Property Valuation Topics

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New "LEED" Office Building in Hartford CBD

After vacating the downtown headquarters it occupied for almost 40 years for the suburbs in 2007, WFSB-TV (Channel 3) left behind an unoccupied, obsolete building. The property was sold in 2008 to an engineering firm which proposes to build the first new commercial office building in Hartford in more than 10 years.

The developer will move the engineering firm to the new site from Middletown and is now looking for tenants to fill out the remainder of the space. Among the attractions of the development is expected Platinum LEED certification which will likely appeal to both tenants and the community at large. The ability of the project to lure tenants away from other office space within the Hartford CBD because of its green attributes will be closely monitored by the real estate industry.

The location, formerly known as Broadcast Plaza, sits at the bottom of the Founders Bridge which connects the east and west banks of the Connecticut River and is likely to have superb 360 degree views.

For further information about our Green Energy and Development Law practice, please contact Brad N. Mondschein, Esq. at (860) 424-4319 or bmonschein@pullcom.com.

Unusual Event: Three Appraisers Agree

The taking of a former Volkswagen auto dealership and repair facility consisting of approximately 2.5 acres with a gross building area of slightly more than 19,000 square feet generated a rare confluence of appraisal opinion.

An opinion not otherwise notable for establishing new law (it was not necessary) or in parsing a difficult fact pattern addressed the property owner's appeal of the Connecticut Commissioner of Transportation's award of $2,129,000. Happily for the appellant, the Commissioner's appraisal was "updated" to $2,786,000.

The second appraiser who testified at trial for the state of Connecticut valued the property at the time of taking at $2,750,000. The property owner's appraiser put forth a market value of $2,785,000. All appraisers used other methodologies than the sales approach.

As Judge Trial Referee Samuel Freed observed, "In most cases of this sort, the court is charged with taking into account the divergent opinions expressed by the witnesses of the claims advanced by the parties. . . What is quite noteworthy in this case is the lack of diversity in the opinions advanced by the experts presented by the parties." Essentially, the court observed, the appraisers' conclusion was "unanimous."

State of Connecticut v. Auto Corner, LLC, Docket No. CV 0740 32622, March 31, 2006.

For more information, please contact Laura A. Bellotti at (860) 424-4309 or at lbellotti@pullcom.com.

Inside this issue:

Depressed Markets and *Ad Valorem* Assessments Discussed

Should the crash of residential property values in South Florida be reflected in the new *ad valorem* tax assessments being generated by assessors? The Miami-Dade County property appraiser does not believe that foreclosures should be included in the data set used in determining new assessments because, as he puts it, they "are rarely a reflection of true market value." (We wonder how he can discount foreclosures when they figure so prominently in conveyance statistics.) The Broward County property appraiser takes the opposing view.

This difference of opinion among assessing officials in adjacent counties certainly raises the possibility of significant litigation and disagreement among the various trial courts as to how to deploy foreclosure data. Perhaps this issue will find its way to Florida's highest tribunals.

Potential Expansion of Appraisers' Liability

In a major decision, the Arizona Court of Appeals* ruled that "an appraiser retained by a lender to appraise a home in connection with the mortgage financing may be liable to the prospective buyer for failure to exercise reasonable care in performing the appraisal."

The buyer of a Scottsdale, Arizona, home conditioned her offer to purchase on obtaining an appraisal acceptable to her lender at the proposed sales price. Her broker recommended Joseph Blagg, whose name had been furnished to the lender. The bank delivered a copy of Mr. Blagg's appraisal to her before the closing.

As it turned out, the appraiser appears to have overstated the "livable area" of the home by approximately 25 percent.

The buyer claimed that if Mr. Blagg had done his homework accurately, she would have not gone forward with the transaction.

The appraiser challenged her lawsuit on the basis that she was not his client and that he had performed the appraisal for the bank, not for her. As a result, he argued, a duty of care was not owed to the home buyer. This position was accepted by the trial court.

