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SUPERIOR COURT OF NEW JERSEY
LAW DIVISION : HUDSON COUNTY
DOCKET NO. HUD-L-4095-12

CITY OF HOBOKEN, Civil Action

Plaintiff,

OPINION

v.

PONTE EQUITIES, INC. and UNITY ENVIRONMENTAL, CORP., d/b/a UNITY EDUCATIONAL SYSTEMS, INC.,

Defendants.

DATE OF HEARING: January 28, 2014

DATE OF DECISION: February 19, 2014

Edward J. Buzak for plaintiff (The Buzak Law Group, LLC)

Daniel E. Horgan and Robert S. Lipschitz for defendants (Waters, McPherson, McNeill, P.C.)

BARISO, A.J.S.C.

Introduction

This matter concerns the appropriate date for valuing condemned property pursuant to the Eminent Domain Act of 1971 (hereinafter, the "Act"), N.J.S.A. 20:3-1 to -50. The Act, our State Constitution, and the Fifth Amendment of the Federal Constitution all hold that when private property is condemned for public use, the condemnor is required to pay "just

compensation" to the property owner. N.J.S.A. 20:3-1 to -50; N.J. Const. art. I, ¶ 20; U.S. Const. amend. V. Under the Act, one of the key factors in determining "just compensation" is the date of valuation of the private property subject to condemnation. Section 30 of the Act, N.J.S.A. 20:3-30, governs the date of valuation in a condemnation action. Section 30 provides as follows:

> Just compensation shall be determined as of the date of the *earliest* of the following events: (a) the date possession of the property being condemned is taken by the condemnor in whole or in part; (b) the date of the commencement of the action; (c) the date on which action is taken by the condemnor which substantially affects the use and enjoyment of the property by the condemnee; or (d) the date of the declaration of blight by the governing body upon a report by a planning board....
>
> [N.J.S.A. 20:3-30 (emphasis added).]

The question presented is whether the actions taken by plaintiff City of Hoboken (hereinafter, the "City" or "Hoboken") at a meeting of the City Council on June 11, 2008, substantially affected the value of the property of Defendants Ponte Equities, Inc. and Unity Environmental Corp. (hereinafter, "Ponte"), thereby establishing the valuation date pursuant to N.J.S.A. 20:3-30(c). The court has the jurisdiction and the obligation to hear and decide the issue of the date of just compensation at this juncture in the case. See N.J.S.A. 20:3-5; see also New Jersey Sports and Exposition Authority v. Giant Realty

Associates, 143 N.J. Super. 338, 346 (Law Div. 1976) ("It is for the court to determine the proper valuation date for use at the trial *de novo*....[I]f commissioners' hearings pursuant to N.J.S.A. 20:3-12 are to have any legal or practical significance and not become a mere exercise in futility, the date of valuation must be settled prior to commissioners' hearings.").

Factual and Procedural Background

On December 3, 1990, Ponte acquired the property in question, located at 51-57 Paterson Avenue, 57-69 Harrison Street, and 58-64 Jackson Street, or Lots 1-7 and 12-18, Block 12, in the City of Hoboken (hereinafter, the "Property" or the "Ponte Property"). The Property is currently zoned I-2 Industrial by the City and has been zoned I-2 Industrial since Ponte's acquisition. The principally permitted uses in the I-2 zone are food processing, manufacturing, retail, and public buildings and uses, such as parking, facilities, parks, and playgrounds. This zone also allows for commercial garages and public parking facilities as conditional uses. The Ponte Property has been used as a public parking lot.

In April 2004, Hoboken adopted its Master Plan, which is the operative planning document for the City. The Master Plan recommended an industrial transition zone for the I-2 zone and designated a number of properties, including the Ponte Property, for open space.

On June 11, 2008, at a meeting of the Hoboken City Council, three separate actions were taken by the City. The first action was the introduction of Ordinance DR-366 (Resolution 08-209), purporting to rezone a variety of properties, including but not limited to, the Ponte Property, as open and recreational space. This ordinance, however, was never adopted, and thus the rezoning never took place. The second action taken by the City was the adoption of Resolution 08-206 entitled "RESOLUTION SUPPORTING ACQUISITION OF BLOCK 11 FOR OPEN SPACE AND PARKLAND." Resolution 08-206 recommended that the Hoboken Zoning Board of Adjustment (hereinafter, the "ZBA") postpone consideration of any and all pending variance applications submitted by properties located in Block 11 and the properties identified in Ordinance DR-366, which includes the Ponte Property located in Block 12. Resolution 08-206 further recommended that the ZBA should consider the intent of the City Council in evaluating variance requests from any of the properties that were listed in proposed Ordinance DR-366 and "to grant no variances that would hinder or make more costly the Council's ability to adopt such zoning...." The third action taken was the adoption of Resolution 08-207, retaining McGuire Associates, LLC (hereinafter, "McGuire Associates") to perform appraisals on a variety of sites in the I-2 zone in southwest Hoboken, inclusive of numerous blocks and lots, as well as the appraisal for the

Cognis-Henkel site located in northwest Hoboken (Blocks 103, 107, and 113). The purpose of Resolution 08-207 was to provide land appraisals for the completion of the City's Hudson County Open Space Trust Fund application, which was to be submitted to the Hudson County Board of Chosen Freeholders (hereinafter, the "Board of Freeholders"). The purpose of this application was to obtain additional funding to be used to acquire multiple properties in Hoboken, including the Ponte Property. There was no assurance that the City's Open Space Trust Fund application would be approved or that the City would institute eminent domain actions on any of the identified properties.

