Eminent Domain Reporter

Volume II / Issue 1
Winter 2008

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Fort Trumbull Litigation Continues

If you had thought the litigation involving New London's development of the Fort Trumbull area of the city was over once the U.S. Supreme Court determined that the takings were for a public purpose, you would have been incorrect. In a case decided last year, the Connecticut Supreme Court ruled that the trial court had erred in dismissing a case brought by Fort Trumbull Conservancy, LLC ("Conservancy") against the City of New London and other local and state agencies.

The trial court had previously granted the defendants' motion to dismiss on the basis that the Conservancy had no standing to bring this case. Defendants also claimed the case was moot. The Conservancy had sought a permanent injunction prohibiting the defendants from implementing the development plan, alleging that the implementation of the plan would have a negative impact on the water, land and air resources in the area.

In determining that the Conservancy had standing, the Court noted that the statute (§22a-16) specifically permits any "person" or "corporation" to bring an action for declaratory and equitable relief "for the protection of the public trust in the air, water and other natural resources of the state from unreasonable pollution, impairment or destruction. . . ." Further, the Supreme Court found that the Conservancy has made a "colorable" claim of unreasonable pollution, impairment or destruction of the environment in its complaint.

As to the mootness argument, the court found that while a considerable amount of work had already been completed in the Fort Trumbull development, there was additional work to accomplish. Hence, the court found that there was at least some possible injury as a result of the remaining work for which the plaintiff sought redress and, therefore, the case was not moot.

The Fort Trumbull case is now pending in Hartford Superior Court following the remand by the Connecticut Supreme Court.

Fort Trumbull Conservancy, LLC v. City of New London, et al., 282 Conn. 791 (2007)

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

Final Chapter Written in Lengthy Condemnation Saga

With its recent decision in *ATC Partnership v. Coats North America Consolidated, Inc.*, 284 Conn. 537 (2007), the Connecticut Supreme Court appears to have written the final chapter in a condemnation saga that began some 13 years earlier. The legal odyssey began in 1994 when a piece of contaminated industrial real estate in Windham was condemned and $1 was deposited in court as just compensation. As the result of ensuing litigation which made its way to the Supreme Court two previous times, the amount of just compensation was ultimately increased to about $1.75 million. This sum was arrived at by valuing the condemned property as if clean and then deducting about $2.7 million in estimated environmental remediation costs.

In this latest litigation, ATC Partnership sought to recover the $2.7 million deduction from its just compensation award from a prior owner of the condemned property. The plaintiff's claim was primarily based on a statute that permits a party that has remediated environmental contamination to seek reimbursement of the remediation costs from a party whose negligence caused the contamination. Alternatively, the plaintiff also sought to recover the estimated remediation costs under common law theories of indemnification.

The Supreme Court upheld the trial court's decision that ATC Partnership was not entitled to such a reimbursement because it had not taken any steps to

actually remediate the property prior to the condemnation. Thus, existing environmental law does not provide an avenue for a condemnee to recover from a predecessor in interest any reduction in its condemnation award attributable to the cost of environmental remediation when that remediation was not in fact undertaken.

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

Transmission Line Easement: Necessary and Convenient

In an interesting decision, a superior court judge, relying in great part on a Siting Council decision, determined that it was necessary and convenient for Connecticut Light & Power (CL&P) to take an easement over private property to install underground vaults and the access thereto. Further, the court determined that there was no showing by the property owner of bad faith, unreasonableness or abuse of discretion in CL&P's locating of the splice vaults, implying that only under those circumstances would the court interfere with CL&P's discretion.

CL&P had obtained Siting Council approval of an electric transmission line between Middletown and Norwalk to improve deteriorating conditions in the electric system in Southwestern Connecticut. While the underground line would be installed primarily under U.S. Route 1 in the area of the proposed taking, the Siting Council decision required that the splice vaults be off the roadway.

