CONDEMNATION OF CONTAMINATED PROPERTY IN THE NEW REGULATORY ENVIRONMENT

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This article surveys the legal issues pertinent to the acquisition by a New Jersey public entity via eminent domain of property that either presently requires environmental remediation or has been fully-remediated. The acquisition can take the form of a voluntary conveyance in lieu of condemnation or by forced taking in a condemnation proceeding. Unless varied by agreement between the public entity and the property owner, the relative rights and liabilities between the parties are generally the same in either scenario.

BACKGROUND

Since the Supreme Court's decision in *Housing Authority of the City of New Brunswick v. Suydam Investors, LLC, 177 N.J. 2 (2003),* the principal focus when contaminated property is condemned has been balancing the costs of remediation against the proper valuation for purposes of determining "just compensation" due the property owner. *Cf. U.S. Const. Amend. V; N.J.S.A. Const. Art. 1, par. 20.* At the time *Suydam* was decided, a far greater number of sites remained in active remediation status under various statutory regimes being overseen by an understaffed New Jersey Department of Environmental Protection (the "NJDEP"). In 2009, however, the Site Remediation Reform Act ("SRRA") was adopted and fully implemented as of May 7, 2012. The SRRA wrought sweeping changes to the clean-up of contaminated sites, the most significant of which was the delegation of oversight responsibility to private Licensed Site Remediation Professionals ("LSRPs"). This greatly accelerated the process, enabling numerous contaminated sites to achieve full remediation, with many more to arrive there shortly as completion deadlines commence in May 2019.

So what does this mean in terms of eminent domain jurisprudence?

STANDARD APPLICABLE TO PROPERTY SUBJECT TO ACTIVE REMEDIATION

Suydam established a procedure whereby contaminated property is valued in a condemnation proceeding "as if remediated," with estimated clean-up costs being withheld from the ultimate condemnation award and escrowed to finance the condemnor's subsequent remediation costs. The rationale is that if the fact finder were to reduce the value of a property because of contamination (i.e., value it as "contaminated property"), and the condemnor were also to later seek contribution for remediation costs, the property owner is essentially charged twice for the same thing, thus violating its constitutional right to "just compensation."

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The *Suydam* Court further explained the distinction between a property's value "as if remediated" versus being "as if clean." Id. at 21, n.4. The former permits a discount to address the so-called "remediation stigma" theoretically associated with previously contaminated property. *See also, Inmar Associates, Inc. v. Carlstadt, 112 N.J. 593, 606, 549 A.2d 388 (1988); New Jersey Transit Corp. v. Mecca & Son Trucking Co., 2005 WL 2364811 (N.J. App. Div. 2005); Matter of City of New York v. Mobil Corp., 12 A.D.3d 77, 78 (N.Y. App. Div. 2004).*

The critical counter-balance to the Court's determination that contaminated property should be valued "as if remediated" was its determination that the property owner would nonetheless bear financial responsibility pursuant to the New Jersey Spill Compensation and Control Act, *N.J.S.A. 58:10-23.11 et seq*. (the "Spill Act"). Moreover, that liability is secured by the escrow procedure, at least to the limit of the property's value. Costs above that amount are still recoverable from the property owner, though obviously collectible only if it has other assets.

A later decision, *New Jersey Transit Corporation v. Franco, 447 N. J. Super. 361, 385 (App. Div. 2016)* (a *Suydam* case), illustrates a potential pitfall in seeking to maximize value by establishing a highest and best use that would require remediation to more stringent clean-up standards. In *Franco*, NJTransit condemned defendants' contaminated property, initially with the intention of using it as the location of a shaft for the ARC Commuter Tunnel under the Hudson River. When the project was cancelled, NJTransit re-stated its intended use of the property as being for unspecified public transportation purposes. Its appraiser valued the property at $990,000 based on an industrial highest and best use. The property owner contested that valuation and submitted an appraisal for nearly $10 Million based on a high-rise residential highest and best use. Interestingly, NJTransit then reversed course and agreed with the residential highest and best use.

The case involved a number of complex zoning issues that are beyond the scope of this article; however, an interesting twist was introduced by the property owner's argument that notwithstanding the agreed upon residential highest and best use, NJTransit's proposed use was industrial, so the quantum of the *Suydam* remediation escrow should be predicated on that rather than the hypothetical highest and best use. The difference in estimated respective clean-up costs exceeded $1.5 Million.

The court ultimately determined that the higher escrow was appropriate, reasoning that the property owner would reap a windfall if it were to receive the benefit of the enhanced residential valuation on the one hand, while simultaneously receiving the benefit of the lower industrial remediation cost on the other. The logic of that proposition appears self-evident, but the property owner countered that NJTransit could actually reap a windfall because the escrowed funds would never really be used for that extensive a clean-up. The court rejected this argument, however, on the grounds that the escrow was just that -- an escrow -- and the property owner would be entitled to any surplus funds (plus interest) once the remediation was completed.

An interesting question remains unanswered, however: What of the condemnor that remediates property to the higher residential standard at the property owner's expense even though not compelled to do so by its actual use? There is no present New Jersey reported case law addressing this, but presumably a property owner could seek redress for clean-up costs incurred with its escrowed funds that were arguably spent improvidently in light of the condemnor' s intended use, even though those costs might have been entirely consistent with the hypothetical highest and best use. The condemnee's argument would be that a market developer would look to implement the most cost-effective remedy possible in light of its intended use, and thus a condemnor should be required to do

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the same, rather than implementing a more expensive unrestricted use remedy, motivated largely by the fact that it is effectively spending the property owner's money rather than its own.

STANDARD APPLICABLE TO FULLY REMEDIATED PROPERTY

But what of the property that must be valued "as remediated" rather than the hypothetical "as if remediated" because its status is actually the former? The Appellate Division confronted this issue in 2012 and held that "if a site has already been remediated with the NJDEP's approval and the condemnee is not subject to any additional remediation liability, the condemnee is no longer exposed to what the Suydam Court referred to as a 'double liability', and therefore the special valuation methodology established in that case does not apply." *See Borough of Paulsboro v. Essex Chemical Corporation, 427 N. J. Super. 123, 47 A. 3d. 48 (App. Div.), cert. denied, 212 N.J. 460, 56 A. 3d 395 (2012).*

The property at issue in *Paulsboro* was a former landfill, the closure of which had been previously approved by the NJDEP. The Borough filed a condemnation action and deposited $1.2 Million into court as its estimate of fair market value "as if remediated." When the property owner moved to withdraw the funds, the Borough opposed the application and sought to escrow the funds for anticipated remediation costs per *Suydam*. The court rejected the Borough's position, however, reasoning that "remediation" of the closed landfill within the contemplation of *Suydam* did not include razing it to ground level (which the Borough wanted done and had estimated would cost $60 Million). The court noted that while the property was subject to ongoing maintenance and monitoring requirements, it was not subject to any additional remediation obligations because that had already been completed. There was, accordingly, no justification for an escrow to fund future remediation costs. *Id. at 131*.

Under the present SRRA regime, it would appear at first blush that when a prospective condemnee's LSRP has issued a site-wide Remedial Action Outcome ("RAO") for a remediated property (that is, the LSRP's certification that the remedy accords with NJDEP regulations), the property should be valued pursuant to the standards established in *Paulsboro* rather than *Suydam*, and no remediation escrow should be required. One important caveat to this, however, is that the NJDEP has a period of three years thereafter to conduct an audit of a RAO, and potentially determine that additional remediation is necessary. *See N.J.S.A.58:10C-25*. There is presently no reported case law evaluating the plausibility of a condemnor' s claim for a *Suydam* escrow where a RAO has been issued but the audit period is still running. There would appear to be a certain logic to it since most market purchasers would want protection of some sort against the possibility of further remediation liability, though the appropriate quantum of any such escrow would necessarily be a matter of significant disagreement between condemnor and condemnee. The position of the latter would obviously be that the property has been remediated and no reasonable basis exists to question the conclusions of the LSRP, whose license is on the line in issuing the RAO. Nor would the property owner look kindly upon a request by the prospective condemnee to engage in further invasive investigations of property pursuant to its rights under *N.J.S.A. 20-3.16*. How this tension will be resolved remains to be seen.

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