On March 11, 2009, McGuire Associates completed an appraisal (hereinafter, the "2009 Appraisal") of the Ponte Property, which was to be included in Hoboken's Open Space Trust Fund application. The appraisal valued the Ponte Property at $10,170,000, finding its highest and best use to be high-density residential use. The appraisal was based on the likelihood that Ponte could obtain a zoning variance permitting residential construction on the Property. This appraisal, however, was not provided to Ponte, and instead was solely used as part of the City's Open Space Trust Fund application.

The Board of Freeholders approved the City's Open Space Trust Fund application and awarded $3 million. This grant

amount, however, was insufficient to fund the acquisition of all the properties located in the application.

No further action was taken by Hoboken until March 16, 2011, when the City adopted the 2010 Reexamination Report of the 2004 Master Plan (hereinafter, the "2010 Reexamination Report"). See N.J.S.A. 40:55D-89 (periodically municipalities are required to revisit their master plans through a reexamination process). The 2010 Reexamination Report was not intended to be a new Master Plan, but rather to review the 2004 Master Plan and its objectives, to outline policy changes since the Master Plan's adoption, and state current objectives. The 2010 Reexamination Report specifically examined the issue of rezoning some industrial lands to other uses and recommended maintaining the existing industrial zoning designations. This Report recommended that the current I-2 zoning regulations remain in place and that a six-acre park be built in an area which included the Ponte Property.

On January 11, 2012, McGuire Associates, completed a second appraisal (hereinafter, the "2012 Appraisal") of the Ponte Property. This appraisal now valued the Property at $2,350,000, using November 21, 2011, as its date of valuation. The appraisal found the highest and best use of the Property to be a public parking lot, noting that, pursuant to the 2010 Reexamination Report, the City no longer allows residential

development in industrial areas or areas not zoned for residential development.

On March 8, 2012, Hoboken offered Ponte $2,350,000 for the Property pursuant to the 2012 Appraisal. This offer was rejected by Ponte.

On August 23, 2012, Hoboken filed a complaint and declaration of taking for the condemnation of the Ponte Property. On August 27, 2012, an order was entered for payment into court.

On January 3, 2013, this court granted Ponte's motion to dismiss the condemnation complaint due to Hoboken's failure to engage in *bona fide* negotiations as required by N.J.S.A. 20:3-6 – namely, for failing to provide reasonable disclosure of the manner in which the amount of offered compensation had been calculated in the City's offer. The order of dismissal was without prejudice, and compelled the parties to engage in limited discovery to explore the basis for the difference in determination of highest and best use of the Property in the 2009 and 2012 appraisals.

On May 21, 2013, McGuire Associates completed a new appraisal of the Property (hereinafter, the "2013 Appraisal"), valuing it at $2,937,000. This appraisal was adopted by the Hoboken City Council.

On September 26, 2013, the court granted Hoboken's motion to reinstate the complaint for condemnation and ordered Hoboken to pay Ponte costs and attorney's fees for its earlier failure to engage in *bona fide* negotiations pursuant to N.J.S.A. 20:3-6. The court also entered an order for payment into court and Hoboken deposited $2,937,000 with the Clerk of the Superior Court as estimated compensation for the taking. Thereafter, Hoboken filed its declaration of taking.

In order to resolve the question of whether Hoboken's actions on June 11, 2008 substantially affected the Ponte Property, the court conducted a hearing on January 28, 2014, at which time Ponte offered expert testimony. Prior to the hearing, however, Hoboken moved *in limine* to exclude the experts' testimony, alleging that the threshold requirements for admissibility under N.J.R.E. 702 and N.J.R.E. 703 were not met because there was no reliable foundation for the opinion testimony. Hoboken additionally alleged that the expert testimony did not meet the relevancy requirements of N.J.R.E. 401. The court proceeded with the hearing on the date of valuation and, pursuant to N.J.R.E. 104, to determine whether the experts' testimony was admissible.

Ponte produced a professional land planner, Peter G. Steck, as its first expert. The parties conceded that Mr. Steck was qualified as a land-planning expert. Mr. Steck testified that

prior to the June 11, 2008 meeting of the Hoboken City Council, zoning variances, such as those to develop residential properties, in the I-2 zone were routinely granted. Mr. Steck opined that the actions taken on June 11, 2008, however, shifted this trend. Mr. Steck maintained that after June 11, 2008, it was "riskier" to apply for a variance in the I-2 zone, although he provided no examples of variance applications that were denied after this date. Mr. Steck referred to the Hoboken City Council's adoption of Resolution 08-206, which recommended that the ZBA postpone consideration of pending variance applications for identified properties, including the Ponte Property. Mr. Steck opined that this resolution, in conjunction with the two other actions of June 11, 2008, "telegraphed" the City Council's message to the ZBA to deny use variances in the I-2 zone and the City's intention to acquire these properties. On cross-examination, however, Mr. Steck conceded that the Municipal Land Use Law (hereinafter, "MLUL"), N.J.S.A. 40:55D-1, *et seq.*, grants the ZBA independent statutory authority. See N.J.S.A. 40:55D-20 ("Any power expressly authorized by this act to be exercised by [the] (1) planning board or (2) board of adjustment shall not be exercised by any other body, except as otherwise provided in this act."). Hoboken's governing body is not empowered to direct the ZBA to take any action with a resolution or unadopted ordinance. Therefore, Hoboken's adoption of

Resolution 08-206 or any of its other actions could not direct the ZBA to follow any course of action or affect ZBA's ability to issue use variances. Mr. Steck further conceded that even if the ZBA were to postpone pending use variance applications, if postponed beyond the statutory time within which the ZBA is required to act, such applications would be approved by default pursuant to MLUL. See N.J.S.A. 40:55D-73 ("Failure of the board to render a decision within such 120-day period or within such further time as may be consented to by the applicant, shall constitute a decision favorable to the applicant."). Mr. Steck reiterated that he is a land-planning professional, not a real estate appraiser; therefore, he would not opine whether Hoboken's actions on June 11, 2008 increased or decreased the value of the Ponte Property.