The action before the court related to CL&P's petition to take two easements for the splice vaults. With a typical governmental taking, the condemnation is complete once the certificate of taking is filed on the land records (even if there is a court proceeding to contest the compensation). If a utility seeks to condemn an easement, the actual condemnation does not occur until a committee of three disinterested citizens who are appointed to assess damages complete their assignment. In this case, the court granted CL&P's motion for immediate entry even though the taking was not completed because it determined that the public interest would be prejudiced if there was a delay in constructing the project. The court also went so far as to terminate an automatic stay that would have become effective with an appeal.

Connecticut Light & Power Co. v. Jerry's Heirs, LLC, 2007 Conn. Super. LEXIS 1073.

If you have any questions or comments, please contact Laura Bellotti at 860-424-4309 or by email to lbellotti@pullcom.com.

Summary Judgment Was Inappropriate

The owners of property sought to enjoin the town of East Haddam from taking their property because the town did not file its statement of compensation with the trial court within six months as required by statute. The town had claimed that the taking was solely for a new middle school, thereby eliminating the six month requirement. However, the referendum adopted by the voters described other municipal uses for a portion of the property being acquired. Since the Appellate Court found that there was a question of material fact in dispute as to whether the site was to be used solely for school purposes, the Court determined that the trial court should not have granted the town's motion for summary judgment.

Leo Gold v. Town of East Haddam, 103 Conn. App. 369 (2007).

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

Property Valuation Topics

Volume XI / Issue 1
Winter 2008

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Revaluations Move Forward

The many Connecticut communities who are revaluing all real estate within their boundaries as of October 1, 2007, have notified property owners of new proposed values and have afforded them the opportunity to meet with the revaluation company or the assessor.

The only remaining option for owners who seek further relief is to file an appeal to the local board of assessment appeals on or before February 20 or, in some cases, by March 20. Appeal forms are available from the assessor's office. Care must be taken in completing these forms. If the board does not act favorably, an appeal can be filed with the Superior Court within two months of the board's decision.

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

Use of Cost Approach Discussed

In a rather unremarkable tax appeal challenging the value of a Bridgeport industrial property as of October 1, 2003, Superior Court Judge Trial Referee Arnold W. Aronson had some interesting observations to make about the selection of the cost approach to value.

The property consists of concrete block/prefabricated metal buildings of modest quality occupied by the owner, a contractor, and is located in a neighborhood "characterized by contractors' yards, warehouse and distribution and outdoor material storage." The property owner's and the city's appraisers both employed the cost and market approaches to value.

The owner's appraiser's estimate of value was $1,620,000; the city's appraiser's estimate of value was $2,570,000, a fairly wide delta.
As Judge Aronson put it, "(a) comparison (of the two appraisers' values) demonstrates how unreliable it is to use the cost approach in the valuation of (this) property. There is such a disparity in the selection of replacement costs and depreciation rates as to make a choice between one or the other more of a toss of a coin."

The lack of wisdom in employing the cost approach to value a run-of-the-mill industrial/warehouse property of a "certain age" is well highlighted by this opinion.

Moutinho vs. City of Bridgeport, Docket Number CV-040412557 (April 11, 2007)

To obtain a copy of the *Moutinho* decision, please contact Gregory F. Servodidio at 860-424-4332 or by email gservodidio@pullcom.com.

New Pretrial Methodology

The Pullman & Comley Property Valuation Department has recently learned that the Superior Court in the Judicial District of New Haven has adopted a new way to pretry tax appeal cases.

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As many know, the tax and administrative appeals court held in New Britain, over which Judge George Levine presides, has an active pretrial intervention program. Judge Levine endeavors to pretry all tax appeals as soon as possible after the return date. His standing orders for these pretrials is that the parties and a client or client representative with decision-making power be present. Unless an appraiser has already been retained, he does not ask a real estate valuation professional to attend.

> **"...standing orders for these pretrials is that the parties and a client or client representative with decision-making power be present."**

The New Haven court has created a "special master's team" composed of attorneys with experience prosecuting and defending tax appeals. According to a recent notice from the New Haven Judicial District, after the pretrial is conducted by this "team," a joint settlement recommendation will be made to the parties. If the case is not resolved, a trial will be scheduled.

