Unreported Disposition
Slip Copy, 58 Misc.3d 1210(A), 2018 WL 413750 (Table), 2018 N.Y. Slip Op. 50024(U)

This opinion is uncorrected and will not be published in the printed Official Reports.

***1** In the Matter of the City of New York, Relative to Acquiring Title in Fee Simple absolute in certain Real Property, where not heretofore acquired, for New Creek Bluebelt, Phase 4, Within an area generally bounded by Hylan Boulevard on the West, Slater Boulevard on the North, Olympia Boulevard on the East, and Hunter Avenue on the South, in the Borough of Staten Island, City and State of New York.
Ivan Galarza, Claimant,
v.
The City of New York, Condemnor.

Supreme Court, Richmond County
(CY) 4018/07
Decided on January 12, 2018

CITE TITLE AS: Matter of City of New York (New Cr. Bluebelt, Phase 4)

ABSTRACT

Constitutional Law
Taking of Property
Wetlands Regulations Not Background Principles of New York Property Law

Constitutional Law
Taking of Property
Wetlands Regulations—Owner who acquired property after enactment of wetlands regulations not barred from challenging regulations as regulatory taking.

City of New York, Matter of (New Cr. Bluebelt, Phase 4), 2018 NY Slip Op 50024(U). Constitutional Law—Taking of Property—Wetlands Regulations Not Background Principles of New York Property Law. Constitutional Law—Taking of Property—Wetlands Regulations—Owner who acquired property after enactment of wetlands regulations not barred from challenging regulations as regulatory taking. (Sup Ct, Richmond County, Jan. 12, 2018, Saitta, J.)

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OPINION OF THE COURT

Wayne P. Saitta, J.

At issue in this condemnation proceeding is the just compensation to be awarded to Claimant, IVAN GALARZA, for the taking of the subject property, located on Staten Island (Block 3714, Lot 34). The Condemnor, THE CITY OF NEW YORK, took title on June 11, 2007 ***2** (the vesting date). The court viewed the property on October 24, 2016, and a non-jury trial was held on, October 31, November 1, 2, and 4, 2016.

FACTS

The CITY acquired the subject property as part of the CITY's New Creek Bluebelt Phase 4 project. The subject property is a vacant lot, approximately 21,000 square feet, 100% of which is covered by designated wetlands. The lot fronts on Seaver Avenue a built street and on Nugent and Filbert Avenues, mapped but unbuilt streets.

The subject property was regulated as wetlands as of the vesting date. The Claimant IVAN GALARZA purchased the property at a tax lien foreclosure auction in 2003, after the enactment of the wetland regulations.

Both parties agree that because of the wetlands regulations, the owner of the property would not be able to obtain a permit to build on the property, and the highest and best use of the property, as regulated, was to remain vacant.

The parties disagree however, as to whether the restrictions on the property imposed by the State's wetlands regulations, constituted a regulatory taking.

The Court must first determine whether there was a reasonable probability that the wetland regulations would be found to be a taking.

A property restricted by wetlands regulations is valued as restricted unless the Claimant can demonstrate that there is a reasonable probability that the wetlands regulations would be held to be a regulatory taking. If so, the Claimant is entitled to an increment above the regulated value, representing an additional amount a reasonable buyer would pay for the probability of a successful judicial determination that the regulations were confiscatory. *Chase Manhattan Bank v State of New York*, 103 AD2d 211, 479 NYS2d 983 (2nd Dept. 1984); *Berwick v State of New York, (Berwick I)* 107 AD2d 79, 486 NYS2d 260, (2nd Dept. 1985); *Matter of City of New York, Staten Island Bluebelt Phase 2 (Fink)* Index 4012/04 (Su. Ct. Kings 2007).

It is the Claimant's burden to establish that there is a reasonable probability that the regulations would be found to constitute a taking. *de St. Aubin v Flacke,* 68 NY2d 66 (1986); *Adrian v Town of Yorktown,* 83 AD3d 746, 920 NYS2d 411, (2nd Dept. 2011).

A preliminary issue necessary to determining whether there is a reasonable probability that a constitutional challenge to the wetland regulations would succeed, is whether the fact that the Claimant purchased the property after the enactment of the wetland regulations bars him from making a regulatory taking claim.

The United States Supreme Court in the case of *Lucas v South Carolina Coastal Council,* 505 US 1003, 112 S Ct 2886 (1992), held that "a logically antecedent inquiry" into whether a regulation constitutes a taking is whether the proscribed use was part of the title to begin with. *Id* at 1027.

In other words, before determining whether the regulation deprives a property of owner of all economically beneficial use of their land, the Court must determine whether the right to put that property to the use or activity prohibited by the regulation was part of the bundle of rights that came with acquisition of the property.

The Supreme Court held that for a regulation that prohibits all economically beneficial use of land not to constitute a taking it,

"cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership. A law or decree with such an effect must, in ***3** other words, do no more than duplicate the result that could have been achieved in the courts--by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise." *Id* at 1029.

The Supreme Court in *Lucas* did not define what is a background principle of property law, and returned the matter to the state court to determine.

The Supreme Court in *Lucas* explained that regulations that prohibit uses that had always been unlawful would constitute codifications of background principles, which would not constitute a regulatory taking. *Id* at 1030. Although the majority in *Lucas* focused on nuisance, and noted that background principles "cannot be newly legislated or decreed", the Court did not explicitly limit background principles to common law.

In his concurrence Justice Kennedy opined that statutes could constitute background principles stating,

"[t]he common law of nuisance is too narrow a confine for the exercise of regulatory power in a complex and interdependent society. *Goldblatt v. Hempstead,* 369 U.S. 590, 593, 82 S Ct 987, 989, 8 L.Ed.2d 130 (1962). The State should not be prevented from enacting new regulatory initiatives in response to changing conditions, and courts must consider all reasonable expectations whatever their source" *Id* at 1035.

Justice Blackmun in his dissent noted that common law nuisance does not have a clear definition but is very case specific noting, "[o]nce one abandons the level of generality of *sic utere tuo ut alienum non laedas, ante,* [use your own property in such a manner as not to injure that of another] one searches in vain, I think, for anything resembling a principle in the common law of nuisance.” *Id* at 1055.

Subsequent to the decision in *Lucas,* the New York State Court of Appeals in four cases decided the same day, that are referred to as the “takings quartet”, held that an owner who takes title after the enactment of a regulation cannot challenge that regulation as a taking, and that in identifying the background rules of State property law, a court should look to the law in force, whatever its source, when the owner acquired the property. *Gazza v NYS Dept. of Environmental Conservation*, 89 NY2d 603, 657 N.Y.S.2d 555 (1997); *Basile v Town of Southampton*, 89 NY2d 974, 655 N.Y.S.2d 877 (1997); *Anello v. Zoning Bd. of Appeals,* 89 NY2d 535, 656 N.Y.S.2d 184 (1997); *Kim v City of New York,* 90 NY2d 1, 659 N.Y.S.2d 145 (1997).

Gazza and Basile both involved claims that New York State wetland regulations constituted regulatory takings.

The Court of Appeals in *Gazza,* held that “a promulgated regulation forms part of the title to property as a preexisting rule of State law. While the remaining property interests may still be freely transferred by the landowner, a purchaser's title is necessarily limited to and by those property interests alone.” *Gazza* at 614.

The Court in *Basile* held, “[e]nactments which are legitimate exercises of police power, such as the wetlands regulations here, do not effect a taking when a purchaser acquires property subject to such regulations.” *Basile* at 976.

The Court in *Anello* held, “[p]etitioner purchased the property in 1991, two years after the steep-slope ordinance was enacted. This statutory restriction thus encumbered petitioner's title from the outset of her ownership and its enforcement does not constitute a governmental taking of any property interest owned by her.” *Anello* at 540.