Ponte also produced Maurice J. Stack, II, a real estate appraiser and real estate broker with substantial experience in the valuation of real estate in Hoboken. The parties agreed that Mr. Stack was qualified as a real estate appraisal expert. Mr. Stack stated that he was retained by the law firm Waters, McPherson, McNeill, P.C. in 2013 and, after collaborating with the law firm, determined that June 11, 2008 was the proper date of valuation of the Ponte Property. Mr. Stack further testified that prior to his retention, he was not aware of the June 11, 2008 actions or their alleged effect on the Ponte Property. He

testified that Hoboken indicated to the public, via its actions on June 11, 2008, its interest in the Ponte Property, thereby causing the Property to be unmarketable for any use beyond its zoning restrictions. According to Mr. Stack, Hoboken, in effect, became the only potential buyer of the Property, as it was unsellable to any private purchaser. To support his unmarketability proposition, Mr. Stack referenced his involvement in the attempted sale of the Cognis-Henkel property, which was one of the properties identified in the June 11, 2008 proposed ordinance, in Hoboken. Mr. Stack testified that he represented the property owner, Cognis-Henkel, in a potential sale to a private buyer. During the negotiations, however, the buyer learned that Hoboken was interested in purchasing the Cognis-Henkel property and abruptly walked away from the transaction. Mr. Stack later conceded that this event occurred sometime *before* June 11, 2008. Aside from the Cognis-Henkel property, Mr. Stack presented no other examples of variance applications or properties affected by Hoboken's actions on June 11, 2008.

Mr. Stack testified further that he agreed with the 2009 Appraisal completed by McGuire Associates. Specifically, Mr. Stack stated that the valuation of the Property at $10,170,000 and its designation of the Property's highest and best use as a residential development was correct. Mr. Stack conceded that

this valuation and highest and best use were accurate despite the fact that it was completed almost a year after the actions which allegedly substantially decreased the value of the Ponte Property. Mr. Stack also asserted that the current use of the Property as a parking lot is an interim use. Mr. Stack then conceded that public parking has been the sole use of the Property for at least the past decade and that he was not aware of any other use intended by Ponte.

Based on the foregoing, Mr. Stack concluded that the actions on June 11, 2008 by Hoboken substantially decreased the value of the Ponte Property despite being unsure whether Hoboken's actions increased or decreased the value of the Property when he was deposed. According to Mr. Stack, the June 11, 2008 actions did have the effect of causing an immediate and direct inference with the use and enjoyment of the Property, thus having a substantial effect within the meaning of N.J.S.A. 20:3-30(c).

Law

In 1962, the Eminent Domain Revision Commission was created to recommend revision to the Eminent Domain Act existing at the time. The Commission's report became the basis for the Eminent Domain Act of 1971. The Commission found that fixing just compensation at the date the condemnation complaint is filed does not always constitute adequate compensation. The

Commission suggested alternative valuation dates in addition to the date the condemnation action is commenced. See Report of Eminent Domain Revision Commission of New Jersey, at 27-28 (1965). "The dominant theme which runs through Article V of the report is addressed to the concept of 'freezing' value once an event occurs which precipitates an upward or downward fluctuation in the value of a piece of property to be ultimately condemned." Giant Realty, supra, 143 N.J. Super. at 347. Thus, "if a governmentally-inspired event occurs prior to the taking which has the effect of increasing or decreasing the value of the property, then that prior date shall become the date of valuation. . . ." Id. at 348.

One of the primary objectives of N.J.S.A. 20:3-30(c) "is to protect the condemnee from a diminution in value resulting from the 'cloud of condemnation' being placed on the property by a potential condemnor; another objective is to insulate the condemnor from the 'ravages of the inflationary spiral.'" Twp. of W. Windsor v. Nierenberg, 150 N.J. 111, 129 (1997) (quoting Giant Realty, supra, 143 N.J. Super. at 348. As previously stated, N.J.S.A. 20:3-30(c) states that "[j]ust compensation shall be determined as of . . . the date on which action is taken by the condemnor which *substantially affects* the use and enjoyment of the property by the condemnee." N.J.S.A. 20:3-30(c) (emphasis added). Thus, not *any* governmental action that

affects the property value invokes N.J.S.A. 20:3-30(c), only those which *substantially affect* the use and enjoyment of the property. See Giant Realty, supra, 143 N.J. Super. at 352 ("Mere tentative statements or staged events will not rise to the level of substantiality."); see also Report of Eminent Domain Revision Commission of New Jersey, supra, at 28 ("The Commission therefore suggests that any increase or decrease in the value of property caused by administrative actions, or public announcements of proposed public improvements . . . shall be disregarded in determining the compensation for the taking, and that compensation shall be fixed as of the date of the action of the taking body shall substantially affect the use and enjoyment of the property."). "A substantial effect upon the use and enjoyment of property is occasioned when the condemnor takes action which directly, unequivocally and immediately stimulates an upward or downward fluctuation in value and which is directly attributable to a future condemnation." Giant Realty, supra, 143 N.J. Super. at 353. "A 'clearly observable and direct interference which is directly related to condemnation' must exist if a substantial effect is to be found." Nierenberg, supra, 150 N.J. at 130 (quoting Giant Realty, supra, 143 N.J. Super. at 353-54).

