

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5586-06T2

NEW JERSEY TRANSIT CORPORATION,
a body corporate and politic,

Plaintiff-Appellant,

v.

AMB INSTITUTIONAL ALLIANCE FUND II,
a Delaware Limited Partnership,

Defendant-Respondent,

and

REALIASTAR LIFE INSURANCE COMPANY,
a Minnesota Corporation, and
TOWNSHIP OF SECAUCUS, IN THE COUNTY
OF HUDSON, a municipal corporation
of the State of New Jersey,

Defendants.

Argued December 16, 2008 – Decided May 18, 2009

Before Judges Parker, Yannotti and LeWinn.

On appeal from Superior Court of New Jersey,
Law Division, Hudson County, Docket No. L-
5591-04.

Dale Laster Lessne, Deputy Attorney General,
argued the cause for appellant (Anne
Milgram, Attorney General, attorney; Lewis
A. Scheindlin, Assistant Attorney General,
of counsel; Ms. Lessne, on the brief).

James M. Turteltaub argued the cause for respondent (Carlin & Ward, attorneys; Mr. Turteltaub and John J. Carlin, Jr., of counsel; Mr. Turteltaub, Mr. Carlin and Scott A. Heiart, on the brief).

PER CURIAM

In this condemnation action, plaintiff New Jersey Transit Corporation (NJT) appeals from an order entered on May 25, 2007 denying its motion for a new trial after a final judgment had been entered memorializing a jury award of \$628,500 to defendant. We affirm.

I

The facts relevant to this appeal are as follows. NJT sought to acquire property for the Secaucus Transfer Project, which involved adding tracks to the existing northeast corridor line that runs from Boston to Washington, D.C., construction of the Secaucus Rail Station and a connection of the new rail line with an existing one. The additional tracks would have created a four-track grade crossing on New County Road, which would have posed a safety problem. To resolve the safety issue, NJT proposed to construct a bridge to elevate New County Road over the four tracks. The bridge was to be situated entirely on county property.

NJT specifically sought to condemn 1,047 square feet of property owned by defendant AMB Institutional Alliance Fund II

(AMB) and take a utility easement and a temporary construction easement on the same property. NJT needed the corner of the property owned by AMB to improve the intersection of Castle Road and New County Road. Pursuant to the Eminent Domain Act, N.J.S.A. 20:3-1 to -50, NJT took possession of AMB's property and, during construction utilized the property as a temporary construction area, resulting in the temporary construction easement. The project was completed in July 2003.

On March 10, 2004, NJT offered AMB \$88,550 for the property and easements. When the parties were unable to negotiate an "agreed-upon price," NJT filed a condemnation action on October 28, 2004. The complaint sought the appointment of commissioners to determine an appropriate amount of compensation. On December 17, 2004, the trial court entered judgment and appointed commissioners. The judgment provided that NJT "is authorized to exercise and has duly exercised its power of Eminent Domain to acquire the property" from AMB. The court appointed three commissioners to appraise the property and determine the fair compensation to be paid.

On March 20, 2006, the commissioners determined that \$131,500 was fair compensation. AMB appealed and demanded a jury trial. Before trial, NJT moved in limine to bar one of AMB's experts from testifying with respect to lost profits, lost

parking, lost vehicular access and the value of the property because the expert allegedly combined compensable and non-compensable damages in his calculations. The motion was denied on March 20, 2007 and the matter proceeded to trial. At trial, the following evidence was presented.

AMB owns 3.44 acres.¹ A 103,980 square foot building, divided into warehouse and office space, is located on the property. The property fronts on Castle Road to the east and New County Road to the south. There are nine loading docks facing Castle Road and four at the back of the property, which were previously used for rail loading. At the rear of the building, there is a concrete pad with a large garbage dumpster, extending from AMB's property to adjacent land owned by Command Enterprises (Command).

Prior to the construction and condemnation, AMB had unrestricted access from New County Road because there were no driveways or curb cuts. Consequently, vehicles could enter the property and drive to the rear of the building to access the dumpster. There was parking along the entire length of the New County Road side of the building.

¹ The official NJT map indicates the property consists of 3.44 acres, while the Tax Map indicates the property consists of 4.20 acres and the McGuire Appraisal states that the acreage is 3.246.

