

<b>Coldiron Fuel Ctr., Ltd. v State of New York</b>
2003 NY Slip Op 30255(U)
March 27, 2003
Court of Claims
Docket Number: 102518
Judge: Ferris D. Lebous
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**STATE OF NEW YORK COURT OF CLAIMS**

**COLDIRON FUEL CENTER, LTD.,**

**Claimant,**

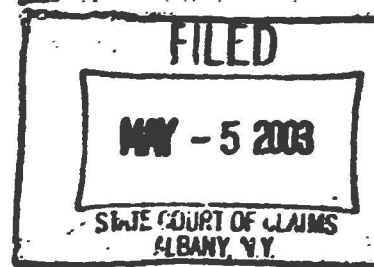
**DECISION**

**-v-**

**THE STATE OF NEW YORK,**

**Claim No. 102518**

**Defendant.**



**BEFORE:**

**HON. FERRIS D. LEBOUS**  
Judge of the Court of Claims

**APPEARANCES:**

**For Claimant:**  
**DeFILIPPO & PROUDFOOT**  
**BY: Frederick J. DeFilippo, Esq., of counsel**

**For Defendant:**  
**HON. ELIOT SPITZER, ATTORNEY GENERAL**  
**BY: James E. Shoemaker, Assistant Attorney General,**  
**of counsel**

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This timely served and filed Claim is for damages resulting from the temporary and permanent appropriation of Claimant's land by the State of New York (hereinafter "State") for purposes connected with the highway system of the State pursuant to Section 30 of the Highway Law and the Eminent Domain Procedure Law (hereinafter "EDPL"). The Claim was filed on May 25, 2000. The premises, consisting of an 81.5 acre parcel of property bisected by New York State Route 17 (hereinafter "Route 17") into two parcels, one located on the north side of Route 17, the other located on the south side, were appropriated in proceedings entitled "Elmira-Lowman S.H. No. 5207", Map No. 107, Parcel No. 134; Map No. 108, Parcel No. 135; Map No. 106, Parcel No. 133; Map No. 113, Parcel No. 140; and Map No. 124, Parcel No. 151. The parties stipulated that the date

of taking was August 12, 1999, and the Court finds that the Claimant, Coldiron Fuel, was the fee owner on the date of vesting and the State has complied with all necessary procedures under the EDPL with regard to service. The Court has made the required viewing of the subject properties.

Claimant is and was the owner of the property by reason of a Deed dated July 7, 1980 from Lewis C. Meyers, Jr., Grantor to Coldiron Fuel Center, Ltd., Grantee, recorded in the Chemung County Clerk's Office on July 10, 1980 in Liber 675 at page 353. The subject property is identified by SBL No. 121.00-1-6 on assessment maps of the Town of Ashland, comprising of an area of approximately 81.5 acres. The site consists of an elongated irregular shaped parcel that is severed by Route 17. That portion of the subject property fronting along the south side of Route 17 contains an estimated 18 acres. The topography is level to rolling, sloping moderately from the south side of Route 17. The property extends southerly to the Chemung River. This portion of the property is bisected by an abandoned railroad right-of-way. Prior to trial the parties agreed that the value to this 18-acre portion of the Claimant's property located on the south side of Route 17 should and would be valued at \$14,000.00. Consequently, the Court finds this value to be appropriate and the remainder of this Decision will address only that portion of the property located on the north side of Route 17.

The north side parcel contains approximately 678 feet fronting along the north side of Route 17 and is intersected at the southeast corner by Oneida Road, which is also known as Old Route 17. This portion of the property is also generally level in topography and at grade with Route 17 to a point that is 200 to 300 feet in depth from the north side of Route 17. A survey map describing the

appropriated parcel located on the north side of Route 17 was stipulated into evidence by the parties (Claimant Ex. 8) and said map and the description set forth therein are adopted by the Court and incorporated herein by reference.

The only portion of Claimant's property that appears developable north of Route 17 is that portion of the property located between the north boundary of Route 17 and the south boundary of property now or formally owned by David Edwards and contains approximately 3.0 acres. The topography of the developed portion of Claimant's property is level and is more or less at grade with Route 17.