In Giant Realty, Judge Trautwein was charged to determine which, if any, action by Hackensack Meadowlands Development

Commission (hereinafter, "HMDC") and the New Jersey Sports and Exposition Authority (hereinafter, the "Authority") substantially affected Giant Realty Associate's (hereinafter, "Giant") property located at the site of the Meadowlands sports complex in East Rutherford, New Jersey. The Authority was charged with exclusive jurisdiction of a defined site in the Meadowlands, and HMDC "was the Authority's agent and therefore HMDC's actions are attributable to the Authority." Giant Realty, supra, 143 N.J. Super. at 355 n. 3; see N.J.S.A. 5:10-1, *et seq*. On June 11, 1971, the Authority requested that HMDC deny all pending building and subdivision applications in the area of the proposed sports complex, which included Giant's property. "HMDC adopted a resolution on that date which instructed its chief engineer to deny the pending applications[;] however, Giant did not have a pending application on that date." Giant Realty, supra, 143 N.J. Super. at 344. On December 28, 1971, HMDC released the first proposed zoning map of the sports complex, which included Giant's property, to the public. The zoning map did not receive final approval from HMDC until November 8, 1972. In April 1972, Giant applied for, and was granted by the Borough of East Rutherford, a building permit to construct a gasoline station on its property. Additionally, in April 1972, Giant applied to HMDC for a zoning certificate and a building permit to use its

property as a gasoline station. On May 4, 1972, Giant entered into a 20-year lease with Amerada-Hess Corporation, where Hess would lease Giant's property for use as a gasoline station. On June 7, 1972, HMDC denied by letter Giant's development applications. Roughly a year later, the Authority instituted a condemnation action on Giant's property.

Judge Trautwein examined three dates as potential valuation dates pursuant to N.J.S.A. 20:3-30(c): (1) June 11, 1971, where HMDC passed a resolution denying pending development applications to Meadowlands property owners; (2) December 28, 1971, where HMDC included Giant's property on its proposed zoning map; and (3) June 7, 1972, where HMDC denied Giant's development applications. The court found that on June 11, 1971, Giant's property was not substantially affected under N.J.S.A. 20:3-30(c), citing several reasons. First, HMDC's resolution only referred to pending applications, and Giant did not have a pending application at that time. Second, there was no evidence that the resolution "was intended to become a policy of HMDC to deny all pending and future applications . . . ." Id. at 356. Third, and last, although "the denial of pending applications did affect Giant by placing potential purchasers and lessees in a more watchful and wary posture . . . . the lack of clear nexus between the HMDC action on June 11, 1971 and Giant's property renders the action not substantial within the

meaning of N.J.S.A. 20:3-30(c)." Id. at 357. Next, when considering December 28, 1971 as a valuation date, the court held that the placement of Giant's property on the zoning map in the proposed sports complex zone had "an effect on the property but it did not precipitate a fluctuation in the value of that property." Ibid. "A prospective purchaser at that time knew that this parcel was earmarked for taking and, as a matter of prudent business, would shy away from purchasing. However, this does not necessarily drive the value of the property temporarily down." Id. at 357-58. The court did concede, however, that the final approval of the zoning map on November 8, 1972 did invoke N.J.S.A. 20:3-30(c), but did not choose the date because a suitable earlier date existed. That earlier date, which invoked N.J.S.A. 20:3-30(c), was June 7, 1972, when HMDC denied Giant's development applications by letter. The court noted that the letter "effectively prohibited Giant's beneficial use of the property." Id. at 355. Giant's property "was raw land being used for no other economic purpose other than perhaps for investment." Ibid. Accordingly, "[t]here is no clearer example of an event which precipitates a fluctuation in the value of vacant property than a denial of a building application." Ibid.

In Nierenberg, a partnership purchased a tract of land, which was already designated on the Township of West Windsor's Master Plan as a potential site for a community park, and

prepared a plan for subdivision. In May 1988, the partnership submitted a subdivision application to the Township, but later determined that its property was not entirely within the area served by public sewers. Therefore, the partnership would be forced to wait at least seven months to perform required underground water tests or attempt to have the municipal sewer plan amended. On July 29, 1988, while the partnership was contemplating its decision, it received a letter from the Township Administrator, stating that the Township may acquire its property for the purpose of establishing a community park. The letter further stated that the Township was already awarded $3 million in Green Acres program funding for the purchase of the partnership's property. The letter included a copy of a map outlining the proposed community park, which included the partnership's property, and a portion of the Master Plan, which discussed the construction of a public park on the partnership's property. Over roughly the next four years, the Township completed several appraisals of the partnership's property and adopted a resolution for purchasing most of the property. In return, the partnership would develop the remaining land, subject to a rezoning of the property. The Township did not approve the rezoning, but offered to purchase the entire tract for about $1 million less than the partnership's original purchase price. Negotiations continued for some time, but the

Township eventually filed a complaint for condemnation. In the condemnation proceeding, the partnership contended that date of valuation was July 29, 1988 because the Township's letter of intent to condemn had invoked N.J.S.A. 20:3-30(c). The partnership argued that no developer would have continued developing the property, nor would any buyer be interested in purchasing the property while threatened with condemnation. The partnership concluded that the letter reduced the property's value by twenty-five percent. The Township, on the other hand, argued that the value of the property decreased because of poor market conditions; therefore, the proper date of valuation was the date the condemnation complaint was filed.

The trial court found that the appropriate date of valuation was July 29, 1988, the date of the letter. The trial court cited several reasons for its ruling: (1) the letter was stated to be a formal notification, leading to the conclusion it was more than a simple letter; (2) the letter included a community park map and the Master Plan, which both identified the property and the Township's plan to use it as a park; (3) the letter stated that the funding for the acquisition of the property was available via the Green Acres program; and (4) the letter stated that several appraisers, such as the Township's and Green Acres' appraisers, would estimate market value of the property, indicating a firm intent to acquire the property. See

Nierenberg, supra, 150 N.J. at 122-23. The trial court "reasoned that the Township's letter impeded development, thereby significantly diminishing the possibility that the land would be put to its highest and best use as a residential development." Nierenberg, supra, 150 N.J. at 123.

The New Jersey Supreme Court agreed with the trial court's finding that the initial letter disclosed the Township's intentions and prohibited unrestricted use of the property, thereby causing a reduction in value of roughly twenty-five percent. The Court held that the partnership should not have been faulted for not continuing to seek development approval from the Township following receipt of the letter because "any such attempt would have been futile." Id. at 135. Therefore, based on the cumulative effect of the letter and its attachments, the Court held that July 29, 1988, the date of the letter, is the proper date of valuation under N.J.S.A. 20:3-30(c).

Finally, in Mount Laurel Twp. v. Stanley, 185 N.J. 320 (2005), Mount Laurel Township obtained a judgment of repose "approving the Township's fair share housing plan that included the [condemnee's] property." Stanley, supra, 185 N.J. at 324. Five years later Mount Laurel filed its complaint in condemnation. During that period, the market value of the condemnee's property "rose significantly due solely to

inflationary pressures." Id. at 323. Mount Laurel argued that N.J.S.A. 20:3-30(c) was invoked when the judgment of repose was entered, but the condemnee contended that the judgment of repose did not substantially affect the property, because the increase in value was due solely to inflation and was not a result of Mount Laurel's actions as condemnor. See ibid. The Supreme Court held that the filing of the judgment of repose did not substantially affect the condemnee's use and enjoyment of the property because it was "undisputed" that the increase in the value of the property after the entry of the judgment of repose was "caused by inflationary circumstances, and was not the result of any act by the condemnor." Id. at 326.

Analysis

Before determining whether Hoboken's actions on June 11, 2008 substantially affected the use and enjoyment of Ponte's Property pursuant to N.J.S.A. 20:3-30(c), the court must first address Hoboken's motion *in limine* to exclude the testimony of Ponte's expert witnesses, Peter G. Steck and Maurice J. Stack, II.

Pursuant to N.J.R.E. 104(a) "[w]hen the . . . admissibility of evidence . . . is in issue, that issue is to be determined by the judge. . . . [who] may hear and determine such matters out of the presence or hearing of the jury." See Kemp v. State, 174 N.J. 412, 432-33 (2002) ("The Rule 104 hearing allows the court

to assess whether the expert's opinion is based on scientifically sound reasoning or unsubstantiated personal beliefs. . . . In the course of the Rule 104 hearing, an expert must be able to identify the factual basis for his conclusion, explain his methodology, and demonstrate that both the factual basis and underlying methodology are scientifically reliable."); see also Koruba v. American Honda Motor Co., Inc., 396 N.J. Super. 517, 523 (App. Div. 2007) (noting that the trial court held a Rule 104 hearing and determined that plaintiff's expert's opinion was a net opinion), certif. denied, 194 N.J. 272 (2008). "Qualified expert testimony is admissible to assist the jury, N.J.R.E. 702, but there must be a factual and scientific basis for an expert's opinion. An opinion lacking in foundation is worthless." Jimenez v. GNOC, Corp., 286 N.J. Super. 533, 540 (App. Div. 1996) (internal citations omitted). Expert testimony may be challenged by a motion *in limine* on the ground that it is a net opinion, that is, it is based only on surmise and speculation, and not on facts. Creanga v. Jardal, 185 N.J. 345 (2005) (motion *in limine* made prior to trial to exclude expert's testimony as net opinion).

> The net opinion rule is a prohibition against speculative testimony. Under this doctrine, expert testimony is excluded if it is based merely on unfounded speculation and unqualified possibilities. Therefore, the net opinion rule appears to be a mere restatement of the established rule that an expert's bare conclusions, unsupported by factual evidence,

> [are] inadmissible. It frequently focuses...on the failure of the expert to explain a causal connection between the act or incident complained of and the injury or damage allegedly resulting therefrom.
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> [Grzanka v. Pfeifer, 301 N.J. Super. 563, 580 (App. Div. 1997) (internal citations and quotation marks omitted).]

The record demonstrates that Ponte's experts' testimony, at deposition and at the court's hearing, like in Grzanka, "was based on supposition, non-sequiturs and unsubstantiated conclusions, and thus clearly constituted a net opinion." Id. at 581. "Neither expert presented market data to support his contentions nor did the experts clearly delineate the effects which they said were visited" upon the Ponte Property by the actions of Hoboken. Giant Realty, supra, 143 N.J. Super. at 355.