In *Kim,* the Court of Appeals rejected that the idea that background principles were ***4** limited to common law, and held,

“[g]iven the theoretical basis of the logically antecedent inquiry--namely, “the State's power over * * * the 'bundle of rights' that [property owners] acquire when they obtain title” (*Lucas v. South Carolina Coastal Council, supra,* 505 U.S. at 1027, 112 S Ct at 2899)--we can discern no sound reason to isolate the inquiry to some arbitrary earlier time in the evolution of the common law. It would be an illogical and incomplete inquiry if the courts were to look exclusively to common-law principles to identify the preexisting rules of State property law, while ignoring statutory law in force when the owner acquired title“ *Kim* at 7, 148.

This New York rule, known as the “notice rule”, had the virtue of being clear and easily applied. Where an owner took title after the enactment of a regulation, they could not challenge that regulation as a taking because whatever the regulation prohibited was not part of the bundle of rights they acquired.

Subsequently, the United States Supreme Court rejected a per se notice rule in *Palazzolo v Rhode Island,* 533 US 606, 121 S Ct 2448 (2001), which involved a claim by a property owner that state coastal wetlands regulations, which prevented development of his property, constituted a regulatory taking.

The Court explained that regulations that are unconstitutional,

“do not become less so through passage of time or title. Were we to accept the State's rule, the post-enactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable. A State would be allowed, in effect, to put an expiration date on the Takings Clause. This ought not to be the rule“ *Id* at 627, 2462-3.

The Court in *Palazzolo,* reasoned that the notice rule would alter the nature of property, because

“the newly regulated landowner is stripped of the ability to transfer the interest which was possessed prior to the regulation. The State may not by this means secure a windfall for itself.“ *Id* at 627-8, 2463; (citing, *Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. 155, 164, 101 S Ct 446.)

The Court also held that the fact that an owner obtained title after the enactment of a regulation does not make that regulation a background principle, but declined to define what a background principle is stating, "[w]e have no occasion to consider the precise circumstances when a legislative enactment can be deemed a background principle of state law or whether those circumstances are present here. It suffices to say that a regulation that otherwise would be unconstitutional absent compensation is not transformed into a background principle of the State's law by mere virtue of the passage of title" *Id,* at 629-30, 2464.

The Court did note that [a] regulation or common-law rule cannot be a background principle for some owners but not for others, and does not become a background principle for subsequent owners by enactment itself. *Id* at 630, 2464.

The Court upheld that part of the State Court determination which held that the claimant there was not deprived of all economic use and therefore did not make out a taking under the *Lucas* standard. However the Court remanded the case to Rhode Island State Court to consider whether the wetland regulations constituted a background principle of state property law in connection with claimant's partial taking claim pursuant to *Penn Central*.

Thus, in the present case, the Court must determine whether the New York State wetland regulations constitute background principles of New York property law.

In addition to citing the takings quartet, the CITY argues that while it is primarily statutes that have created limitations on the development of wetlands, protection of wetlands is also grounded on common law, citing an article by Professor Fred Bossleman entitled "Limitations Inherent in the Title to Wetlands at Common Law" 15 *Stanford Environmental Law Journal* 247 (1996).

In the article, Professor Bossleman describes the economic use of wetlands in medieval England for their natural products such as phragmites used for thatch, and peat, as well as fishing and hunting of fowl in the 14th through 17th century. S*upra,* at pp 265-7. He described the common law regulation of wetlands to maintain the water level of the wetlands and ensure that uses and exploitation of the wetlands were sustainable. S*upra,* at p 285.

However, Bossleman also noted that these regulations related to wetlands that were held in common, (*supra* at p. 273-5) or on which tenants retained the right of commons. They did not apply to an estate in fee. S*upra,* at p.276.

He further described how beginning in the 17th century, Parliament extinguished the rights of commons, including in wetlands, and "eliminated both wetlands and the fen people, and created new agricultural land held by individual landowners". S*upra* at p 297. Professor Bossleman concluded that as a result of the enclosure and drainage of wetlands, the common law regulations of wetlands fell into disuse and the wetlands which remained became part of the fee simple estates of large landowners. S*upra,* at p. 303.

As the medieval common law of wetland regulations applied to lands subject to rights of commons and was supplanted by Parliament in the 17th century, it is of limited relevance to determining background principles of New York property law.

The CITY also cites the decision of the Superior Court Rhode Island which, on remand in *Palazzolo,* held that the contested wetlands regulations were background principles of Rhode Island property law. *Palazzolo v State of Rhode Island,* 2005 WL 1645974 (Sup Ct, RI, 2005).

The Superior Court of Rhode held that, "[b]ecause clear and convincing evidence demonstrates that *Palazzolo's* development would constitute a public nuisance, he had no right to develop the site as he has proposed. Accordingly, the State's denial to permit such development cannot constitute a taking." *Id* at 5.

While development of wetlands constitutes a nuisance under Rhode Island law, development of wetlands was not a nuisance under New York law. Further, prohibitions on filling and developing wetlands were never a traditional part of New York property law.

To the contrary, in New York, wetlands in their natural state were considered undesirable and an impediment to development. The filling in of wetlands, in order to build upon them, was a longstanding practice and part of the common history of the City of New York.

As the early City of New York expanded, wetlands were routinely filled and built upon. In the early 1800's the marshes surrounding the Collect Pond in lower Manhattan were filled and the springs feeding the pond and marshes were drained by means of a canal along the site of Canal Street.

The tenements of Five Points were built on filled marshland. The area that became Washington Square was marshland that was drained at the turn of the 19th century.

This approach to marshland was consistent with the City's policy to promote the private development of land, beginning with the Commissioner's Plan of 1811 which imposed a strict ***5** rectilinear gridiron street plan on Manhattan, without regard to the Island's natural topography. The plan subdivided the City's land into rectangular blocks and lots, in order to facilitate its being freely bought and sold, to be developed.

The development of wetlands continued through the nineteenth century. In Brooklyn, the marshland surrounding Bushwick Creek, which separated Greenpoint from Williamsburg was filled in, as was the marshland in Red Hook, by Gowanus Creek and by Wallabout Bay.

The filling in and development of wetlands continued well into the 20th century, with Co-op City, which was built on wetlands in the mid 1960's, and Starrett City, which was built on wetlands in the early 1970's.

By the 1970's, the attitudes toward developing wetlands changed as the environmental importance and benefits of wetlands became recognized. In 1975 New York State enacted regulations that restricted development of wetlands, including residential development. The wetland regulations marked an abrupt reversal in the treatment of wetlands and constituted a distinct change in the legal rights of owners of wetlands.

Building on wetlands in Staten Island was widespread up until the enactment of the wetland regulations and the mapping of the wetlands on the island.

Given this history, it is clear the New York State wetlands regulations did not simply make explicit a prohibition on activity that "was always unlawful", and therefore the wetland regulations are not background principles of New York property law. see *Lucas* 505 US at 1030.

In the recent case of *Matter of New Creek Blue Belt Phase 3 (Baycrest Manor Inc.),* 65 N.Y.S.3d 552, 2017 NY Slip Op 07994 (2nd Dept 2017), the Appellate Division Second Department held that wetland regulations were not background principles of New York property law.

The Appellate Division noted that to read *Gazza, Sook Duck Kim, Anello, and Basile* as automatically barring an owner from challenging a regulation that was in effect at the time they acquired the property would be inconsistent with the United States Supreme Court holding in *Palazzolo. Matter of New Creek Blue Belt Phase 3 (Baycrest Manor Inc.)* at 559.

The case in *New Creek Blue Belt Phase 3 (Baycrest Manor),* like the present case, involved a claim by an owner of wetlands property which was taken by condemnation, that the property should be valued with an increment over its value as restricted by the wetlands regulations, to reflect the probability of a successful challenge to those regulations as a regulatory taking.

In the present case, the CITY cites the Second Department's decision in the case of *Monroe Equities LLC v State of New York,* 145 AD3d 680, 43 N.Y.S.3d 103 (2nd Dept 2016), which found that watershed regulations constitute background principles of New York law.

However, *Monroe Equities* is distinguishable, because watershed regulations are different from wetlands regulations.

In *Monroe Equities,* the owner of a property located in the Lake Mombasha watershed was denied a permit to build three residences on the property because the watershed regulations prohibited the placement of a subsurface sewage disposal system within 300 feet of Lake Mombasha. The owner challenged the watershed regulations as a per se *Lucas* taking. The Second Department affirmed the denial of the owner's regulatory takings claim finding that "the right to install a septic system was never part of the 'bundle of rights' the claimant acquired with title to the property." *Monroe Equities* at 683.

Although the Appellate Division decision does not describe the objective of the ***6** watershed regulations, the decision of the lower trial court indicates that the property was located on the shores of Lake Mombasha, which was the sole source of water supply for the Village of Monroe, and that the regulations established a 300-foot sanitary buffer around the perimeter of the lake, within which no subsurface sanitary waste disposal system could be placed. *Monroe Equities LLC v State of New York,* 47 Misc 3d 747, 4 N.Y.S.3d 816 (Ct of Cl, 2014).

The purpose of the watershed regulations was to prevent human waste from seeping into and polluting the Village's water supply. Unlike the State's wetlands regulations, the watershed regulations at issue in *Monroe Equities* prohibited a nuisance which the Village could have traditionally enjoined at common law.

New Creek Blue Belt Phase 3 (Baycrest Manor), rather than *Monroe Equities,* is the relevant precedent, and establishes that wetland regulations are not part of the background principles of New York property law. Therefore, a challenge to the wetlands regulations is not barred merely by the fact that Claimant purchased the property after the regulations were enacted.

The Court must next consider whether there was a reasonable probability of a successful challenge to the wetlands regulations as applied to the subject property.

If as of the date of vesting, there was reasonable probability that the regulations could be successfully challenged as a regulatory taking, the subject property should be valued with an increment in addition to its value as regulated. The amount of the increment should reflect what a hypothetical buyer would pay for the property in light of the probability of a successful challenge. *Chase Manhattan Bank v State of New York*, 103 AD2d 211, 479 NYS2d 983 (2nd Dept 1984); *Berwick v State of New York, (Berwick I)* 107 AD2d 79, 486 NYS2d 260, (2nd Dept. 1985); *Matter of City of New York, Staten Island Bluebelt Phase 2 (Fink)* Index 4012/04 (Su. Ct. Kings 2007).

To show a reasonable probability that a constitutional challenge to the wetland regulations would succeed, a claimant must demonstrate that the regulations render their property unsuitable for any economic or private use, and destroy all but a bare residue of its value. *Spears v Bearle* 48 NY2d 254, 422 NYS2d 636 (1979), *de St. Aubin v Flacke,* 68 NY2d 66, 505 N.Y.S.2d 859 (1986); *Chase Manhattan Bank v State of New York,* 103 AD2d 211, 479 NYS 983 (2nd Dept. 1984).

In the present case, both appraisers agreed that an owner of the property would not be able to obtain a permit for any development of the property or for any use other than leaving it vacant. Additionally, the "Assessment of Potential Development" submitted by the CITY concurs that because 100% of the property is wetlands, it is unlikely DEC would issue a permit for any construction on the subject property.

However, Michael D. Zarin Esq., a land use attorney who testified as an expert on regulatory taking claims for the CITY, stated that while it is unlikely that a permit would be granted for the subject property because it is fully covered with Class I wetlands, it is not impossible. He states it is possible that DEC might allow one home to be developed on the subject property which undermines a challenge to the regulations. However, neither side valued the property based on a possibility that a permit for any development would be granted so the Court cannot assume that a permit for some development would have been issued.

Even though the wetland regulations prohibit all economic use of the property, the question remains whether the regulations have destroyed all but a bare residue of the value of the property.

In this case, both parties have presented comparable sales of Staten Island wetland properties that were similarly restricted so as to prohibit any development. The CITY's appraiser valued the subject property, as restricted, at $200,000. The CITY's appraiser valued the property as unregulated after extraordinary costs at $1,231,493 which indicates that the regulations reduced that value of the property by approximately 84%. Claimant's appraiser valued the subject property, as restricted, at $147,000. Claimant's appraiser valued the property as unregulated after extraordinary costs at $1,375,000 which indicates that the regulations reduced the value of the property by approximately 89%.

Claimant argues that there is a reasonable probability of a successful challenge to the wetlands regulations as regulatory taking under both the *Lucas* and *Penn Central* standards. The claim that the regulations constituted a per se taking pursuant to *Lucas* was not testified to by Claimant's expert at trial but only contained in Claimant's post trial brief.

In the case of *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 415, 43 S Ct 158, (1922), the United State Supreme

Court first held that if regulation goes too far it will be recognized as a taking, but declined to define when a regulation has gone too far.

A regulation constitutes a per se taking only in the extraordinary circumstance where no economically beneficial use of land is permitted and the regulations have extinguished all of the property's value. *Lucas v South Carolina Coastal Council,* 505 U.S. 1003, 112 S Ct 2886 (1992). Where there is a per se taking the court does not have to consider all of the factors under a Penn Central analysis, but only whether there has been a total loss of economic value. *Palm Beach Isle Associates v US,* 231 F.3d 1354 (Ct of App, Fed Cir, 2000); *Florida Rock Industries Inc., v US,* 18 F3d 1560, (Ct of App, Fed Cir, 1994)

Claimant here asserts that the regulations constitute a per se taking because they prohibit any economically valuable use of the property, even if they do not extinguish all of the economic value of the property.

The distinction is relevant here because although the regulations prohibit any development of the property, the property has a value of between $147,000, and $200,000 if sold.

In *Lucas,* the trial court had found that the property there had been rendered valueless because the regulations prohibited all economically viable uses. *Lucas* 505 US at 1007, 112 S Ct at 2889. The United States Supreme Court did not review the trial court's finding that the regulations rendered the property valueless. The Supreme Court in *Lucas* used the concepts of prohibition of all economic use, and of extinguishing all value in the property, somewhat interchangeably at various points in its decision. However, it did so in the context of accepting, for purposes of the appeal, the trial court's determination that the regulations rendered the property valueless.

However, the Court did not explicitly hold that a regulation which prohibits all economically beneficial uses of a property necessarily renders the property valueless.

Justice Kennedy expressed some reservation that a regulation that prevented all development of a beachfront property necessarily deprived it of all economic value, but stated he was bound by the trial court's finding that it did. *Lucas* at 1033-4 2903.

Justice Blackmun in his dissent was even more critical of that proposition, noting

"[p]etitioner can picnic, swim, camp in a tent, or live on the property in a movable trailer. State courts frequently have recognized that land has economic value where the only residual economic uses are recreation or camping. Petitioner also retains the right to ***7** alienate the land, which would have value for neighbors and for those prepared to enjoy proximity to the ocean without a house.“ (internal citations omitted) Blackmon dissent in *Lucas* at 1044, 2908.

Similarly, Justice Souter dissented in part because he believed that the trial court's finding that the regulations deprived the property of all value was highly questionable, but not preserved for review. See Souter dissent, *Lucas* at 1076, 2925.

Although three Justices, questioned whether prohibition of all economic use would constitute a taking where the property still had sale value, the Court in *Lucas* did not address that issue.

In their subsequent decision in *Tahoe-Sierra*, the United States Supreme Court again conflated the two concepts. In restating the per se rule of *Lucas,* the Court explained,

"[t]he categorical rule that we applied in *Lucas* states that compensation is required when a regulation deprives an owner of "*all* economically beneficial uses" of his land. Under that rule, a statute that "wholly eliminated the value" of Lucas' fee simple title clearly qualified as a taking. But our holding was limited to "the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted." *Id., at* 1017, 112 S Ct 2886. The emphasis on the word "no" in the text of the opinion was, in effect, reiterated in a footnote explaining that the categorical rule would not apply if the diminution in value were 95% instead of 100%. anything less than a "complete elimination of value," or a "total loss," the Court acknowledged, would require the kind of analysis applied in *Penn Central. Lucas. "* (internal citations omitted) *Tahoe--Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency,* 535 US 302 at 330, 122 S.Ct. 1465 at 1483, (2002).

Claimant relies on the case of *Lost Tree Village Corp. v United States,* 787 F3d 1111 (Fed Cir 2015), which held that residual noneconomic value does not preclude a finding of a per se taking where all economic use is prohibited. The Court in *Lost Tree* held that the value the real estate would have if sold is not economic value stating,

"[w]hen there are no underlying economic uses, it is unreasonable to define land *use* as including the sale of the land. Typical economic uses enable a landowner to derive benefits from land ownership rather than requiring a landowner to sell the affected parcel." *Id* at 1117.

The CITY points out that the present case is not a regulatory takings case and that the relevant issue is whether on the date of vesting a hypothetic buyer would pay an increment above the subject property's regulated value in consideration of the probability of a successful challenge to the wetlands regulations. The CITY argues that the decision in *Lost Trees* undermines Claimant's assertion that a buyer would pay an increment for the subject property, citing that part of the decision which states, "[i]n the real world, real estate investors do not commit capital either to undevelopable property or to long, drawn-out, expensive and uncertain takings lawsuits." *Lost Tree Village Corp,* at 1118. However, the context of this language in the decision is that the Court believed that the suggestion that an owner of a property for which all economic use was restricted could still realize value by selling the property was unrealistic, and therefore regulations which prohibited all economic use were a per se taking.

However, it has also been held that the value of a property as a speculative investment is proper in considering whether there has been a taking. *Florida Rock Industries Inc. v US,* 18 F3d 1560 (Ct of App, Fed Cir, 1994).

Florida Rock, involved a challenge by an owner to a denial of a permit to mine limestone under its wetlands property. The Court found that there was no per se taking because there was a market for the property as a speculative investment, noting, "[a] speculative market may exist in land that is regulated as well as in land that is not, and the precise content of regulations at any given time may not be particularly important to those active in the market." *Florida Rock Industries Inc.,* 18 F3d at 1566.

While there have been no cases presented to the Court where an investor has purchased Staten Island property that was covered 100% by wetlands and then challenged the wetland regulations, nonetheless wetlands properties which cannot be presently developed are bought and sold on Staten Island for reasons that are not entirely clear.

Properties on Staten Island that consist of 100% non-beachfront wetlands, such as the subject property, cannot be put to recreational use. Neither are they valuable to an adjoining property owner to preserve a view, as they cannot be built on whether the adjoining owner buys them or not. It would appear that such wetlands are bought either on the expectation that the restrictions may eventually be challenged, waived or modified, or simply on the expectation that the buyer may be able sell the property at a profit.

However, despite the fact that the buyer's motivations are unclear, there is an established market for wetlands properties on Staten Island for which there are no permissible uses. There is no justification in ignoring this market simply because the investors are speculating on the future value of the property.

Some confusion is caused by the word speculative. The cases that hold that one cannot consider speculative uses in valuing property in condemnation cases refer to non-current uses where it is not probable that the property would be put to such a use in the reasonably near future. This is different from investors who speculate in property by purchasing it on the possibility or expectation that it will increase in value at some point in the future. In this sense, speculative purchases represent investment backed expectations.

"Dollars are fungible; a speculative market provides a landowner with monetary compensation which is just as satisfactory as that provided by any other market." *Florida Rock Industries Inc.* 18 F3d at 1567. What is relevant is the price they are willing to pay as of the date of vesting, not whether their expectations for future value will be met.

The holding in *Florida Rock* is more relevant than *Lost Tree* to the market in Staten Island, where owners of wetland properties, that cannot be developed, are able to sell their properties for value.

When one considers that the value of the subject property for sale as regulated is between 84% and 89% of its unregulated value, the regulations have not deprived the property of all economic value and thus do not constitute a per se taking pursuant to *Lucas*.

However, even if the regulations do not eliminate all of the economic value of a property, they may constitute a partial taking under the doctrine set forth by the United States Supreme Court in *Penn Central v City of New York*, 438 US 104, 98 S Ct 2646 (1978).

This analysis is an "essentially ad hoc, factual inquiry," in which the court considers three factors: (1) "[t]he economic impact of the regulation on the claimant," (2) "the extent to which the regulation has interfered with distinct investment-backed expectations," and (3) "the character of the governmental action." *Id* at, 124.

Although *Penn Central* focused on distinct investment backed expectations, the Supreme Court subsequently looked at "reasonable investment backed expectations", an objective test. ***8** *Kaiser Aetna v US,* 444 US 164 at 175, 100 S Ct 383 at 390.

A court must make an ad hoc determination whether a regulation constitutes a taking based upon the particular circumstances of the case. *Tahoe-Sierra*, 535 US at 322, 122 S Ct 1478; *Yee v. City of Escondido,* 503 U.S. 519, 523, 112 S Ct 1522, (1992). The determination depends upon the magnitude of the regulation's economic impact, and the degree to which it interferes with legitimate property interests. *Lingle v Chevron USA Inc.,* 544 US 528, 125 S Ct 2074 (2005)

A mere diminution of value is not sufficient to constitute a taking. *Penn Central* 438 US 104, 98 S Ct 2646 (1978). The court must bear in mind that "[g]overnment could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Lingle* at 538 (quoting *Pennsylvania Coal Co., v Mahon,* 260 US 393, 413, 43 S Ct 158 (1922)).

In evaluating the first factor, the economic impact of a regulation in a takings case, the court must compare the value that has been taken from the property with the value that remains in the property." *Keystone Bituminous v DeBenedictis*, 480 U.S. 470 at 497, 107 S Ct 1232 (1987).

The United States Supreme Court has consistently declined to set forth a mathematical formula or specific percentage of loss of value that, by itself, would constitute a taking under a *Penn Central* analysis. *See Kaiser Aetna v. United States*, 444 US 164, 174-5, 100 S Ct 383, 389--90 (1979); *Florida Rock industries Inc., v US,* 18 F3d 1560, at 1570 (1994).

The Appellate Division Second Department held in *Chase Manhattan Bank v State of New York,* 103 AD2d 211, 479 NYS2d 983 (2nd Dept. 1984), that where wetland regulations deprived the claimant of all financially rewarding uses of the property and also reduced the property's value by 86%, there is a reasonable probability that the regulations could be successfully challenged as a regulatory taking.

The Second Department recently held *Matter of New Creek Bluebelt, Phase 3, (Baycrest Manor Inc.)* 65 N.Y.S.3d 552, 2017 NY Slip Op 07994, (2nd Dept 2017), that an 88% diminution of value, together with the effective prohibition on development of any part of the property, established a reasonable probability that the wetlands regulations would be found to constitute a regulatory taking. It similarly held that where there was an 82% diminution in value, caused by wetlands regulations that prohibited any development on any part of the wetlands property, there was a reasonable probability of a taking. *Matter of New Cr. Bluebelt, Phase 4 (Paolella),* 122 AD3d 859, 997 N.Y.S.2d 447, 2014 NY Slip Op. 08029 (2nd Dept. 2014).

In *Friedenburg v State of New York,* 3 AD3d 86, 767 NYS2d 451 (2nd Dept. 2003), the Second Department held that while a diminution of 95% of the value of a property would not qualify as a per se regulatory taking, a 92.5% -95% loss of value, together with an inability to use the property for any economic or even recreational purposes, constituted a regulatory taking under a *Penn Central* analysis.

In *Adrian v Town of Yorktown,* 83 AD3d 746, 920 NYS2d 411, (2nd Dept. 2011), the Second Department found no regulatory taking where regulations reduced the value of a 15-acre parcel by 64%. In that case the claimant sold the parcel for $3,600,000 and contended that it was worth $10,000,000 as unregulated.

In *Putnam County Nat. Bank v City of New York,* 37 AD3d 575, 829 NYS2d 661 (2nd Dept. 2007), the Second Department found that watershed regulations which reduced the value of a parcel by 80% did not constitute a regulatory taking. In that case the plaintiff was denied a ***9** permit to develop a 36-lot subdivision because a sewer for a development that size could not be built under the watershed regulations.

Subsequently, that plaintiff was given approval for an alternate plan to develop a 17-lot subdivision. After obtaining approval, the plaintiff sold the property for $1.4 million dollars which it claimed was 20% of what the property would have been worth had it been allowed to develop the 36-lot subdivision.

The Court held that the plaintiff realized a ”reasonable return“ upon its sale of the property, and that the economic impact of the regulations was insufficient to constitute a regulatory taking. *Id* at 577.

In the present case, the CITY's appraiser, Bob Sterling MAI, valued the subject property, as regulated, at $200,000. Claimant's appraiser, Brent Lally, valued the subject property, as regulated, at $147,000.

In terms of the value of the subject property as regulated, the comparable sales analyzed by the two appraisers ranged from an unadjusted low of $1.50 a square foot to a high of $27.93. The average adjusted value of the comparable regulated sales used by Sterling was $12.24, but he concluded to an adjusted value of $9.50 because he felt that his sale four at $23.74 skewed the average.

The average adjusted value of the comparable regulated sales used by the Lally was approximately $7 a square foot which he chose as his indicator of value. However, there are problems with several of Lally's comparable sales.

Sales 3, 4 and 5 do not front to any open streets unlike the subject property, and sale 6 is not a fully restricted property, as DEC granted a permit to build a two-family home on the wetland adjacent portion of the property. Lally's regulated sale 7 is a much larger parcel that covers two entire block fronts on Stobe Avenue, and is a couple of blocks above Hylan Boulevard, a few blocks from a Staten Island Railroad Station.

Lally's regulated sales 1 and 2 were the same properties as Sterling's sales 3 and 1. Lally valued his regulated sale 1 (Sterling sale 3) at $6.90 and his regulated sale 2 (Sterling's sale 1) at $11.81. Sterling valued his sale 1 (Lally's sale 2) at $9 and his sale 3 (Lally's sale 1) at $5.59.

Sterling's adjusted values for these two sales are more reliable than Lally's as Lally did not adjust for the fact that its regulated sales 1 and 2 were much smaller than the subject property and because he incorrectly took a positive adjustment for street access, when sales 1 and 2 had street access.

For these reasons, the Court adopts Sterling's regulated value of $9.50 a square foot or $200,000 in total.

The values for comparable unregulated sales of each were relatively close with both Claimant and the CITY having proposed eight detached single family semi-detached homes as the highest and best use of the property as unregulated. Lally found an unregulated value before extraordinary costs, of $1,617,000, while Sterling concluded to a higher value of $1,701,000.

Claimant raised two valid objections to adjustments to the comparable sales of unregulated properties made by Sterling. First Sterling took a 5% downward topology adjustment to account for the fact that pilings might be necessary, even though there was no evidence introduced that pilings were necessary for the proposed two-story homes. Michael Murphy, an engineer with Henningson, Durham & Richardson Architecture and Engineering PC, (HDR), who testified on behalf of the CITY about the extraordinary costs associated with the property, did not include pilings in the extraordinary costs and instead included an amount ***10** for the excavation of four feet of soil. In light of this, the topology adjustment was inappropriate.

Further, Sterling took a 7.5% negative adjustment for motivation, to account for added profit a buyer would demand for the additional extraordinary costs. What this ignores is the fact that the full extraordinary costs are deducted from the purchase price so the buyer does not incur additional costs compared to comparable non-wetland sites.

However, even with these unwarranted adjustments, the CITY's unregulated value before extraordinary costs is higher than Claimant's value of the property as unregulated before extraordinary costs. Therefore, the Court will adopt the CITY's unregulated value before extraordinary costs, of $1,701,000.

The is a major difference in the extraordinary costs that each side estimated would be necessary to put the subject property in a developable condition.

Claimant's expert, Todd Ettlinger, PE, LS, LC, estimated the extraordinary costs totaled $242,560, while the CITY's engineering expert, Murphy of HDR, estimated the extraordinary costs to be $469,507.

The original report of HDR, which was exchanged pursuant to 22 NYCRR 202.61, was done by Magnus Sjoberg of HDR who estimated the extraordinary costs at $679,000. Sjoberg subsequently left HDR and was unavailable at the time of trial. Murphy testified in his place. However, Murphy disagreed with several items in Sjoberg's estimate.

As part of its rebuttal, the CITY sought to put in a revised estimate of extraordinary costs that exceeded Sjoberg's estimate. The Court did not admit the revised estimate of extraordinary costs to the extent it included costs that were higher than Sjoberg's estimate. The Court did allow Murphy to testify at trial as to those items from Sjoberg's report that he accepted, to testify as to which items that he believed were not in fact extraordinary costs, and to testify as to items which he believed cost less than indicated in Sjoberg's report. Also, the Court allowed Murphy to identify those items for which he thought Sjoberg's estimates were too low, but not to testify to any amount higher than Sjoberg's estimates.

Claimant argues that the Court should attribute no cost to any item for which Murphy disagreed with Sjoberg's estimate, even where Murphy believed Sjoberg's estimate was too low. However, there is no justification to do so. There is no prejudice to Claimant in considering Sjorberg's estimates for those items Murphy agreed were extraordinary costs, but which Murphy believed cost more than Sjoberg's estimate.

Murphy declined to adopt Sjoberg's inclusion of a stabilized construction entrance, and his inclusion of street trees and signs, testifying that they were not extraordinary costs. He also testified that the costs for a water system should not have been included because the City would extend the water mains. Murphy also reduced Sjoberg's estimates for the cost of constructing a new roadway because he stated that the roadway would only have to be 24 feet, not 35 feet as indicated in Sjoberg's estimate.

With Murphy's amendments to HDR's original estimate of extraordinary costs, the major differences between the extraordinary costs of each side were the cost of excavation of hydric soils, and the estimated soft costs.

Murphy included soft costs for mobilization, contingency, construction inspection fees and construction management. These costs were calculated as percentages of the extraordinary hard costs and totaled 35% of those hard costs. Ettlinger only included soft costs for engineering and contingency at a combined 15% of extraordinary hard costs.

Murphy included $114,174 to excavate 4 feet of hydric soils over the entire property, ***11** while Ettlinger testified is was not necessary to excavate to soil. Murphy stated that excavation was necessary because the soil was mucky, which is described as a combination of decomposing organic matter and water, with very little soil. He testified mucky soil is unsuitable to build upon. Ettlinger testified that the soil was sandy silt and that clean fill could be added on top of it without excavation.

Claimant also introduced into evidence a memo on HDR stationary, purportedly written by another HDR staff person on behalf of Murphy, which discusses Best Engineering Practices to be used for site plans of New Creek Phase 4. The memo states that it is best practice to "Assume it is needed to excavate hydric soils for both wetland and floodplain areas for buildings and roadways (soil information not available for this area to determine if this is necessary.) " Murphy denied knowledge of this memo.

However, in its rebuttal report HDR, also included three soil samples from the same wetlands as the subject property, one of which was in close proximity to the subject property, which indicated that the soil was mucky and not silty sand.

While one cannot assume that it is always necessary to excavate hydric soils, in this case, the excavation of the mucky soils would be necessary. Therefore, the Court adopts the CITY's extraordinary costs, as reduced by Murphy's testimony, of $469,507.

When the extraordinary costs of $469,507 are deducted from the CITY's value of the subject property as unregulated of $1,701,000, the result is $1,231,493. When compared to the regulated value of $200,000, this indicates the regulations resulted in a diminution of 84% of the value of the property, which leaves no more than a residue of its unregulated value.

The second factor in the *Penn Central* analysis, is whether the property owner had investment backed expectations with which the regulations interfered.

However, as addressed above, the present case, unlike *Penn Central,* is not a regulatory takings case, but a case valuing a property taken in condemnation where all economic use of the property is prohibited by wetlands regulations.

The issue in this case is whether on the date of vesting there was a reasonable probability that the wetlands regulations could be successfully challenged, for which a hypothetical buyer would pay an increment above the value of the property as regulated.

Applying the reasonable expectations prong of the *Penn Central* analysis in the context of an eminent domain valuation case raises the question as to whose expectations are to be considered. Those of the owner on the date of vesting, or those of the hypothetical buyer.

In a regulatory takings case, it is the expectations of the owner of the property that are relevant, but in a case involving a property that has been condemned where the claimant seeks to value the property above its regulated value based on the probability of a successful regulatory challenge, then it is the expectations of the hypothetical buyer that are relevant.

In *Berwick v State of New York (Berwick I),* 107 AD2d 79, 486 NYS2d 260 (2nd Dept. 1985), the Court looked to what a hypothetical buyer would pay over the regulated price of a property, for the probability that that buyer would be able to successfully challenge the regulations.

If one is considering a hypothetical buyer's expectations, then by definition one must consider the reasonableness of the expectations as an objective test, rather than whether the expectations had been backed by investments.

However, in light of *Palazzolo,* the distinction as to whose expectations are relevant, will not usually be significant. Under the holding of *Palazzolo* even an owner who took title before ***12** enactment of a regulation would be barred from challenging the regulation, if the regulation embodied a background principle of state property law. Conversely, if the prohibitions contained in a regulation were not backgrounds principles then the prohibited uses were part of an owner's bundle of rights regardless of when they took title. Thus, the relevant issue in determining whether a Claimant or hypothetical buyer's expectations were reasonable is not notice of the regulation, but whether the regulation embodied a background principle.

Also, in this case, as the Claimant took title well after the enactment of the wetlands regulations, the Claimant and a hypothetical buyer are in the same position in terms of reasonable expectations.

The more significant question is to what extent should the existence of the regulations be considered in determining the reasonableness of an owner's or buyer's expectations.

The Justices in *Palazzolo* were not in agreement on the answer to this question.

The majority opinion did not comment on whether, or to what extent, existing regulations that did not embody background principles should be taken into account in determining whether those regulations interfered with reasonable expectations of an owner or buyer.

Additionally, two of the Justices who were part of the five Justice majority (Justice Stevens did not concur with that Part II -B of the decision) wrote concurrences in which they disagreed as to whether the challenged regulation should be considered in determining the reasonableness of investment backed expectations.

Justice O'Connor in her concurrence stated that regulations in existence at the time of taking of title (or the date of vesting) should be considered in determining the reasonableness of investment backed expectations stating,

"[t]he more difficult question is what role the temporal relationship between regulatory enactment and title acquisition plays in a proper *Penn Central* analysis. Today's holding does not mean that the timing of the regulation's enactment relative to the acquisition of title is immaterial to the *Penn Central* analysis . . . Further, the regulatory regime in place at the time the claimant acquires the property at issue helps to shape the reasonableness of those expectations“ *Palazzolo* 533 US at 632-3, 121 S Ct 2465-6.

Justice O'Connor did not set forth any specific guidelines as to what extent the timing of the enactment of the regulations should be considered in determining the reasonableness of the expectations, but stated ”Courts instead must attend to those circumstances which are probative of what fairness requires in a given case.“ *Palazzolo* at 635, 2467.

Justice Scalia wrote a concurrence to register his disagreement with Justice O'Connor's view that the existence of the challenged regulation should be considered in determining the reasonableness of the expectations, stating,

“the fact that a restriction existed at the time the purchaser took title (other than a restriction forming part of the 'background principles of the State's law of property and nuisance,) should have no bearing upon the determination of whether the restriction is so substantial as to constitute a taking. The “investment-backed expectations” that the law will take into account do not include the assumed validity of a restriction that in fact deprives property of so much of its value as to be unconstitutional.“ (internal citation omitted) *Palazzolo* at 637, 2468.

Additionally, Justice Breyer wrote a separate dissent in which he concurred with Justice O'Connor that the regulations in effect at the time of transfer should affect an owner's reasonable expectation stating,

“[o]rdinarily, such expectations will diminish in force and significance-rapidly and dramatically-as property continues to change hands over time. I believe that such factors can adequately be taken into account within the *Penn Central* framework.“ *Palazzolo* at 655, 2477.

It is important to remember that the second prong of the *Penn Central* analysis is not merely investment backed expectations, but ”the extent to which the regulation has interfered with distinct investment backed expectations. “ *Penn Central v City of New York,* 438 US 104, at 124, 98 S Ct 2646, at 2659 (1978).

One can only measure the extent to which the challenged regulation interferes with reasonable investment backed expectations by comparing what an owner could do with the property absent the regulation, to what they could do with it as restricted by the regulation. One cannot measure the interference of the regulation on reasonable expectations, if one starts the analysis by limiting what expectations are reasonable to only such uses as the challenged regulation allows.

Further, Justice O'Connor's suggestion that the regulatory scheme in place at the time a claimant acquires the property helps shape the reasonableness of the expectations, and thus should be a factor in determining whether expectations for a use of a property are reasonable, runs counter to the underlying logic of *Palazzolo* that regulations that do not embody a background principle of state property law, and are unreasonable, ”do not become less so through passage of time or title.“ *Palazzolo,* at 627, 2462.

An attempt to judge the reasonableness of expectations of a use that a regulation prohibits, in light of the existence of the regulation itself becomes hopelessly circular.

While the general regulatory environment in effect at the time of acquisition should be a factor in determining the reasonableness of expectations, Justice Scalia's concurrence is correct that the restrictions of the challenged regulation should not be considered in determining whether the owner's or buyer's expectations are reasonable. It is the extent to which the regulations interfere with expectations that are reasonable absent the regulation that should be considered.

In this present case, absent the wetland regulations it would be reasonable for a hypothetical buyer to expect that they could develop residential houses on the property, consistent with the zoning resolution. The property is suitable to be developed residentially, though the owner would incur some extraordinary costs. Numerous wetland properties in the vicinity of the subject property have been successfully developed residentially. Both Claimant and the CITY agree that given the fact that the property is covered 100% by Class I wetlands, no permit for any development would by allowed under the regulations. Thus, the regulations substantially interfered with reasonable expectations to develop the property.

The third factor discussed in *Penn Central* is the character of the governmental action. This inquiry looks to whether it amounts to a physical invasion, or instead, merely affects property interests. *Lingle v Chevron USA Inc.,* 544 US 528, 125 S Ct 2074 (2005).

Also considered as part of the character of the regulation, is the concept of "reciprocity of advantage" that is, whether the regulation is part of a more general regulatory scheme that provides some benefit to the restricted property owner, such as in the case of a comprehensive zoning plan. While the benefits to the property owner do not have to equal the benefits gained by other property owners, where a regulation singles out a particular property with a disproportionate burden, there is no reciprocity of advantage, which is indicative of a taking. *Penn Central, a*t 438 US, at 1335, 98 S Ct, at 2664-5

While the wetlands regulations do provide a general public benefit, their burden falls disproportionally on a limited group of owners. Further, the burden falls most disproportionately on owners of properties such as Claimants' which are covered 100% wetlands, as opposed to owners of properties with wetland adjacent portions.

Significantly, in terms of evaluating the character of the regulations, the regulations, as they affect the property, approach a physical taking because they require the owner to leave the property vacant.

In considering the *Penn Central* factors as applied to the subject property, the Court finds that the wetlands regulations diminished the value of the subject property by 84%, that they interfered with the reasonable expectations of the Claimant or a hypothetical buyer to develop the property residentially, and that the character of the restrictions were such that they disproportionally burden the subject property and prohibited any economic use of the property.

This situation is almost identical to the facts in, *Matter of New Creek Bluebelt, Phase 3, (Baycrest Manor Inc.)* 65 N.Y.S.3d 552, 2017 NY Slip Op 07994, (2nd Dept 2017), and *Matter of New Creek Bluebelt Phase 4 (Paolella),* 122 AD3d 859, 997 N.Y.S.2d 447 (2nd Dept 2014), where the wetland regulations prevented any development on the property, and resulted in an 88% and 82% diminution of value respectively. The Second Department held that those facts evidenced a reasonable probability that a challenge to the wetland regulations as applied to the properties in those cases, would be successful.

Additionally, in this present case, the diminution of value is so great and the character of the regulations which prohibit any economic use so invasive, that even if a hypothetical buyer did not have a reasonable expectation to develop the property, on balance, the regulations so nearly approximate a physical appropriation so as to constitute a taking under a *Penn Central* analysis.

Therefore, the subject property must be valued at its regulated value plus an increment to reflect the probability that the regulations could be successfully challenged as a regulatory taking. *Chase Manhattan Bank v State of New York*, 103 AD2d 211, 479 NYS2d 983 (2nd Dept. 1984); *Berwick v State of New York (Berwick I),* 107 AD2d 79, 486 NYS2d 260, (2nd Dept. 1985); *Matter of City of New York, Staten Island Bluebelt Phase 2 (Fink)* Index 4012/04 (Su Ct Kings 2007).

The increment must be determined by the realities of the marketplace, which are that a knowledgeable buyer would not pay the full unregulated value of the property, but would adjust his purchase price to offset the cost in time and money of applying for a permit and challenging its denial in court as confiscatory. An investor would pay only the value of the property as so restricted, plus some increment representing its enhanced value at such future time if and when he is successful in nullifying the wetlands restrictions in court. *Berwick v State of New York (Berwick I),* 107 AD2d 79 at 84.

The increment is determined first by calculating the difference between the unregulated value after extraordinary costs of $1,231,493 and the regulated value of $200,000. That difference is $1,031,493. The Court must next determine what part of that difference should be added to the regulated value as an increment.

Lally adopted the same increment of 75% of the difference that was applied by the Court in *Berwick v State of New York* (*Berwick II*), 159 AD2d 544, 552 N.Y.S.2d 409 (2nd Dept 1990).

In *Berwick II* the Court applied an increment of 75% of the unrestricted value of three properties after first deducting the value of the properties as restricted. This 75% increment was ***13** then added to the restricted value of the properties.

While it is not explicitly stated, it is apparent from the context of the decision that the downward adjustment for developability issues was to account for the extra time, risks and construction costs associated with developing wetlands property.

Lally adopted the 75% increment based on a letter of legal instruction from Claimant's counsel. He did not provide any evidence that the increment reflected the market in Staten Island, other than his testimony that it accorded with his experience as an appraiser.

However, the Appellate Division Second Department in a recent case involving another Staten Island wetlands property, has rejected applying the 75% increment of *Berwick II* without evidence that that increment is appropriate to the specific property at issue, stating,

"[a] prior application of the same percentage increment is insufficient, standing alone, to justify its application in a subsequent case (*see Matter of New Cr. Bluebelt, Phase 4,* 122 AD3d at 863). Lally added no further evidence to support the application of that increment here. In short, that increment lacked a sound evidentiary basis." of *Matter of New Creek Blue Belt Phase 3 (Baycrest Manor Inc.),* 65 N.Y.S.3d at 562.

As Lally provided no rationale for applying the 75% increment to the subject property other than his experience, the Court will adopt the deduction for time, cost, and risk approach used by Sterling in his rebuttal.

Sterling testified at trial that he researched, to the best of his knowledge, every regulated wetlands sale in Staten Island since the early 2000's, and that most purchasers did not apply for a permit to develop their properties, and that none of those who were denied a permit pursued a regulatory takings challenge.

Sterling stated that there is no direct market evidence available of the Staten Island sales from which to estimate an increment. He also testified, that he does not believe that an investor would pay an increment over the regulated value of wetlands property for the probability of a successful challenge to the regulations.

However, the fact remains that investors continued, at least up to the date of vesting, to purchase wetlands properties on Staten Island which could not be put to any economic, or even recreational, use.

Further, there is a wide range of values among the comparable wetlands properties presented by the parties, ranging from an unadjusted value of $1.50 a square foot to $27.93 a square foot. Neither appraiser has been able to account for this wide range or offer a rationale as to why investors purchase wetlands that cannot be developed.

A more thorough explanation of the motivations of purchasers of restricted wetlands in Staten Island and of the wide range of values of such restricted properties is necessary justify the Court abandoning the rule laid down in *Chase Manhattan and Berwick,* that an increment must be added to the regulated value of a wetlands property because investors will pay an increment over the regulated value, where there is a probability that the regulations can be successfully challenged. *Chase Manhattan Bank v State of New York*, 103 AD2d 211, 479 NYS2d 983 (2nd Dept. 1984); *Berwick v State of New York (Berwick I),* 107 AD2d 79, 486 NYS2d 260, (2nd Dept. 1985).

While he maintained that no increment should be applied to the subject property, Sterling stated that if an increment were to be applied it should be based on the time, costs, and risk involved in a challenge to the wetlands regulations. He relied on the report of the CITY's regulatory takings expert, Michael Zarin Esq., for the estimate of the costs of a regulatory ***14** challenge and the amount of time such a challenge would take.

While Zarin is not an appraiser, he did testify as as to the costs and time it would take to pursue a regulatory challenge to the wetlands regulations, which his training and experience qualifies him to do. While Sterling used Zarin's estimate of the cost and time a regulatory takings challenge would take, those estimates were only some of the factors that went into Sterling's calculation of the increment a market buyer would pay. As an attorney experienced in the costs and time involved in a regulatory takings challenge, Zarin is qualified to give an opinion on those costs. It is proper for an appraiser to rely upon those opinions in determining what increment a hypothetical buyer would pay in light of the probability of a successful challenge. Such reliance is no different from an appraiser relying on a design professional's opinion as to what could be built on the property absent wetland regulations, or what extraordinary costs would be incurred in such construction.

Zarin estimated that the costs for pursuing the regulatory challenge could total $500,000 and take 5 years.

He stated that a hypothetical purchaser would first have to spend 2 years pursuing a wetlands permit application before the New York State Department of Environmental Conservation (DEC). He stated that to start a buyer would have to engage a wetlands expert to determine the extent of the wetlands on the property at a cost of between $5,000 and $10,000. He further stated that the buyer would then have to file at least one meaningful application with DEC and that an initial application is likely to cost $35,000 to $50,000. Additionally, he stated the DEC might require multiple resubmissions before it deems the application complete, which could cost an additional $25,000.

Although Zarin stated it is possible that DEC may require an Environmental Impact Statement (EIS), he also stated that given the small size and residential nature of the proposed development it is likely that DEC would issue a negative declaration that no EIS is required. He estimates that the issuance of a negative declaration would take an additional 3 months.

He stated that after the application is deemed complete it is more likely than not that DEC would require a legislative hearing where members of the public could comment on the project, which would add 3 months and $25,000 to the cost of the process.

According to Zarin, following a denial of a permit, the buyer would have to retain counsel to pursue a challenge in court and the hourly rates for attorneys in these types of cases range from $350 to $650 an hour. He estimated that drafting the complaint would cost $10,000 to $20,000.

He states that the course of litigation is likely to involve a motion to dismiss at a cost of $50,000 to $100,000 and one year's time, and another 1 to 2 years and $50,000 to $100,000 in fees if there is an appeal of a denial of the motion to dismiss.

He stated that there would likely be an additional year and $50,000 to $100,000 in fees for discovery, an additional year and $50,000 to $100,000 in fees to defend against a motion for summary judgment, with and additional year and $50,000 to $100,000 if a denial of summary judgment is appealed.

Lastly, if the case went to trial it would add another year and hundreds of thousands of dollars in fees.

Steven Barshov, Esq., an attorney who specializes in land use and environmental law, testified on behalf of Claimant to rebut Zarin's estimates of the time and cost of a regulatory challenge. He stated that Zarin's estimates overstate the costs involved in a regulatory challenge ***15** for the subject property because the facts are not in dispute; and because the property is 100% covered by wetlands.

Barshov stated that given the fact that no permit would be given by DEC to develop the property, it would be unnecessary for a buyer to pursue a futile application before DEC. He added that even if a buyer chose to file an application to avoid a possible motion to dismiss for failure to exhaust administrative remedies, it is likely that only one or two revisions would be required by DEC. Barshov stated that it is unlikely that DEC would require a legislative hearing.

He also stated that given that DEC would not issue a permit for 100% Class I wetlands, it is likely the application could be decided on the basis of a conceptual review. Barshov stated that pursuant to 6 NYCRR 621.15(j) and (l), a post conceptual review decision is a binding decision the completes the administrative remedies.

He concurred with the estimate of Ettlinger that the time it would take to get a post conceptual review decision would be 1 year and the cost would be $12,000. He added that if the buyer engaged legal counsel for the permitting process for the purpose of assuring that administrative remedies would be deemed exhausted, that would add $15,000 in attorney's fees, assuming a rate of $500 an hour.

Barshov also contested Zarin's estimates of the cost and time of a court challenge of the denial of a permit by DEC. Barshov believed that the case presents no complex factual issue or any novel issue of law. He said that given that the underlying facts that the property is 100% wetlands and that DEC would not issue any permit for development, the principal issue to be litigated is valuation.

Barshov estimates the litigation would require attorney's fees of $187,500, based 250 hours at $750 an hour, as well as $50,000 in appraisal and engineering fees, and $10,000 in court costs, for a total of $247,000 for litigation. Together with his estimated costs of $27,000 for the application process, he estimated the total cost of a challenge to be $274,500.

The difference between Zarin's and Barshov's estimates stem from their basic approaches. Zarin looked at the case as one that would be aggressively and exhaustively litigated by the State, which would require a hypothetical buyer be prepared to do the same. Barshov believed the because the facts are straight forward and not disputed, the application process and litigation would not be complex.

Zarin testified that it is possible that DEC might grant a permit for minimal development in order to avoid a precedent that the wetlands regulations constituted a regulatory taking, but admits that it is unlikely. He cites *In the matter of the Application of Jean Simonelli,* 2011 WL 6934243 (New York State Department of Environmental Conservation, July 25, 2011), as an example of a case where a permit was granted to build a single two-family home on a property covered 100% by Class I wetlands in Staten Island.

That property, located on the east side of Bloomingdale Road at the intersection of Radigan Avenue consists of two lots, which together were approximately 11,000 square feet. The property was part of a 43-acre freshwater wetlands, but was separated from the main body of the wetlands by Bloomingdale Road. The DEC Commissioner granted the permit based on the unique character of the property. Specifically, he cited to the small size of the property, the fact that it was separated from the rest of the wetlands by Bloomingdale Road, a busy street, and was surrounded by residences. He also noted that the property had no viable steward and was used for illegal dumping, which endangered its attributes as a wetland. He concluded, "[o]n balance, leaving the property in its current state would provide for less protection than if the application ***16** were granted . . ." *Id.*

Zarin also cited *In the Matter of Rampulla Associates Architects,* 1988 WL 158349 (New York State Department of Environmental Conservation, November 8, 1988), in which the Commissioner granted a permit to build on wetlands property. However, in that case, the property was approximately half wetlands and half wetlands adjacent, and the permit was for a single house, only 300 feet of which was located on the wetlands portion of the property.

The characters of the properties in *Simonelli* and *Rampulla* are sufficiently different from the subject property that the granting of a permit in those cases has little bearing on the present case.

More to the point, the CITY did not value the subject property here on the basis of a permit being granted for any development. Zarin is likely correct, that if DEC issues a permit for partial development of the site there would be no valid takings claim, but in such case the subject property would be worth far more than its regulated value.

It is not proper to assume that a permit for some development could be granted for the purposes of evaluating the likelihood of a successful regulatory challenge, but not consider the value of such partial development in valuing the property to determine just compensation.

Zarin also discussed a case, *Haberman v City of Long Beach et al.,* (unreported), in which he represented a property owner challenging a moratorium declared by the City of Long Beach. He stated that the case took 6 years and $800,000 in fees to be ready for trial and involved extensive motion practice, discovery and an appeal. However, that case involved a temporary moratorium, which is a more complex type of regulatory takings case than a permanent ban on all development, as in this present case. Also, the complaint included claims for violation of civil rights pursuant to 42 USC 1983.

While Zarin's observation that litigation involving regulatory takings claims are factually intensive and legally complex, may often be true, it is not uniformly true in all cases. His estimate contemplates all possible contingencies that could occur in both the administrative process and in the court case. However, the facts and issues involved in the regulations impact on the subject property are not particularly complex nor are the material facts in dispute.

It is undisputed that the property is 200 feet by 105 feet, 100% of which is Class I wetlands. As discussed above, as regulated, the property can be put to no economic or even recreational use. Both sides agree that the highest and best use of the property absent the wetlands regulations is to construct eight single family semi-attached houses.

While a hypothetical buyer would have to make one meaningful application for a permit, it is more likely that the application would be resolved through a post conceptual review decision, rather than that DEC would require a legislative or adjudicatory hearing.

Zarin's estimate of $10,000 to $20,000 to draft a complaint is excessive given the straight forward facts in the present case. Also, after the Supreme Court decision in *Palazzolo,* it is unlikely that a motion to dismiss based on lack of reasonable investment backed expectations would be viable, although a summary judgment motion would be likely.

However, even a summary judgment motion would face difficulties given the ad hoc fact-based nature of a *Penn Central* analysis, the fact the reasonable expectations are only one factor in the analysis, and the fact that the regulations permit no economic use of the property.

Similarly, while there would be discovery and a deposition of the buyer as to its expectations, discovery would not likely be drawn out or require extensive motion practice, given the straight forward facts in the case.

On the other hand, Barshov's estimates of $27,000 for professional and attorney fees for the permit process and $187,000 of attorney's fees for the litigation, based on 250 hours of attorney's time, are too low.

The most likely scenario is that the permitting process, would be completed after a conceptual review decision without hearings, and cost approximately $50,000 in fees. The litigation, which would most probably include some discovery and a motion for summary judgment, would cost approximately $300,000 in professional and attorney's fees. The entire process of exhausting administrative remedies and subsequent litigation would most likely take approximately 3 1/2 years.

Sterling's, cost of deregulation, of $558,734, based in part on Zarin's estimates, consists of three components. The first is opportunity costs of $50,000, based on 5% of the regulated value of $200,000 over the 5 years that Zarin estimated. The second is five years of real estate taxes totaling $8,734. The third is legal and professional fees of $500,000, that Zarin estimated are needed to prosecute the regulatory challenge.

If Sterling's costs are adjusted by assuming that it will take 3 1/2 years and $350,000 to pursue the regulatory challenge, then cost of de-regulation becomes $391,882, consisting of opportunity costs of $35,000 (5% for 3 1/2 years), $6882 representing 4 years of real estate taxes, and $350,000 for professional and attorney's fees.

When this $391,882 is deducted from the $1,031,493 difference between the unregulated and regulated values of the subject property, the result is an increment of $639,611.

Sterling calculates the present value of the increment by assuming a discount rate of 12% over the five years. The 12% consists of 5% to account for the opportunity costs for the amount of the increment, based on the safe rate on one year certificates of deposit as of June 2007, as well as 3% to account for inflation, and 4% to account for the risk that the challenge would not be successful or the value of the property could decline.

However, the 4% for risk should not be applied as part of the present value calculation. Similar to the legal and professional fees needed to challenge the regulations, the deduction for risk should be applied to the increment before it is discounted to its present value. This is because the risk that the challenge to the regulations may not succeed is a different from determining present value. The present value of a sum to be received in the future is a mathematical discounting of a known amount based on an assumed interest rate and number of years. Accounting for risk is not part of a present value calculation.

If one reduces the $639,611 by 4% to account for risk, then the increment becomes $614,027. If a discount rate of 8%, (5% opportunity costs and 3% inflation), is applied for 3 1/2 years then the discount factor is .76443, and the present value of the increment is $469,380.

When this increment is added back to the regulated value of the property of $200,000, the result is $669,380 or approximately $32 a square foot.

Wherefore, the Court finds that the value of the subject property for condemnation purposes on the date of taking was $669,380 or $669,000 rounded. Settle judgment and order on notice.

Dated: January 12, 2018

Brooklyn New York

Hon. Wayne P. Saitta

JSC