AMB's expert, Michael J. Spillane, P.E., P.L.S., a licensed engineer, land surveyor and planner, testified that NJT built a parapet along the length of the new bridge and newly-elevated New County Road, which eliminated direct access to the property from New County Road. Consequently, access to the property was only available along Castle Road. Spillane testified that the distance between the building and the property line was only 9.1 feet, which could not accommodate a turning radius for large trucks, particularly for the garbage trucks trying to reach the dumpster. Spillane also testified that the loading docks in the rear of the property would not be accessible. Spillane further noted that safety vehicles, such as fire trucks and ambulances, would not be able to reach the rear of the building either.

Spillane testified that by losing access to the rear of the building, the structure became "functionally obsolete" because

what you have now is a . . . building with access from one side and not even halfway access to the rear. There's not even the ability to just drive around the building to access the back of the building. You can't get to the back of this building without going on somebody else's property, whether it's the county road right of way or the neighbor's, you have to encroach on somebody's property to get to the back of your building.

Spillane confirmed that prior to construction, the property enjoyed unrestricted access from New County Road. He testified

that AMB had twenty-one parking spaces fronting on New County Road prior to construction. Although NJT claimed that it could replace four of these spaces along the side of the building, Spillane indicated that the designated area for the spaces was insufficient and, at best, one parking space could be placed on the side of the building – resulting in a loss of twenty spaces. He acknowledged that the 9.1 foot distance between the southwest corner of the building and the right-of-way had not changed, but he noted that the addition of the elevated roadway, bridge and parapet eliminated access to the rear of the building altogether, albeit access from Castle Road remained unchanged.

Charles Klatskin, a real estate broker and developer who specializes in industrial properties, testified on behalf of AMB that he showed AMB's property to potential clients during the three-month construction period. The biggest negative observed by prospective tenants was the lack of parking for the building. Klatskin asserted that NJT's temporary easement was "killing the building" and that NJT should have been obligated for the full rental value of the building during the construction period. Klatskin acknowledged that AMB had received a waiver for thirty-seven parking spaces on the property, rather than the sixty-six spaces required under the zoning ordinance, but the waiver predated the construction and was not relevant to the taking.

Richard M. Chaiken, M.A.I., C.R.E., a real estate appraiser and consultant, prepared a report on behalf of AMB estimating the market value of the property taken by NJT and damages to the remainder. Chaiken estimated that just compensation for the taking was \$655,000, consisting of the following components: \$155,000 for the temporary construction easement and \$500,000 for the parcel subject to the fee taking by NJT. His estimate for the value of the temporary construction easement reflected the elimination of all parking spaces along Castle Road and at the corner of New County Road during the construction period. In Chaiken's opinion, the temporary easement "effectively destroyed the utility of the building. No one would rent the building and nobody would rent the space to anybody else."

Todd Robertson Edwards, Senior Program Manager for NJT, testified that the corner of the property was acquired in order to build a new intersection between the New County Road bridge and Castle Road. Pursuant to the construction easement, NJT built a detour road on the New County Road side of AMB's property to allow cars to continue to travel through the area while the bridge was under construction. Edwards acknowledged that construction of the bridge eliminated access to the property from New County Road and that NJT did not make the administrative application required for revocation of AMB's

access to New County Road. He claimed, however, that the bridge was not built on AMB's property, nor did it alter the 9.1 foot distance between the building and the property line.

Thomas Martin, Project Manager for NJT, developed the plans and specifications, obtained bids from contractors and coordinated the construction activities for the project. He testified that AMB never complained about lack of parking on its property. He did, however, acknowledge that AMB had expressed its concern over the distance between the building and the proposed parapet. To address this concern, NJT constructed the parapet seventeen feet, ten inches from AMB's building, rather than on the property line. He further acknowledged that the right of entry agreement between NJT and AMB provided for "a suitable turning radius for a fifty foot long vehicle . . . to negotiate the turn around the southwesterly corner of the building from New County Road heading in a westerly direction making a right hand turn to the rear of the building." NJT never acquired the necessary property rights from AMB's neighbor, however, to permit construction of that "suitable turning radius."

Albert F. Chanese, M.A.I., an appraisal expert, prepared a report for NJT in which he used a sales comparison approach to value the corner of the property taken by NJT. Chanese estimated

that the 1,047 square feet taken was valued at \$8.72 a square foot, for a total value of \$9,130. In his view, the utility easement was valued at \$13,600 and the temporary construction easement at \$10,625. NJT added \$19,200 as rent of twelve parking spaces it took during the construction. In Chanese's opinion, the total value of the taking and the easements amounted to \$66,155. In his opinion, there were no damages to the remainder of the property as a result of the taking.

