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TAX CERTIORARI AND CONDEMNATION

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High Condemnation Awards Could Lead to Reimbursement of Legal Fees

It is a little known but very valuable fact for real property owners that, under a recently enacted law, a condemnee who is successful in obtaining a condemnation award substantially above the amount originally offered can now generally recover all or most of its legal and expert witness costs. New York State struggled for many years before resolving the conundrum of providing just compensation for property taken by the State and its municipalities while functioning within the American legal system where a litigant generally must absorb all or practically all of its legal and expert fees.

A property owner awarded the full market value of its condemned property by a court quite obviously does not receive the "just compensation" guaranteed by the Fifth Amendment to the U.S. Constitution and Article 1, §7 of the New York State Constitution if it is still out of pocket for substantial attorney, appraisal and engineering fees. Nevertheless, the Court of Appeals has held, in *Hakes v. State*, 81 NY2d 392, 398, 599 NYS2d 498, 501 (1993), that recovery of fees and costs is not a constitutional right:

While condemnees are undoubtedly entitled under the State and Federal Constitutions to just compensation for property taken by the State, they received such compensation in the awards based on property value. The fees and costs allowed under [Eminent Domain Procedure Law] 701 are not an automatic part of such compensation. To the contrary, we have long held that attorney fees and additional costs are 'mere incidences of litigation' and are not embraced in the constitutional right (*City of Buffalo v. Clement Co.*, 28 NY2d 241, 262-264, 321 - NYSM 345). The Legislature's determination to allow such fees and costs - in the discretion of the court - does not establish a new entitlement but merely allows a court in condemnation cases to ameliorate the condemnee's costs in cases it considers appropriate.

Historically, New York State has attempted to "amelio-



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rate" the condemnee's litigation costs at least as far back as 1890 when the General Condemnation Law and Grade Crossing Law were first enacted. Those laws gave courts discretion to grant an additional allowance of costs, not exceeding 5 percent, upon the amount awarded for damages. While far from adequate, the purpose of this allowance was that:

A person or corporation, whose property is sought to be taken under condemnation proceedings, is entitled to be heard at every step in the process, and in justice should be compensated not only for the land or property taken, but should be indemnified against all costs and expenses reasonably incurred, either in resisting the appropriation or in the proceedings for ascertaining the compensation to be made. *Matter of Brooklyn v. Long Island Water Supply Co.*, 148 NY 107 (1895).

Even this statement of fairness did not apply to all costs and all condemnations. Expert and legal fees were not recoverable under either the 1890 statutes or under recovery of cost provisions in the civil procedure laws. Claimants in municipalities that took property under special laws were not entitled to even this small allowance until 1970 when the Fourth Department in *City of Buffalo v. J W Clement Co.*, 34 AD2d 24, 36, 311 NYS2d 98, 111, (4th Dept. 1970) mod. on other grounds, 28 NY2d 241, 321 NYS2d 345 (1971), held:

The Buffalo Charter results in unequal and unjust treatment of those owners in Buffalo whose property is condemned by the City as distinguished from those owners whose property is otherwise condemned... Hence the Buffalo Charter must be held unconstitutional insofar as it deprives Clement of equal treatment under the law, that is, with respect to an extra allowance for costs....¹

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Additional Allowance

An effort to expand the concept of additional allowance was made as part of the 1977 recodification of condemnation law into the Eminent Domain Procedure Law (EDPL). EDPL 701 granted an additional allowance of up to 10 percent of the award, not to exceed \$10,000, in instances where the award was at least 200 percent of the condemnor's proof and the court was satisfied that the condemnee had borne extraordinary expenses for expert witness fees.

EDPL 701 was amended in 1987 to provide for the following far more applicable and generous "additional allowance" geared to "just and adequate compensation:"

In instances where the order or award is substantially in excess of the amount of the condemnor's proof and where deemed necessary by the court for the condemnee to achieve just and adequate compensation, the court, upon application, notice and an opportunity for hearing, may in its discretion, award to the condemnee an additional amount, separately computed and stated, for actual and necessary costs, disbursements and expenses, including reasonable attorney, appraiser and engineer fees actually incurred by such condemnee....

The purpose of this amendment was to even the playing field so as to permit a condemnee to refuse a low offer and have a fair chance to recover the costs of pressing its claim for a more just amount of compensation. This purpose was set forth by *General Crushed Stone Company v. State of New York*, 93 NY2d 23, 27, 686 NYS2d 754, 755 (1999), where the Court of Appeals held:

The current section also reflects a 1987 amendment that expanded the types of fees and costs recoverable. Instead of being able to recover only "extraordinary expenses for expert witnesses fees beyond the expense for the preparation of an expert witness' appraisal report" in certain limited circumstances, a condemnee now may recover a wider array of litigation costs, including attorney, appraiser and engineering fees... Moreover, the purpose of the amendment was to ease the "strict limits on recoverable costs" so that a condemnee would not be forced "to accept a condemnor's offer even if he or she believes that it does not constitute just compensation" (see, Governor's Approval Mem., Bill Jacket, L. 1987, ch. 771, §1, reprinted in 1987 McKinney's Session Laws of N.Y., at 2724). While this Court and the United States Supreme Court have both determined that reimbursement of litigation expenses does not fall within the constitutional right of just compensation for a taking, this fact cannot undercut the Legislature's clear statutory directive that "just and adequate compensation" cannot be achieved where the ultimate award is significantly impaired by costs necessary to demonstrate that

the condemnor's offer was substantially lower than it should have been [citations omitted]. Allowances under section 701 merely provide a means of mitigating the financial damage wrought by the condemnor's low, original offer.

The twofold requirements that (1) an award is substantially in excess of the condemnor's proof - which has been held to mean the condemnor's original offer - and (2) claimant's expenses must have been incurred to achieve just and adequate compensation, must both be met. *First Bank & Trust Co. of Corning v. State*, 184 AD2d 1034, 585 NYS2d 261 (4th Dept. 1992), aff'd, 81 NY2d 392, 599 NYS2d 498 (1993) (Although award was 294 percent of State's initial offer, claimant's expenses were incurred to present unsuccessful claim for consequential damages to nonappropriated property.).

The "substantially in excess" requirement has been judicially interpreted in unreported cases to mean that an additional allowance is appropriate when the award is as little as 21 percent over the condemnor's pretrial offer. See also, the reported cases of *Karas v. State*, 169 AD2d 816, 565 NYS2d 185 (2d Dept. 1991) (42 percent); *Scuderi v. State*, 184 AD2d 1073, 585 NYS2d 271 (4th Dept. 1992) (41 percent).

Case after case has approved an additional allowance for legal fees based upon reasonable and standard contingent fees meeting normal standards and practices of the condemnation bar. See *Town of Riverhead v. LoBozzo*, 207 AD2d 789, 616 NYS2d 973 (2d Dept. 1994).

(1) This case illustrates the bad old days of condemnation before the Eminent Domain Procedure Law was enacted in 1977. The City of Buffalo appraised the property for \$532,000 for purposes of obtaining federal funds, but valued it at \$310,000 for trial purposes and only offered the condemnee \$258,000. EDPL 303 now requires that condemnees must be offered the condemnor's highest appraised value.

U.S. Judge Jack B. Weinstein, while serving as Nassau County Attorney in 1964, was aghast at the County's then practice of offering less than its appraised value. He ordered the County Attorney's office to make settlement offers at no less than their highest appraisal value. See "Empirical Look into the Practices of Condemnation: Nassau County Study," 67 *Columbia L. Rev.* '167); "Sovereign's Duty to Compensate for the Appropriation of Public Property," 67 *Columbia L. Rev.* (1967).