Mr. Steck's testimony lacked the requisite factual basis because he provided no factual evidence to support the proposition that the events undertaken by Hoboken on June 11, 2008 substantially affected the use and enjoyment of the Ponte Property. First, Mr. Steck declined to state whether Hoboken's actions substantially affected the Ponte Property within the meaning of N.J.S.A. 20:3-30(c). Therefore, Mr. Steck offered no guidance as to whether the value of the Property had decreased after June 11, 2008. Notwithstanding this infirmity, Mr. Steck presented no direct examples of variance applications submitted

by any of the affected properties that were denied after June 11, 2008. Mr. Steck relied on no market data nor did he conduct or rely on any studies of the Ponte Property, or any other affected property, supporting a conclusion that Hoboken's actions substantially affected the Ponte Property. Second, Mr. Steck acknowledged that, pursuant to the MLUL, Hoboken's resolution recommending the ZBA to postpone consideration of pending variance applications had no legal effect on the ZBA's application review process. Further, what differentiates Hoboken's resolution from HMDC's resolution denying pending applications in Giant Realty is its effect on the respective identified properties. In Giant Realty, HMDC's resolution definitively *denied* all pending applications, as the action was directed at its chief engineer, an agent of HMDC. It cannot be disputed that the resolution adopted by HMDC in Giant Realty is indeed a harsher action than that taken by Hoboken in Resolution 08-206. Yet, even under this harsher action, the court found that Giant's property was not substantially affected pursuant to N.J.S.A. 20:3-30(c) because Giant, like Ponte, did not have a pending application when the resolution was adopted. Hoboken's actions may exhibit its intent to condemn the identified properties, including the Ponte Property, but do not carry any legal effect on the identified properties under the MLUL.

Therefore, Hoboken's actions on June 11, 2008 did not substantially or directly affect the Ponte Property.

Based on the foregoing, Mr. Steck could not opine on the principal issue to be decided at this posture in the case – whether N.J.S.A. 20:3-30(c) should be invoked. Mr. Steck, instead, offered testimony with no factual foundation. At its best, Mr. Steck's opinion proffers unfounded speculation.

Similarly lacking any factual foundation is Mr. Stack's testimony. In forming his opinion, Mr. Stack also presented no market data, analysis, or studies on which he relied. In Giant Realty, the court criticized the lack of any market data to support the expert opinions presented by the parties. See Giant Realty, supra, 143 N.J. Super. at 355 ("Neither expert presented market data to support his contentions nor did the experts clearly delineate the effects which they said were visited upon Giant's parcel by the actions of HMDC. What the experts did attempt to do, however, was to come to legal conclusions based on their expertise. Making legal conclusions is the province of the court and not the experts."). In Mr. Stack's deposition, he states that he "has a wealth of data" to analyze whether there was a decrease in the value of the Property, but later admitted that he never completed an analysis. During the hearing, Mr. Stack's testimony was equally infirm. Mr. Stack had no specific information as to any effects on other properties stemming from

Hoboken's actions on June 11, 2008. Mr. Stack futilely offered the Cognis-Henkel property as an example. As indicated earlier, this example is unsuitable because Hoboken's actions on June 11, 2008 had no effect, at least none presented to the court, since this property allegedly became unmarketable *well before* June 11, 2008. Furthermore, although Mr. Stack contends that the Ponte Property became unmarketable to potential private buyers, he does not support his opinion with any marketability study of the Property, or even other affected properties. In Nierenberg, the Court makes reference to the Township of West Windsor's expert completing a marketability study in support of his opinion. In the case at hand, however, neither expert submitted by Ponte has completed any type of study or analysis of the Property. Instead, Ponte's experts chose to base their conclusions solely on their general professional experience in Hoboken, not on any specific facts or cognizable effects that resulted from Hoboken's actions on June 11, 2008.

Mr. Stack based his opinion on his general knowledge of the City of Hoboken, informed by his experience as a real estate appraiser. Specifically, Mr. Stack relied upon understanding Hoboken's real estate market's general sentiment. This basis for expert testimony, however, is nothing more than vague feelings, perceptions, and a general and obscure sense of the atmosphere for Hoboken's property sales. Mr. Stack's opinion

lacked any factual foundation. Lacking examples of effects on other properties or data offered, Mr. Stack's testimony is based on mere generalizations, which cannot serve as a foundation for expert testimony.

It is evident that Mr. Stack's testimony was based "merely on unfounded speculation and unquantified possibilities." Vuocolo v. Diamond Shamrock Chem. Co., 240 N.J. Super. 289, 300 (App. Div.), certif. denied, 122 N.J. 333 (1990). Mr. Stack's testimony demonstrated that his opinion was unsupported by any relevant factual evidence. In accordance with Giant Realty and Nierenberg, it is readily apparent that the conclusions reached by Ponte's experts constitute net opinions. Therefore, there is no proof that Hoboken's actions on June 11, 2008 had a substantial effect upon the use and enjoyment of the Ponte Property since those actions did not directly, unequivocally and immediately stimulate an upward or downward fluctuation in value, which was directly attributable to a future condemnation.

Since Mr. Steck's and Mr. Stack's testimony lacked any factual basis, they constitute net opinions for failing to meet the threshold requirements of N.J.R.E. 702 and N.J.R.E. 703. Consequently, Hoboken's motion *in limine* to exclude Ponte's experts' testimony is granted. As a result, Ponte has failed to offer sufficient evidence to find June 11, 2008 as the appropriate valuation date pursuant to N.J.S.A. 20:3-30(c).

Therefore, the date of valuation of the Ponte Property is hereby fixed as the date upon which Hoboken commenced its condemnation action – August 23, 2012. See N.J.S.A. 20:3-30(b).