The jury found that the value of the property taken in fee was \$11,000; damage to the remainder as a consequence of the taking was \$487,500; and the construction easement was valued at \$130,000. In total, the jury awarded \$628,500 to AMB.

After the verdict, NJT's motion for a new trial was denied and it appealed, arguing:

POINT I

AMB IS NOT ENTITLED TO DAMAGES DUE TO ACCESS SINCE ITS PROPERTY HAS REASONABLE ACCESS IN ACCORDANCE WITH THE COMMON LAW PRINCIPLES OF ACCESS

POINT II

THE COURT ERRONEOUSLY APPLIED THE STATE HIGHWAY ACCESS MANAGEMENT ACT AND THE ACCESS MANAGEMENT CODE TO THIS CASE SINCE NEW COUNTY ROAD IS A COUNTY ROAD

A. AMB is Not Entitled to Damages for Lost Parking on Its Property for Which There Were No Approvals

POINT III

THE TRIAL COURT IMPROPERLY . . . INSTRUCTED THE JURY TO CONSIDER DAMAGES TO THE PROPERTY AS A RESULT OF A PROJECT WHICH WAS CONSTRUCTED COMPLETELY ON COUNTY PROPERTY

POINT IV

ALLOWING AMB'S APPRAISAL EXPERT, CHAIKEN, TO TESTIFY AS TO BOTH COMPENSABLE AND NON-COMPENSABLE ELEMENTS, WAS REVERSIBLE ERROR BY THE TRIAL COURT

POINT V

THE JURY INSTRUCTIONS INCLUDED ERRONEOUS APPLICATIONS OF LAW AND WERE MISLEADING, THEREBY LEADING TO A VERDICT THAT WAS UNJUST AND PREJUDICIAL TO NJ TRANSIT

II

NJT initially argues that common law principles of access apply here, rather than the State Highway Access Management Act, N.J.S.A. 27:7-89 to -98 (Management Act), or N.J.A.C. 16:47-1.1 to -9.1 (Access Code), because New County Road is a county road, not a state road. NJT maintains that AMB is not entitled to compensation for "loss of access" since AMB continues to have reasonable access to its property via Castle Road.

The trial court determined that the Management Act applied to county roadways, specifically New County Road, pursuant to N.J.S.A. 27:16-1, which provides that counties may adopt an access management code that complies with the provisions of the Management Act. The trial court emphasized that "any county

access management code must comply with the [Management Act].
Any lesser standard would be ultra vires[.]"

The Management Act provides that:

Every owner of property which abuts a public road has a right of reasonable access to the general system of street and highways in the State, but not a right to a particular means of access. The right of access is subject to regulation for the purpose of protecting the public health, safety and welfare.

[N.J.S.A. 27:7-90(e).]

The Management Act further provides that alternative access for industrial properties will be considered reasonable if the following condition is met:

[A]ccess onto any improved public street, highway or access road or easement across an industrial access road, provided that the street, highway or access road is of sufficient design to support necessary truck and employee access as required by the industry.

[N.J.S.A. 27:7-94(c)(2).²]

Relying on High Horizons Dev. Co. v. Dep't of Transp., 120 N.J. 40, 49 (1990), NJT notes that "a property owner is not entitled to access to his land at every point between it and the highway but only to free and convenient access to his property."

² NJT's brief cites to N.J.S.A. 27:7-94(c)(1), the Management Act's provision concerning commercial property. AMB's property is industrial, however, not commercial and is governed by N.J.S.A. 27:7-94(c)(2).

NJT claims that if the condemnation action merely limits access but does not deny reasonable access to the property, the owner is not entitled to compensation, citing State v. Charles Inv. Corp., 143 N.J. Super. 541, 544 (Law Div. 1976), aff'd o.b., 151 N.J. Super. 14 (App. Div. 1977), aff'd o.b., 76 N.J. 86 (1978). The cases relied upon by NJT, however, refer to commercial properties, not industrial.

N.J.S.A. 27:7-94(c)(2) provides that alternative access to industrial premises will be reasonable if it is "of sufficient design to support necessary truck and employee access as required by the industry."