It is hoped that this program will be as effective as the pretrial protocols being observed in the New Britain court.

If you have any questions or require any further information concerning this new pretrial program, please contact Elliott B. Pollack at 860-424-4340 or by email epollack@pullcom.com.

Foreign Country Taxation Issue Decided

The Summer 2007 issue of *Property Valuation Topics* wrote about litigation involving a number of foreign countries seeking to avoid paying property taxes on portions of their real property not deemed to be exempt under New York law. New York only exempts real estate used exclusively for diplomatic offices or ambassadorial living quarters.

After New York City filed tax liens to collect substantial unpaid taxes, the foreign countries had the cases removed to the federal courts where both the trial and intermediate appellate courts rejected their position.

In a decision released June 14, 2007, the U.S. Supreme Court ruled that the foreign countries could not rely on their sovereign status to obtain an exemption under New York real property tax law for property the Empire State did not expressly exempt.

In this era of a sharply divided Supreme Court, it is pleasant to note that seven members joined in the majority opinion written by Justice Clarence Thomas. Justices Stevens and Breyer dissented.

Permanent Mission of India to the United States, et al vs. City of New York, United States Supreme Court, Docket Number 06-134.

If you have any questions or comments, please contact Marjorie S. Wilder at 860-424-4303 or by email mwilder@pullcom.com.

Appraiser Independence

The emphasis on appraiser objectivity and independence by the Uniform Standards of Professional Appraisal Principles (USPAP) is well placed and, indeed, critical to achieving sound real estate value estimates.

One of the lessons being learned from the current mortgage backed security crisis is that weaknesses in the appraisal and debt-rating processes pursued before mortgage backed securities come to market has potentially impacted on their credit worthiness.

Before these securities are marketed, sellers approach rating services, such as Moody's, to do so. This is somewhat unusual because typically, the value of an asset being purchased in the market is determined by the buyer prior to purchase rather than by the seller prior to sale. A number of analysts are challenging these arrangements as less likely to produce accurate value statements and sound assessments of credit worthiness. In addition, it appears that some or perhaps much of the rating services' compensation was contingent in the sense that it was based on the successful sale of the securities. As those of us who labor in the property valuation vineyards know, one of the classic disclaimers required of a real estate appraiser is that her compensation is not so linked.

One commentator reviewing the current problems in the marketplace notes that these practices "will have to change to shore up the securitization process and allow it to continue maintaining the flow of capital to the mortgage and market." Congressional hearings are coming on this and other securitization issues.

Any member of the Property Valuation Department would be pleased to discuss this article with you.

Pay or Play in the Volunteer State

Connecticut grants property owners a limited right to withhold payment of property taxes upon the filing of a real estate tax appeal. Failure to make payment of the minum required amount, however, does not forfeit the right to challenge an assessment; it potentially subjects the property owner to interest at the rate of 18 per cent annually, lien fees and possible collection action.

The state of Tennessee has taken a stricter approach by endorsing legislation, recently signed by the governor, which imposes "pay or play" restrictions on property owners.

ATTORNEY NOTES

Pullman & Comley, LLC is pleased to announce that Laura A. Bellotti, formerly an associate in the Property Valuation Department, has become a member of the firm. Laura is resident in the firm's Hartford office

Pullman & Comley's Property Valuation Department announces that it has been selected as the Connecticut editor for the *Eminent Domain Compendium* published by the American Bar Association. The Property Valuation Department has also authored the Connecticut chapter of the *ABA Property Tax Deskbook* for many years. Pullman & Comley is proud to be writing the Connecticut sections of two important reference sources for valuation professionals throughout the United States.

Department chair Elliott B. Pollack will review important 2007 Connecticut property valuation developments at the Advanced Property Tax Seminar sponsored by the American Bar Association and the Institute for Professionals in Taxation on March 13, 2008, in New Orleans.

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Volume XI / Issue 1
Winter 2008
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