Although the ruling on Hoboken's motion *in limine* is dispositive in establishing August 23, 2012 as the appropriate date of valuation of the Ponte Property, the issue of whether Hoboken's actions on June 11, 2008 substantially affected the use and enjoyment of Ponte's Property under N.J.S.A. 20:3-30(c), nonetheless, will be explicated below in an effort to present a full record of all the questions presented to the court.

Defendant Ponte asserts that this case is governed by N.J.S.A. 20:3-30(c), which states that "[j]ust compensation shall be determined as of . . . the date on which action is taken by the condemnor which substantially affects the use and enjoyment of the property by the condemnee." N.J.S.A. 20:3-30(c). According to Ponte, the proper date of valuation of the Property is June 11, 2008, when Hoboken passed several resolutions, which affected the Ponte Property, and proposed an ordinance identifying the Property as targeted for use as open space. Ponte argues that Hoboken's actions substantially affected its use and enjoyment of the Property because the actions diminished the possibility that the land would be put to its highest and best use as a residential development, thereby reducing the value of the Property by roughly seventy percent.

Ponte contends that Hoboken's actions on June 11, 2008 were taken in contemplation of condemnation. Ponte argues that by targeting the Property for open space and instructing the ZBA to postpone pending variance applications, Hoboken was able to place the "cloud of condemnation" upon the Property, thereby eliminating all potential buyers of the Property. See Giant Realty, supra, 143 N.J. Super. at 348. Thus, according to Ponte, Hoboken's action lowered the cost of Hoboken's anticipated acquisition of the Property for use as a park. Hoboken, on the other hand, argues that its actions on June 11, 2008 did not substantially affect Ponte's use and enjoyment of the Property, because the actions did not "directly, unequivocally and immediately stimulate[] an upward or downward fluctuation in value . . . which is directly attributable to a future condemnation." Giant Realty, supra, 143 N.J. Super. at 353. Thus, Hoboken urges that N.J.S.A. 20:3-30(b) provides the proper standard for determining the date of valuation, specifically, the date of the commencement of the action – August 23, 2012.

"The question whether and when a landowner's use and enjoyment of his or her property has been substantially affected under N.J.S.A. 20:3-30(c) is a mixed question of law and fact." Nierenberg, supra, 150 N.J. at 135 (internal quotation marks omitted). The case before the court shares similarities to the

governmental actions taken and facts presented in Giant Realty and Nierenberg. First, Hoboken's adoption of Resolution 08-206, which recommended that the ZBA postpone consideration of any pending variance applications, is similar to the action taken by the HMDC in Giant Realty, when HMDC adopted a resolution denying any pending applications. Both Ponte and Giant did not have applications pending at the time each governmental entity respectively acted. In Giant Realty, the court acknowledged that "the denial of pending applications did affect Giant by placing potential purchasers or lessees in a more watchful and wary posture." Giant Realty, supra, 143 N.J. Super. at 357. Notwithstanding this finding, the court found that Giant was not "directly affected on that date" and there was a "lack of a clear nexus between HMDC[']s action . . . and Giant's property . . . ." Id. at 356-57. In the case at hand, Hoboken's adoption of a resolution recommending that the ZBA postpone consideration of pending applications shares an even greater lack of nexus to any effect on the Ponte Property. First, and as stated earlier, in Giant Realty, HMDC's resolution was harsher than Hoboken's action in this case. HMDC affirmatively *denied*, not recommended a postponement of, all pending applications. Hoboken, on the other hand, merely recommended that the ZBA postpone consideration of pending applications. As mentioned, under the MLUL, Hoboken's recommendation has no legal authority or effect

on the ZBA's ability to grant variances. The ZBA is a quasi-judicial, independent authority and is not statutorily compelled to abide by, or give any credence to, Hoboken's adopted resolution when reviewing applications. Second, Ponte had no application pending before the ZBA that could be substantially affected by Hoboken's recommendation. Third, as conceded by Mr. Steck, postponement of a variance application beyond the statutory time-limits of the MLUL results in an automatic approval.

The introduction of Ordinance DR-366 by Hoboken purporting to rezone as open and recreational spaces a variety of properties, including the Ponte Property, is most similar to HMDC's action of including Giant's property on the proposed zoning map of the Meadowlands sports complex. In Giant Realty, the court held that when the proposed map indicated that Giant's property was in the sports complex area, "the threat of condemnation became greater, and while it was not imminent, it was foreseeable." Id. at 357. "A prospective purchaser at that time knew that this parcel was earmarked for taking and, as a matter of prudent business, would shy away from purchasing." Id. at 357-58. However, Giant's property value was not driven down, because it was not reasonably certain that it would soon be condemned. In the case at hand, even if it was accepted that the Ponte Property was "earmarked for taking" by Hoboken, that

does not necessarily mean that its value was diminished by Hoboken's actions. If a publically circulated map proposing to condemn Giant's property did not substantially affect its use and enjoyment, it is unlikely that a proposed ordinance, *which was never adopted*, significantly affected the Ponte Property.

Furthermore, Ponte has presented no evidence proving a diminution in value of the Property as a result of the actions on June 11, 2008. In fact, the evidence presented by Ponte supports the exact opposite conclusion. Mr. Stack agreed that the valuation submitted by Hoboken's retained appraiser, McGuire Associates, in the 2009 Appraisal was proper. What is significant about this appraisal is that it was completed in March 2009, almost a year after Hoboken's June 11, 2008 actions. It is difficult to accept that Hoboken's actions on June 11, 2008 had a substantial effect on the Property when an appraisal, completed close to a year after these actions, produced its highest valuation. A valuation to which Ponte's expert agrees is proper despite it taking place well after the Property was allegedly substantially affected and devalued by roughly seventy percent.