NJT claims that AMB is precluded from recovering for loss of access because NJT did not acquire access rights in the condemnation action. NJT did not raise this issue in the trial court, however, and it is, therefore, subject to the plain error rule. R. 2:10-2.

NJT points to State v. Orenstein, 124 N.J. Super. 295, 298-99 (App. Div.), certif. denied, 63 N.J. 588 (1973), to support its contention that when the description of the property to be acquired attached to the complaint does not seek access rights, AMB cannot claim loss of access damages. In Orenstein, we found that the trial court erred in allowing the jury to determine whether the State's taking included the defendant's easement

over neighboring land. Id. at 299. We emphasized that the jury could only decide value or damages of the taking and any "claim that the condemnor is in fact taking more property and rights than those described in the complaint . . . must be presented to and decided by the court before it enters judgment appointing condemnation commissioners." Id. at 298.

Here, the jury was charged with determining just compensation owed to AMB as a result of the project and its effect on AMB's property. NJT did not "acquire" AMB's access rights, but rather infringed upon AMB's access rights to New County Road. AMB, therefore, was not obligated to raise this issue before the court entered its judgment appointing commissioners. Rather, the court correctly considered the loss of access rights within the ambit of just compensation.

NJT's failure to include "access rights" in its complaint does not justify the omission. NJT's program manager, Edwards, acknowledged that the construction eliminated access to the rear of the property from New County Road. Consequently, it was not unreasonable for the jury to conclude that loss of access rights should be included in its valuation of the property rights taken, even though NJT did not include access rights in its complaint.

III

NJT next argues that since the Management Act and the Access Code generally applied to State highways, AMB had the burden of proving that the Access Code was adopted by Hudson County, which has jurisdiction over New County Road. The trial court determined that the Management Act applied to county roadways, specifically New County Road, pursuant to N.J.S.A. 27:16-1(i), which provides that counties may adopt an access management code that complies with the provisions of the Management Act. The court further emphasized that "any county access management code must comply with the [Management Act]. Any lesser standard would be ultra vires." We agree. R. 2:11-3(e)(1)(E).

IV

NJT further argues that the trial court erred in instructing the jury on the applicability of the "grandfather permit" provision of the Access Code. The "grandfather permit" is defined as:

the access permit assumed to exist for a lot with access prior to July 1, 1976 when no subsequent or previous permit has been issued for the lot. A grandfathered permit allows continuation of the lot access and use in existence on July 1, 1976 Grandfathered permits are subject to the same regulations as actual permits.

[N.J.A.C. 16:47-1.1.]

"Grandfathered clauses reflect the legislative policy that the new regulatory process shall be effective prospectively." City of Linden v. Benedict Motel Corp., 370 N.J. Super. 372, 391 (App. Div.) (quoting Paul Kimball Hosp. v. Brick Township Hosp., 86 N.J. 429, 440 (1981)), certif. denied, 180 N.J. 356 (2004). In essence, the Code provides that exemptions from provisions regarding parking lot access and use are permissible if the parking spaces existed on July 1, 1976. Ibid. (citing N.J.A.C. 16:47-1.1).

In situations where parking spaces were not initially approved, equitable estoppel may nonetheless be employed "where interests of justice, morality and common fairness clearly dictate that course." Id. at 393 (quoting Middletown Twp. Policemen's Benevolent Ass'n v. Twp. of Middletown, 162 N.J. 361, 367 (2000)). Essentially, the principle of estoppel "is that one may, by voluntary conduct, be precluded from taking a course of action that would work injustice and wrong to one who with good reason and in good faith has relied upon such conduct." Ibid. (quoting Summer Cottagers' Ass'n of Cape May v. City of Cape May, 19 N.J. 493, 503-04 (1995)).

By virtue of Edwards' testimony, it was clear that NJT knew that the construction on New County Road would diminish parking spaces on the property. Edwards testified that prior to the

beginning of construction, he had discussions with AMB and the prior owner of the property respecting parking conditions.

We are satisfied that the trial court properly allowed the jury to determine whether the "grandfather permit" applied to parking on the property.

V

NJT further contends that AMB is not entitled to damages for the remainder of the property because the project was built entirely on county property and the taking of the corner did not adversely affect the remainder of the property. NJT maintains that the trial court erred in allowing the jury to consider damages to the remainder of AMB's property.