The property has been improved by a restaurant and fuel center. Site improvements consist of a large paved parking area containing an estimated 75,000 square feet. There are two single wall underground storage tanks containing 10,100 gallons each, one 8,000 gallon fiberglass tank and three double walled tanks each containing 6,000 gallons. In addition, there is a 12,500 gallon above ground tank for storing diesel fuel. Prior to appropriation, the property was accessed from the southeast corner at the intersection with Oneida Road or Old Route 17 and along Route 17. In addition, the site was accessed at the southwest corner with a curb cut on Route 17. The site was serviced publically and had utilities available, including electric, telephone, gas, and water. No public sewers were available and sewage disposal was handled with an on site system.

Building improvements consisted of a single story framed building with a gross area of 3,994 square feet containing a restaurant and truck stop. This building was divided into two separate units.



**Claim No. 102518****Page 4**

The west side of the structure contained the restaurant with a seating capacity of 84 persons and a gross area of 2,428 square feet over a partial basement. The front entry vestibule of the restaurant measured 4 feet by 7 feet with a side entry vestibule (west side) measuring 5.5 feet by 7 feet. A hallway connected the restaurant to the adjacent truck stop facility on the east side of the building. The restaurant had a large dining area with a linoleum floor covering, a drop ceiling consisting of 2 foot by 4 foot panels and suspended fluorescent lighting fixtures. The walls were covered with wood paneling. In the basement area a gas fired boiler and hot water heater were present. The northerly section of the dining area was also covered with a tile floor with an "L" shaped counter adjacent to the kitchen. The kitchen also was tile covered with a floor drain and a rear door leading to an 8 foot by 8 foot walk-in cooler. Restrooms serviced the facility, covered in ceramic tiles, with vanities and single sink sets.

The east end of the building was used in conjunction with gasoline sales and as a truck stop and convenience store. This area contained a gross area of 1,566 square feet. The front entry led to a small retail area also covered in ceramic flooring, with drop ceiling, fluorescent flush lights and wood paneling. The east wing of the building measuring 8 feet by 20 feet was the sales area for the gasoline and diesel fuel portion of the business. This section had vinyl flooring, a drop ceiling with flush lights, wood paneling, and a Formica counter that extended along three walls. The center section of this building also served as a retail area and there was a door along the east wall leading to the parking area. The rear section of the building contained a small office area and also had an exterior wall. This rear section of the building also had access to a shower room with a concrete floor, drop ceiling, two shower stalls, urinal, and water closet.

The building exterior consisted of vertical wood siding with a flat built-up roof, with a mansard facade along the front, east and west sides. Additional improvements consisted of a 24 foot by 24 foot canopy supported by a single vertical column over the front pump island containing three gasoline pumps. Along the west side was a 24 foot by 48 foot canopy supported by two vertical columns over the pumps for diesel fuel. There were three pumps under this canopy.

All buildings, improvements, and structures located on the subject parcel have been either razed or removed.

The subject property is zoned business to a depth of 500 feet from the north side of Route 17. The remaining land located on the north of the business zone is zoned residential/agricultural which permits agricultural uses and residential development. However, any remaining portions of Claimant's parcel on the north side of Route 17 currently has no access to any road or highway which permits business or commercial traffic. The taking, including the improved gas station, pumps, buildings, and all the pertinent structures, etc., is more accurately described in Claimant's Exhibit 8 which shows the total taking of property improved and used for commercial and business purposes to be a total of approximately 1.1 acres.

In discussing the highest and best use of the property, each of the appraisers states that the highest and best use of the property before the appropriation was for commercial use as a gasoline station/convenience store operation. Both also agree that the highest and best use of the remaining property after the taking is for vacant rural agricultural land that either is landlocked or has no hope

Claim No. 102518

Page 6

for future commercial or industrial development due to the lack of any type of commercial traffic access to the property as it now exists.

The primary question for the Court to determine is what effect the taking had on the remainder. There are a number of differences between the parties which constitute the difference in values between the appraisers' reports. However, the primary difference between the reports pertains to the amount of severance damages attributed to the remainder.

At trial, Claimant called two appraisers to testify. One of the Claimant's appraisers was John S. Miller, of Central New York Appraisal Group, who prepared an appraisal report relative to the above-referenced parcels. The Court heard testimony from Mr. Miller and accepted his appraisal report as Exhibit 11. Mr. Miller prepared an analysis using the income capitalization approach based upon the number of gallons sold at various convenience store locations throughout the Upstate New York Region. Claimant contends that the income capitalization approach which in part calculates gallons of gasoline sold at a subject property in order to arrive at an appropriate value, is an important and accepted method of valuing these types of service stations/convenience stores. The Court is inclined to agree, however, with the Assistant Attorney General that while other states may generally accept gallonage as a method of valuation, New York courts have shied away from the use of gallonage as the sole basis for determining valuation in appropriation proceedings. (*Kozecke v State of New York*, 34 AD2d 599; *Matter of County of Nassau (Old Country Road)*, 57 Misc 2d 488). As the Third Department noted in *Kozecke*, "[t]here can be no doubt that to some extent the number of gallons sold is dependent upon the management of the premises...and is beyond



the control of the fee owner.” (*Kozecke*, 34 AD2d at 599). Moreover, as a general rule, the amount of profit earned from a business conducted on condemned property is not ordinarily admissible in evidence. (*Nichols on Eminent Domain*, Revised 3<sup>rd</sup> Ed., Vol. 5, Section 19.06 [1]). Rather, profits depend on the economy, the amount of capital invested, and the skill and dedication of the entrepreneur along with many other variables. “What one man might do at a profit, another might only do at a loss.” (*Sauer v City of New York*, 44 AD 305, 308). Consequently, the Court has not considered the testimony or appraisal report of Mr. Miller to the extent the same utilized the income capitalization approach, based on calculating the gallons of gasoline sold at the subject site, to arrive at a market value for Claimant’s business. The Court’s sole use of Mr. Miller’s appraisal is that portion of his report which evaluates the land as vacant in both the before vesting and after vesting situations.

At trial, Claimant also called his other appraiser, Robert G. Pogel, of Pogel, Schubmehl, Rogachefsky & Ferrara, LLC. Mr. Pogel’s appraiser report was received into evidence by the Court as Claimant’s Exhibit 9, and he testified in relation thereto. To counter Mr. Pogel’s testimony, the State called John J. Dessena, a certified general real estate appraiser for the State Department of Transportation.

All the appraisers made a determination of the land value by using the comparable sales of vacant land method. Claimant’s appraiser, Miller, examined five sales (sales 1 - 5) and the Defendant’s appraiser examined three sales (sales 1 - 3). Mr. Miller, after making adjustments to his comparable sales, arrives at a range of values from \$137,631.00 to \$157,823.00 per acre. He



arrives at a value of \$151,724.00 per acre for the subject property. Defendant's appraiser, after making adjustments, arrives at a range of values of \$24,500.00 to \$36,303.03 per acre. Defendant's appraiser finds the per acre value of the subject property prior to the vesting date to be \$36,000.00.

Based upon the foregoing, the Court determines that the value of Claimant's property immediately before the taking was \$90,000.00 per acre. The total value of the property before the taking was \$270,000.00 (3 acres times \$90,000.00). Therefore, the Court finds Claimant's direct damages for land taken to be \$99,000.00 (R) (1.1 acres x \$90,000.00).<sup>1</sup>

The Court must next determine if there was any severance damage to the remainder as a result of the taking. It is well-settled where the State takes a portion of property, the claimant is entitled not only to direct damages for the taking but also consequential or indirect damages for the diminution in the value of the remaining property as a result of the taking. (*Fason Properties Inc. v State of New York*, Ct Cl, August 29, 1994, Blinder, J., Claim No. 81102). As a general rule, the measure of damages in a partial taking case is the difference between the fair market value of the whole property before the taking and the fair market value of the remainder after the taking. (*Acme Theatres, Inc. v State of New York*, 26 NY2d 385, 388). Both appraisers agree that the taking of the land and the improvements resulted in some amount of severance damage.

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<sup>1</sup> In reaching its findings, the Court is mindful of the arguments made at trial and has made its determinations based upon a review of the evidence presented herein and the unique character of the subject vis-a-vis the comparable sales.

In determining the before value of the subject property, inclusive of improvements, the appraisers used the sales comparison of improved properties. Claimant's appraiser, Mr. Pogel also used the cost approach and the income capitalization approach. Defendant's appraiser used only the sales comparison of improved properties. The property and its use can not be considered a specialty and therefore the Court will disregard the use of the cost approach. (*Matter of Saratoga Harness Racing v Williams*, 91 NY2d 639, 645-646). An examination of the appraisers' reports shows that the Defendant's appraiser relied on the sales comparison of improved properties method for valuing the subject property. Claimant's appraiser relied a little heavier on the comparable sales method of improved properties in the before situation. The Court, while not disregarding the other methods, will limit its discussion to the comparable sales method of improved properties.

Mr. Pogel testified that it was necessary to view sales of similar uses around the State which were similarly situated to the Claimant's service gasoline convenience store since there were not a lot of comparable properties similarly situated in the Chemung County area. Consequently, he searched around the State for similar uses with close proximity, easy on and off access, to State interstates with similar traffic volumes of approximately 18,000 vehicles per day. Once these comparable sales had been found at various locations, the witness adjusted the same for utilities, location, quality of construction and age. After examining each of five similarly situated parcels and applying the above-referenced adjustments, Claimant's appraiser testified to an adjusted value of the improved property at the time of taking of \$960,000.00.

Mr. Dessena, relying most heavily on the comparable sales approach, in viewing their various comparable sales concluded an adjusted value of approximately \$645,500.00. However, as noted during cross-examination, and as the Court so finds, the State's reliance on the comparable sales used in their report failed to consider a number of factors which were applicable to the subject property and which were properly considered by the Claimant's appraiser. More specifically, with regard to the comparables contained in the State's appraisal, no traffic counts were performed, there were no general limiting conditions, no diesel fuel sales occurred at any of these comparables and none of the comparables used by the State could accommodate eighteen wheeler tractor trailer traffic.

After considering the testimony and proof presented at trial, and that of the Claimant's appraiser which the Court found more credible, the Court finds that the fair and reasonable market value of the subject property before the taking was \$840,000.00. The Court attributes a value of \$270,000.00 to the land and a value of \$570,000.00 to the building and improvements.

In analyzing the after value of the subject property, the Court notes that the parties' appraisers opine that the highest and best use for the subject property has changed. All of the improvements, including the buildings, were taken by the appropriation. Therefore, the total value of the buildings and the improvements must be awarded to the Claimant.<sup>2</sup> After the appropriation, the remaining portion of the parcel on the north side of Route 17 consisted of approximately 63.5 acres. Of that total acreage, 61.5 acres is zoned residential/agricultural and approximately 2 acres

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<sup>2</sup>The Court notes that claimant has not pursued a fixture claim and did not submit a report for fixtures lost.



is zoned commercial. The commercial portion of the acreage north of Route 17 has lost access to Route 17. This commercial acreage has no other commercial access available by local or county roads. The Court finds these acres are unable to be developed regardless of commercial access. The opinion of the appraisers is, and the Court finds, that the highest and best use of this property is for limited recreational use.

In valuing the land after the vesting date, Defendant's appraiser examined the same sales as in the before situation, and Claimant's appraiser, Mr. Pogel analyzed three sales. Despite the lack of any commercial access and the limited use of the commercial property, Defendant's appraiser still finds a value of \$3,000.00 per acre of the commercial property. After the vesting date, the Claimant's appraiser finds no difference between the commercial property and the remaining 61.5 acres north of Route 17 and values the entire parcel as one unit. The Court agrees with the Claimant's approach to value in the after situation. While the property may be zoned commercial, there is no commercial use of the property. At this point, this portion of land is indistinguishable from the remaining acreage north of Route 17. Thus, the Court adopts the value of \$300.00 per acre after the appropriation or \$19,000.00(R) (63.5 acres x \$300.00 per acre). However, this finding overvalues this portion of land in trying to determine damages. The Court must value the 1.9 acre remainder in order to arrive at the appropriate damage figure. Using the per acre price of \$300.00, the Court finds the after value of the 1.9 acre remainder to be \$570.00. The Court finds a total damage to the land of \$269,450.00(R). This figure is comprised of direct damages of \$99,000.00 and severance damage in the sum of \$170,450.00 (\$269,450.00 - \$99,000.00).



Claim No. 102518

Page 12

As previously stated, the improvements and the buildings were taken by the Defendant. The Court awards the Claimant damages in the sum of \$570,000.00. This figure represents the value of the buildings and the improvements as found by the Court. Consequently, the Court finds that the amount by which Claimant has been damaged by this appropriation relative to the parcel located on the north side of Route 17 is \$839,450.00 (\$570,000.00 + \$269,450.00).

As for the parcel located on the south side of Route 17, it was mentioned earlier that the parties stipulated that the 18 acres of land located on the south side had basically been reduced to scrub land, totally lacked access to any type of roadway or thoroughfare, and agreed that \$14,000.00 was a fair and accurate amount by which Claimant had been damaged for that portion of the appropriation. As such, the total amount by which the Claimant has been damaged by takings of parcels located on both the north and south sides of Route 17 totals \$853,450.00 (\$839,450.00 + \$14,000.00).

In addition to the fee acquisition, the State also acquired a temporary easement for 2.185 acres of the subject property. Claimant is entitled to the fair rental value for the area of the temporary easement. The Court concludes that the value of the temporary easement is \$65.55 per annum or \$5.50(R) per month. The value of the 2.185 acres at \$300.00 per acre is \$655.50. The Court accepts the appraiser's rate of return of 10% and finds the annual rental to be \$65.55. Dividing this amount by twelve months, the Court finds a monthly rent of \$5.50(R).

Claim No. 102518

Page 13

Accordingly, it is the finding of the Court that Claimant is entitled to an award of \$853,450.00 with statutory interest thereon from the vesting date of August 12, 1999 to February 12, 2000 and then again from May 25, 2000, to the date of decision herein and thereafter to the date of entry of judgment for the permanent appropriation; and \$5.50 per month for the temporary easement from the vesting date of August 12, 1999, until the easement was/is extinguished, with appropriate interest.

Any motions on which the Court previously reserved or which have not heretofore been decided are hereby denied.

The award to the Claimant herein is exclusive of the claims, if any, of any persons other than owners of the appropriated properties, their tenants, mortgagees or lienors having any right or interest in any stream, lake, drainage, irrigation ditch or channel, street, road, highway or public or private right of way or the bed thereof within the limits of the appropriated properties or contiguous thereto; and is exclusive also of claims, if any, for the value of or damage to easements or appurtenant facilities for the construction, operation or maintenance of publicly owned or public service electric, telephone, telegraph, pipe, water, sewer or railroad lines.

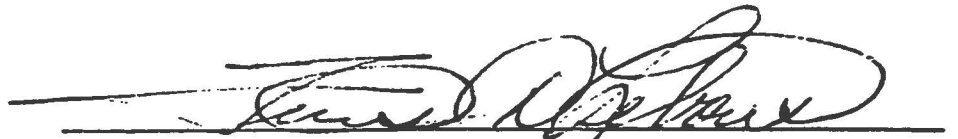
The Chief Clerk is directed to enter judgment in favor of Claimant as set forth above and to the extent that Claimant paid a filing fee, it may be recovered pursuant to Court of Claims Act § 11-a (2).

## DECISION

Claim No. 102518

Page 14

ENTER JUDGMENT ACCORDINGLY.

Binghamton, New York  
March 27, 2003A handwritten signature in black ink, appearing to read "Ferris D. LeBous", is written over a horizontal line. The signature is stylized and cursive.FERRIS D. LEBOUS  
Judge of the Court of Claims