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$8.1M Award for Taking Reversed Due to Error on Presumption of Use Variance and Road Dedication

In an unusual step, the Appellate Division recently reversed the Law Division due to "prejudicial error" in permitting defendant condemnees' experts to "offer trial testimony which was legally inadequate and legally incorrect," and in so doing, ordered a new trial on the issue of just compensation. The decision, *New Jersey Transit Corp. v. Franco*, Docket No. A-3802-12T4, decided on October 19, will be reported and is precedential.

The case involved the condemnation by New Jersey Transit Corp. of adjoining properties in Hoboken, Union City and Weehawken. New Jersey Transit offered $934,500 for the taking (subject to remediation of contamination), and the condemnation commissioners awarded compensation of $1.35M to the defendants/condemnees. On appeal to the Law Division, the defendants' appraisal report valued the property at approximately $9M. The defendants' appraisers ultimately valued the property at a highest and best use for a 12-story, 72-apartment high-rise building on the Union City parcel and a four-story, 54-apartment mid-rise building on the Hoboken parcel. The ultimate issue in arriving at the viability of the highest and best use was access to the consolidated parcels. Access was proposed through a private driveway and cul-de-sac which would provide access for the entire site from Weehawken's West 19th Street and would occupy the majority of the property in Weehawken.

The Appellate Division found that the "crucial issue on appeal is whether the creation of a cul-de-sac on the Weehawken parcel of the property would have required and received approval by Weehawken." The defendants' experts assumed Weehawken would not need to approve a use variance for the cul-de-sac which would constitute the sole use of the Weehawken parcel. Alternatively, the defendants' experts contended that the street could be dedicated to Weehawken without need for a use variance. Prior to trial, New Jersey Transit filed a motion in limine to bar the introduction of defendants' plans and the experts' reports prepared by their appraiser and planner. New Jersey Transit contended that "the experts' opinions failed to analyze whether there was a reasonable probability Weehawken would grant a use variance," or alternatively "it was speculative that Weehawken would accept dedication of the cul-de-sac." New Jersey Transit also requested a N.J. R. Evid. 104 hearing to determine the admissibility of the experts' reports. The Law Division denied New Jersey Transit's *in limine* motion and refused to hold an evidentiary hearing. The defendants' experts testified at trial over New Jersey Transit's objections, which resulted in a jury award of $8.1M in compensation.

At the trial, the defendants' experts' testimony was ambiguous as to whether it was reasonably probable that Weehawken would grant a use variance or accept defendants' offer to dedicate the cul-de-sac as a public street. The Appellate Division concluded that a use variance would be required for the Weehawken property. In that regard, the court explained that the Weehawken property was located in a zone that permitted only one-, two- and three-family homes. The driveway could not be construed as an accessory use, as no other use or structure was proposed for the Weehawken property. Instead, the driveway had to be considered a principal use. Because it was intended to exclusively service the high-rise and mid-rise multifamily buildings proposed for the Union City and Hoboken parcels — uses that are not permitted in the Weehawken one-, two- and three-family zone — the Appellate Division concluded that "a use variance would be required to use the Weehawken parcel lawfully as a private driveway." Similarly, with regard to the defendants' suggestion that the driveway could be dedicated to Weehawken as a public cul-de-sac without the need for a use variance, the Appellate Division concluded that a "city is not required to accept a dedicated street," and absent "Weehawken's acceptance of defendants' 'dedication,' defendants would 'retain ownership of the Weehawken lots.'"

Therefore, the Appellate Division found that the "defendants were required to show a reasonable probability Weehawken would either grant a use variance for the cul-de-sac or accept the dedication of the cul-de-sac as a public street." In light of this finding, the court held that the defendants' experts' testimony at trial failed to prove that it was reasonably probable that Weehawken would grant a use variance to permit the driveway or accept dedication of the cul-de-sac as a public street. The court noted that the evidence presented in that regard was "legally incorrect and legally inadequate," and therefore, the "quality of the evidence that the jury was allowed to consider undermined the soundness of the jury's property valuation determination." Hence, due to the "prejudicial error in denying plaintiff's motion *in limine*, and thus allowing defendants' experts to offer trial testimony which was legally inadequate and legally incorrect," the Appellate Division ordered a new trial on the issue of just compensation. The court also directed the Law Division to "examine the evidence proffered in support of the reasonable probability of a zoning change and determine whether it can render its required determination based on the papers," and if not, to hold an N.J. R. Evid. 104 hearing. The defendants were permitted to prepare new expert reports and revised plans, with new rebuttals from the plaintiff, to assist the Law Division in this analysis. In closing, the Appellate Division expressed no opinion on whether the defendants could, in fact, show such a reasonable probability. It did, however, reject New Jersey Transit's argument that testimony showing a reasonable probability would be improper because approval is not certain.

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