"Property owners are entitled to just compensation for land taken in condemnation." State v. Weiswasser, 149 N.J. 320, 329 (1997) (citing State v. Silver, 92 N.J. 507, 513 (1983)). "[W]here only a portion of a property is condemned, the measure of damages includes both the value of the portion of land actually taken and the value by which the remaining land has been diminished as a consequence of the partial taking." Ibid. (quoting Silver, supra, 92 N.J. at 514).

In reliance on State v. Van Nortwick, 287 N.J. Super. 59 (App. Div.), certif. denied, 143 N.J. 320 (1995), the court instructed the jury to consider any diminution in the value of

the remainder property as a result of the taking. NJT argues that the trial court's reliance on Van Nortwick is misplaced. We disagree.

Van Nortwick was a condemnation case involving acquisition of part of the defendant's property for a highway improvement project in Ocean County. Id. at 62. We held that the defendant was permitted to present evidence concerning the impact the taking had on the remainder of the property, particularly vehicular maneuverability and limitations on future design options for the building. Id. at 63.

NJT notes that in Van Nortwick, the State acquired a wide strip across the property's entire frontage, which significantly reduced the potential buildable area and the property's access rights. In contrast, NJT maintains that it took only a small corner of AMB's property. In our view, the size of the taking does not change the principle that the diminution in value of the remaining property must be included in the measure of damages where only a portion of the property is taken. Id. at 71. The trial court correctly instructed the jury to consider damages to the remainder of the property.

VI

NJT next argues that the trial court erred in allowing AMB's expert, Chaiken, to testify with respect to both

compensable and non-compensable elements. NJT raised this issue in its pre-trial in limine motion to exclude Chaiken's expert report and testimony. The trial court denied the motion and NJT renewed it after Chaiken's testimony. The motion was again denied. NJT now argues that the trial court erred in allowing Chaiken's testimony on "alleged business loss during the period of the temporary construction easement."

Chaiken, however, did not specifically testify to "alleged business loss." Rather, he testified that loss of access to the property and all available parking along New County Road "effectively destroyed the utility of the building." Chaiken testified that "[n]o one would rent the building . . . for the duration of this temporary easement." He estimated "that the fair economic rent . . . would be 103,980 square feet at \$6.00 a square foot" for a total of \$155,000.

This testimony does not address business losses as NJT claims. NJT relies on a Law Division decision in State v. Sun Oil Co., 160 N.J. Super. 513, 527 (Law Div. 1978). NJT's reliance is misplaced, however, because there the court stated that "[w]here a temporary construction easement is taken for highway purposes and the property is rented, the rental value of the property taken is the normal measure of damages and is

awarded for the period taken." Id. at 527. Chaiken's testimony was consistent with Sun Oil.

We are satisfied that the trial court properly allowed Chaiken's testimony with respect to the loss of rental value for the property during the temporary construction easement.

VII

Finally, NJT argues that the jury instructions were erroneous and misleading, resulting in an unjust and prejudicial verdict. Specifically, NJT maintains that the jury was erroneously instructed (1) to apply a standard from the Access Code as to the "grandfathered permit" concerning AMB's parking spaces; (2) to determine whether there were damages to the remainder when there was only a small taking of 1,047 square feet at the corner of the property; (3) to determine whether AMB was entitled to compensation without first deciding if a compensable property interest was taken; (4) to consider that "[a]s a result of the taking and New Jersey Transit's project, the subject property has lost direct access to County Line Road" and "the right-of-way [is] a public road capable of being accessed by the defendant owner, AMB," thereby misinforming the jury that there was a second "taking;" (5) to consider that AMB was entitled to damages for diminished value in the remainder of the property as a result of the fee taking; and (6) to consider


the loss of rental value during the temporary construction easement as part of AMB's damages.

We have previously addressed each of these issues and need not discuss them further in the guise of erroneous jury instructions. We have carefully considered NJT's arguments with respect to the jury charges and we are satisfied that they lack sufficient merit to warrant further discussion in this opinion. R. 2:11-3(e)(1)(E).

Our review of the entire jury charge satisfies us that "the instructions clearly and correctly state the principles of law pertinent to the issues." Kaplan v. Haines, 96 N.J. Super. 242, 251 (App. Div. 1967) (citing Abramsky v. Felderbaum, 81 N.J. Super. 1, 7 (App. Div.), certif. denied sub nom. Abramsky v. Esso Standard Oil Co., 41 N.J. 246 (1963)).

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION