 1, 2008, and for five years thereafter, that is unless the General Assembly alters the current five-year revaluation cycle! Among the larger communities presently calendared for revaluations are Ansonia, Danbury, Farmington, Glastonbury, Middletown, New Britain, South Windsor and Waterbury.

Please feel free to contact any member of the Pullman & Comley Valuation Department for further information.

Impact of Vapor Intrusion on Property Values

Together with a colleague, Pullman & Comley environmental and land use partner Diane W. Whitney published an important note in the May 2007 issue of *Connecticut Lawyer*: "Vapor Intrusion: Causes, Effects and Issues."

The authors focus on volatile organic compounds capable of generating vapors which can enter buildings, usually as a result of environmental contamination. Among the more familiar of these compounds are trichloroethene (TCE), tetrachlorethane (TCA), benzene, toluene, dichloroethene and mercury.

"Why we care about vapor intrusion," the authors write, "is, curiously, subject to dispute." Scientific authorities have not unified their thinking around a standard which accepts certain toxicological levels as harmful to human health even though many scientists "believe that inhalation of these chemicals can present a more serious health risk than contact with skin or ingestion."

Even remediated property can implicate vapor intrusion issues, the authors assert. Sites thought to be cleaned up yesterday may return to a list of contaminated sites tomorrow if vapor intrusion is detected.

Connecticut's remediation standard regulations enacted in 1996 bear directly on vapor penetration and provide specific guidelines for vapor contamination in residential and industrial/commercial land use contexts. Notwithstanding, current standards applicable to the so-called "Phase I" investigations, the authors tell us, "are not entirely clear on how vapor intrusion is to be considered." Because environmental consultants do not have clear guidance as to how to address this issue, the authors are concerned that "vapor intrusion language may be added unnecessarily to Phase I reports to avoid subsequent malpractice claims against environmental professionals."

What does this all mean to property valuation professionals? In situations where environmental contamination is a potential issue, additional efforts appear to be necessary, on a case by case basis, to confirm the absence of vapor intrusion as potentially impacting value. If it is reasonable to believe that a property is contaminated with volatile substances, the intensity of investigation required to address this problem will present a challenge to the property valuation community until further guidance is obtained from state and federal regulators.

If you have any questions or comments, please contact Gregory F. Servodidio at 860-424-4332 or by email gservodidio@pullcom.com, or Diane W. Whitney at 860-424-4330 or by email to dwhitney@pullcom.com.

Twenty-Five Percent Failure to File Penalty Upheld

Last January, Superior Court Judge Robert G. Gilligan had occasion to address the appeal of a property owner seeking to overturn the Waterbury assessor's imposition of the statutory 25 percent penalty for failing to file its personal property declaration in a timely fashion.

Regardless of whether the delay was one day or some longer period, Judge Gilligan ruled that once the late filing is established, neither the assessor nor the Board of Assessment Appeals has the right to waive the penalty. Presumably, if the envelope from the assessor's office containing the declaration did not arrive or if the property owner's premises were destroyed by casualty, perhaps an exception could be created but this was not the case here.

Of importance to owners of nonexempt personal property required to file annual declarations, the court also ruled that a request for the 45-day extension authorized by the statute must be submitted to the assessor before the initial time limit for filing the declaration (November 1 in each year) expires. Interestingly, the property owner, while filing a late extension request, sought to solve its problem by seeking only the difference between the time elapsed from the initial due date of the declaration and the 45-day period (December 15).

Your editors find that most assessors are cooperative and understanding when taxpayers cannot complete their personal property declarations on time. Judge Gilligan's ruling points out the necessity, however, to seek an extension and to furnish good cause in the request before the passage of the filing date.

Eylet Crafters, Inc. v. Waterbury, Superior Court, Judicial District of Waterbury, January 25, 2007.

Please feel free to contact Laura A. Bellotti at 860-424-4309 or by email to lbellotti@pull.com.

Can Cap Rates Go Higher?

At a symposium on global tax property taxes presented by the International Property Tax Institute at New York University on May 3, Howard Gelbtuch, MAI, Senior Appraiser and Valuation Consultant at Greenwich Realty Advisors, commented on the significant decline his firm has noted in "going in" capitalization rates in major realty markets around the world.

> **"It is difficult to know how much lower cap rates can fall..."**

He pointed to the purchase of a large apartment house on the west side of Manhattan in November 2006 with an indicated cap rate of 1.5, the office building at 666 Fifth Avenue in Manhattan which was sold in December 2006 at a cap rate of 2.7, a mixed use office building located at 112 Great Russell Street in London which was sold in October 2006 showing a rate of 3.1%, the 420,000 square foot office building known as Pacific Century Place in Tokyo which was sold in September 2006 showing a cap rate of 2.5 and the twin high rise towers styled City Bank Plaza in Hong Kong, which was sold in May 2006 with a rate of 1.6.

It is difficult to know how much lower cap rates can fall and, conversely, how high property prices can float before the apparent bubble bursts or, hopefully, begins to deflate slowly so as to avoid undue financial stress on real estate markets.

If you have any questions or comments, please contact Gregory F. Servodidio 860-424-4332 or gservodidio@pullcom.com

Waterfront Taking: $2,000,000 or $10,000,000?

Malba Cove Properties, Inc. owned several parcels of waterfront land on Powell's Cove on the Long Island Sound in the Borough of Queens in New York City. Requiring Malba's property, in part, to create the Powell's Cove Environmental Waterfront Park, title vested in the city on February 29, 1996 (is a leap year a good sign for the city or for the property owner?). In view of the huge market value differential, noted in the title of this article, major litigation followed after the city's taking was accomplished.

Questions about which the parties were at issue included the density of development permitted by New York City zoning, whether larger structures could be feasibly constructed, whether waterfront setback requirements were properly interpreted and applied by the parties' experts, what impact tidal wetlands classifications had on potential development and, without exhausting the issues discussed in a lengthy New York State Supreme (trial) Court opinion, the comparability of the "comparable" land sales used by the opposing appraisers.

Selection of comparables by the parties' appraisers played a key role in the dramatically increased award for the property owner. The trial judge approvingly noted that "claimant bases its valuations upon comparable sales including one property in (the immediate area) and eight in . . . nearby neighborhoods . . . ." On the other hand, the trial court commented, "the probative value of the city's comparable sales is seriously called into doubt because all five. . . are located significant distances from (the subject property). The subject neighborhood, it went on, "being an upscale, waterfront neighborhood, is certainly a more desirable area than any of the areas relied upon by the city (in its appraisal report)." The court castigated the city for failing "to include any waterfront properties in its appraisal," instead relying on inland sales with upward adjustments to reflect waterfront exposure but, "without any sales data to support its conclusion."

Taking somewhat of "a-plague-on-both-your-houses" stance, the court strongly qualified its reliance on the comparables selected by both appraisers in their market analyses as "not sufficiently similar to the subject property to permit meaningful comparison . . . . ." Both appraisers, the judge ruled, did not adequately explain their adjustments.

This lengthy opinion can also be examined as something of a primer for presenting valuation evidence about undeveloped waterfront property. The court's criticism of the plaintiff's appraiser's work, at least, may be taken *cum grano salo*; his value was $10,000,000 which, may be compared with the Court's award of slightly in excess of $9,000,000!

Matter of Powell's Cove Environmental Waterfront Park, Queens, Docket No. 14010/00, Supreme Court, King's County, New York (February 22, 2007).

Elliott B. Pollack at 860-424-4340 or by email to ebpollack@pullcom.com or Marjorie S. Wilder at 860-424-4303 or by email to mwilder@pullcom.com, both in our Hartford office, can furnish additional information about this case.

ATTORNEY NOTES

Pullman & Comley's ninth annual Property Valuation Symposium will take place on October 4, 2007 at the Culinary Institute in Hartford. Our internationally known guest speaker is Peter F. Korpacz. Look for your invitation soon. If you have any questions, please contact Pullman & Comley's Marketing Department at (203) 330-2008.

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