> **"...an appraiser retained by a lender to appraise a home in connection with the mortgage financing may be liable to the prospective buyer for failure to exercise reasonable care in performing the appraisal."**

On appeal, the jurists decided to reexamine Arizona law concerning the third-party liability of an appraiser.

Noting that Mr. Blagg was aware of the buyer's cancellation option and of her right under federal law to receive a copy of his report from the lender, the Arizona court commented that since "the buyer was obligated to reimburse the cost of the appraisal ordered by the lender," there was "no reason to impose on the parties to a transaction the burden of paying twice for the same information simply so that the buyer may join the lender within the scope of the appraiser's duty of care."

In the future, other tribunals may apply hte court's reasoning to commercial property appraisal reports.

Sage v. Blagg Appraisal Company, Ltd., Arizona Court of Appeals, Division One, Docket No. CV 20006 092272 (April 30, 2009).

For further information, please contact Gregory F. Servodidio, Esq. at (860) 424-4332 or gservodidio@pullcom.com.

A Club Can be A House

Property Valuation Topics readers are most likely aware of the vacation club phenomenon which became popular about 10 years ago. Distinguished from the time share concept, vacation clubs develop facilities in various tony locations around the world. Memberships permit visits to the clubs' various destinations based on the financial arrangements that are part of the overall club membership terms.

WorldMark, The Club, is one of these outfits. Among its other locations, it developed an attractive property in Estes Park, Colorado, consisting of 32 separate buildings containing 51 lodging units and ancillary facilities. The title is held by WorldMark.

Because Colorado's various *ad valorem* property classifications favor a *residential* category, WorldMark sought to reverse a decision of the Larimer County assessing authority which placed the Estes Park property in a *commercial* category, akin to a hotel.

The applicable Colorado definitional statute depicts a hotel as a facility providing lodging to the general public on an overnight or weekly basis. Since actual use, not nomenclature, is typically the primary factor "in determining the proper classification for property tax purposes," WorldMark was able to void the commercial classification by establishing that only its members use the property and that is it not available to the general public.

Although the assessing authorities emphasized that WorldMark's memberships are sold to the general public with no particular exclusivity, the facts before the reviewing court demonstrated that during 2005, the assessment year in question, the general public was not to be seen at the Estes Park club site.

> **"Actual use, not nomenclature, is typically the primary factor in determining the proper classification for property tax purposes."**

As a result, the somewhat incongruous (at least to your editors) result was that the Colorado Court of Appeals reversed the Board of Assessment Appeals and ordered that WorldMark, The Club's 32 buildings and 51 lodging units be treated as residential real property during the assessment year in question.

WorldMark, The Club v. Larimer County Board of Commissioners, et al., Colorado Court of Appeals, Docket No. 08 CA 0853 (February 19, 2009).

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Inverse Condemnation Claims Against Power Company Rejected

In an effort to update Connecticut's aging electricity grid, the Connecticut Light & Power Company (CL&P) received state approval to erect larger towers and string more powerful transmission lines within an easement area it had owned for many years. These activities prompted five residential property owners in the town of Orange to sue CL&P for overburdening its easement, trespass, private nuisance and inverse condemnation. Their basic theory was that CL&P's activities had a significant negative impact on the market value of their properties, entitling them to compensation.

By means of a motion for summary judgment, CL&P attempted to have the inverse condemnation claims removed from the litigation. Inverse condemnation is a cause of action against an authority with eminent domain powers brought by a private property owner whose property has allegedly suffered significant harm for the authority's actions in the absence of an actual taking. Under Connecticut case law dating back nearly 20 years, the Supreme Court has set the bar very high for property owners to prevail on such a claim. They must prove that there has been "substantial interference" with their property which has destroyed its value or substantially diminished their use or enjoyment of the property.

The plaintiffs in this case attempted to clear that high hurdle by alleging that their properties had suffered a significant decrease in market value because of the public fears associated with high voltage power lines. Unfortunately for them, their allegations were not sufficient to meet their burden. As a result, the trial court agreed with CL&P that the inverse condemnation aspect of the case should be removed.

CL&P also attempted to weaken the remaining aspects of the plaintiffs' case dealing with the alleged overburdening of the easement, trespass and private nuisance. The court rejected CL&P's efforts, leaving open the possibility that the homeowners could obtain some compensation for these claims.

Passariello v. Connecticut Light & Power Company, 2009 WL 1141184 (Conn. Super.), March 31, 2009.

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

Don't Overlook *De Facto* Claims

Eminent Domain Reporter readers are familiar with the typical condemnation case in which a local, state or federal governmental unit acquires property by eminent domain. In these "plain vanilla" cases, the governmental entity physically acquires either a property or a portion of a property. If the property owner is not satisfied with the taking award, a court appeal is available. In the case of a partial taking, the property owner has the right to seek damages to the property acquired as well as to assert damages to the remainder caused by the taking.

In a minority of cases, governmental action will not involve the taking of any portion of a specific parcel but, rather, may potentially implicate a damage claim as a result of the taking of a separate and discreet parcel. How can this happen?

For example, a 100 unit apartment complex is located on Blackacre; its dedicated parking lot consisting of 225 parking spaces is located on Whiteacre. The town of Yukon takes the parking lot for construction of an addition to the town hall. No portion of Blackacre is touched. Depending on the particular facts and circumstances, however,the apartment property owner may have a claim for damages due to the taking of the parking lot.

Another example: The construction of a municipal sewage plant after a taking results in noxious odors and sewer sludge truck traffic adversely affecting the shopping center located nearby. While no part of the

shopping center was acquired by eminent domain, the shopping center owner may have a claim as a result of the sewer plant taking.

A third example: The state of Nutmeg announces plans to acquire multiple parcels in a given neighborhood as part of the planned expansion of a light rail line. Several years pass after the announcement of the takings due to planning, funding and environmental impact study delays. Nutmeg asserts its continuing intention to acquire the properties but advises the public that further delays can be expected before the project is initiated. Owners may have claims against Nutmeg for damages because of the property owners' inability to make financial commitments to tenants, subdivide, obtain financing or to otherwise deal with these properties as having any sort of a commercial future.

The bottom line: Governmental acquisition activity in your area, even if not involving the present taking of your property, may create claims for condemnation damages which should be examined before applicable statutes of limitations expire.

Elliott B. Pollack can be reached at 860-424-4340 or epollack@pullcom.com to answer questions about this topic.

The Court's Award of Interest Can Include Several Rates

In a recent decision, the superior court determined the amount of interest to be included with the additional award of just compensation granted to a property owner for the taking of its land. Several rates of interest were determined for the years in which the court found the property owner's just compensation had been withheld by the condemnor. The decision relies on the Connecticut Supreme Court's recognition that the superior court has broad discretion to determine a "reasonable and just" rate of interest as part of just compensation. It also indicates that the right to award interest in an eminent domain action does not depend upon statutory authority.

The superior court also cited two decisions of the U.S. Supreme Court as support for its position that interest in condemnation appeals is not dictated by statute and the U.S. Constitution requires a judicial determination of just compensation. This determination includes an interest component in an amount that the superior court deems adequate for the total award of just compensation.

In its analysis, the superior court's test was to look at what a reasonably prudent person investing funds to produce a reasonable rate of return, while maintaining safety of principal, would receive. The time period during which the property owner did not receive its full award of just compensation was from the taking on April 4, 2005, through the court's decision in February, 2009. Since the economy, rates of return and interest rates went through such a dramatic period of fluctuation during those years, and the latter portion of the period was one of protracted low or negative growth, a reasonable and just annual rate of interest for a condemnee is at least equal to the weekly average one-year constant maturity yield of U.S. Treasury securities.

Based on the court's analysis of applicable rates of return and interest rates on Treasury securities during the time between the taking and the court's decision, the former property owner was awarded the following rates of interest: 6 percent for 2005, 10 percent for 2006, 7.5 percent for 2007 and 2 percent for 2008.

City of Shelton v. Wiacek Farms, LLC, 2009 WL 765398 (Conn. Super.), February 24, 2009.

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