Hoboken's action adopting Resolution 08-207, which retained McGuire Associates to perform appraisals on a variety of sites in the I-2 zone, including the Ponte Property, for the purpose of the City's Open Space Trust Fund application is not nearly as

strong as the action taken by the Township of West Windsor in Nierenberg. In Nierenberg, the Township's letter of intent to condemn, along with its attachments, had a collective effect of invoking N.J.S.A. 20:3-30(c). Like in the case at hand, the condemnor made reference to applications for funding for the potential acquisition of properties. What distinguishes Ponte from Nierenberg, however, is the fact that the Township of West Windsor's letter specifically stated that it had sought and successfully obtained funding to purchase the partnership's property. In Ponte's case, Hoboken's adopted resolution retaining McGuire lent no assurance that the funding was available or sufficient to acquire the Ponte Property. Instead, on June 11, 2008, Hoboken's application for Open Space Trust Fund money was not even completed, let alone accepted by the Board of Freeholders. Therefore, the action taken by Hoboken in Resolution 08-207 is substantially weaker than the action taken by the Township of West Windsor in its letter of intent in Nierenberg.

Another factor that distinguishes the instant case from Nierenberg and Giant Realty is that none of Hoboken's actions restricted the Ponte's permitted uses in the I-2 zone. In Nierenberg, the Township impeded residential development, one of the permitted uses under the R-2 Residential zone in which the partnership's property was located, "thereby significantly

diminishing the possibility that the land would be put to its highest and best use as a residential development. [T]he only apparent alternative use would be agricultural." Nierenberg, supra, 150 N.J. at 123. In Giant Realty, HMDC restricted Giant's permitted use within its zone by denying its building application, thereby reducing the property to raw, undeveloped land with no viable use. In the instant case, however, Hoboken did not restrict any of the permitted or conditional uses available to Ponte in the I-2 zone. Instead, Hoboken arguably restricted an unpermitted use – residential development – in the I-2 zone. On this basis, and in comparison to those mentioned cases, Hoboken's actions were not nearly as restrictive as those taken by the governmental entities in Giant Realty and Nierenberg.

Ponte submits if it had made an effort to seek a use variance it would have been futile. Ponte's argument, however, is misplaced. In Nierenberg, the Court held that any continued effort by the partnership to seek development approval for its subdivision application "would have been futile." Id. at 135. If the partnership chose to further pursue its application, it either needed to wait at least seven months to conduct required percolation tests, at an approximate cost of $40,000, or attempt to have the municipal sewer plan amended. See id. at 117. The Court found that such a "course of action would have succeeded

in consuming substantial partnership assets with no commensurate benefit." Id. at 135. In the instant case, if Ponte were to submit a use variance, it would not have been equally burdensome nor futile. First, as explained, under the MLUL, if Ponte submitted an application and the ZBA followed Hoboken's recommendation to postpone consideration of pending applications beyond the statutory time-limits, the application would be approved by default. Second, the burden of submitting an application to a zoning board of adjustment for a use variance is far less burdensome than the lone course of action available to the partnership in Nierenberg. There is no evidence indicating that the submission of a variance application to the ZBA would cost upwards of $40,000 or require close to a seven-month wait nor that it could be as cumbersome as amending a municipality's established sewer plan, which would be a formidable task for any private property owner. Therefore, it would not have been "futile" for Ponte to pursue a zoning variance, enabling it to develop a residential complex, in the same context as it was "futile" for the partnership to seek a subdivision application in Nierenberg.

Finally, what further differentiates Giant Realty and Nierenberg from the instant case is the directness of the condemnor's actions. In Giant Realty, HMDC outright denied Giant's building application. In Nierenberg, the Township of

West Windsor directly sent "formal notification" of its intent to condemn the partnership's property. See Nierenberg, supra, 150 N.J. at 122. Hoboken took no such direct action against the Property. Instead, Hoboken took a mix of indirect actions against the Property, all of which were analogous to actions in Giant Realty and Nierenberg, which those courts found to be insufficient to trigger N.J.S.A. 20:3-30(c).

Even taking all three of Hoboken's actions on June 8, 2011 cumulatively, as the Court evaluated the condemnor's actions in Nierenberg, they are still insufficient to invoke N.J.S.A. 20:3-30(c). The three actions taken by Hoboken may have merely put potential buyers on guard, but did not substantially affect the Property indicating a reasonable certainty that it would be soon condemned. Therefore, the court finds that Hoboken's actions on June 11, 2008 did not have a substantial effect upon the use and enjoyment of the Ponte Property, and these actions did not directly, unequivocally and immediately stimulate an upward or downward fluctuation in value, which was directly attributable to a future condemnation. As a result, the court holds, even assuming, *arguendo*, that Ponte's experts' testimony and opinions were admissible, the proper valuation date would remain the date on which Hoboken filed its complaint in condemnation – August 23, 2012 – pursuant to N.J.S.A. 20:3-30(b).

In closing, it should be noted that this ruling does not make any judgment or indication as to the likelihood of whether Ponte would have been successful in obtaining a use variance. This question is to be answered by the trier of fact of just compensation based on the highest and best use of the Ponte Property, i.e., the condemnation commissioners or, if commissioners' award is appealed, by a jury.