

Bona Fide Negotiations in New Jersey

by Lester G. Finch

Lester Finch is currently the Deputy Director, Division of Right of Way, for New Jersey's Department of Transportation. He has been employed with the department for the past 30 years. A state certified general real estate appraiser and a certified tax assessor, he holds a master's degree from Rider College, Trenton, New Jersey.

In 1991, the American Association of State Highway and Transportation Officers (AASHTO) Administrative Subcommittee on Legal Affairs released the results of a nationwide survey outlining the pre-litigation disclosure requirements of each of the 50 states. The survey was requested by the New Jersey Department of Law to determine what appraisal information the state's respective condemning authorities must provide to a prospective condemnee as part of

pre-litigation negotiations.

The survey revealed that only New Jersey and two other states were required to disclose all written appraisals obtained for the purpose of establishing just compensation. This article will discuss the New Jersey Department of Transportation's restructuring of its acquisition program to accommodate the evolution and court ordered expansion of the definition of bona fide negotiations.

REASONABLE DISCLOSURE: THE BEGINNING

In 1972, the *New Jersey Rules Governing Civil Practice* were amended, at Rule 4:73-1, to require that the condemnation complaint include a statement setting forth the amount of compensation offered by the condemnor and a "reasonable disclosure" of the manner in which the compensa-

tion had been calculated. In addition, at least 15 days prior to the hearing, the parties were required to exchange a list of comparable sales intended to be established by proof at the commission hearing or trial.

PRE-TRIAL DISCLOSURE OF APPRAISAL REPORT

In 1983, in the case of *State by Commissioner of Transp. v. Siris*, the court held that the state had to disclose its appraisal report at the commission hearing. To that point in time, the *Rules Governing Civil Practice* required only the disclosure of the comparable sales. The *Siris* court also held that the condemnee had no statutory burden to offer proof at the commission hearing to support the condemnees opinion as to proper consideration.

In dictum, the *Siris* court said that *New Jersey Statutes Annotated* 20:3-6 (the eminent domain statute), required disclosure of complete appraisal information during pre-litigation negotiations. Since this was dictum and therefore not binding as law or precedent, the state continued to comply with the *Rules Governing Civil Practice*.

In *Siris*, the court found "no sound reason to support the right of the state to shroud its valuation approaches in secrecy when condemning property." "Secrecy," said the court, "is as contrary to the interest of the citizens who pay the cost of condemnation as it is to those who property is condemned. Full disclosure by the state, the taker, is the intention of the Legislature."

In 1985, the case of *F.M.C. Stores v. Borough of Morris Plains* reached the New Jersey Supreme Court, which held that "a condemnor may not conduct itself so as to achieve or preserve any kind of bargaining or litigational advantage over the property owner. The condemnor's primary obligation is to comport itself with compassion and integrity and in doing so, government may have to



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forego the freedom of action that private citizens may employ in dealing with one another."

Also that year, perhaps in response to the pressure of recent court decisions, the *Rules Governing Civil Practice* were amended to expand the definition of "reasonable disclosure." Unless the court for good cause ordered otherwise, the *Rules Governing Civil Practice* now required a description of the appraisal valuation method or methods relied upon, a breakdown of land and improvement value, and data concerning the comparable sales or leases upon which we relied in establishing the just compensation. In addition, Rule 4:73-1 required that the complaint set forth "a reasonable disclosure of the manner in which the compensation was calculated." This vague requirement was to provide much grist for the mills of the New Jersey Superior Court system.

Concurrently, the *Rules Governing Civil Practice* were amended to require the exchange of experts' reports prior to the hearing before commissioners. The parties were required to exchange the written appraisal reports of any person who was to be called as a valuation expert. In those cases where the state may have secured more than one appraisal report, it was required to exchange only the report which was to be entered into evidence at the hearing.

DISCLOSURE OF THE "APPROVED" APPRAISAL AT THE PRE-LITIGATION NEGOTIATIONS STAGE

The movement was rapidly gaining momentum. In 1985, in the case of *State by Commissioner of Transp. v. Hancock*, the Superior Court Appellate Division affirmed the trial court finding that the owner or agent must be provided with a copy of the state's "approved" appraisal during pre-litigation negotiations. Had the case not involved a nominal taking of vacant land on which we had secured only one appraisal, the court might

have required disclosure of all appraisal reports at this juncture.

The state presented the argument that requiring it to furnish its appraisal during pre-litigation negotiations gives the prospective condemnee the opportunity to structure a reactive appraisal and thereby prolong litigation by seeking an excessive award. The *Hancock* court rejected the argument relying, in part, on Rule 4:73-11, which it read "as requiring full disclosure so that trial surprises do not occur." The court saw no reason "to impose any lesser requirements during negotiations, a point at which many of these cases are resolved and are more likely to be resolved if the state makes a truly full disclosure."

The *Hancock* court also relied upon *New Jersey Statutes Annotated* 20:3-6, which requires full disclosure

of all information upon which the taking agency relied, before initiating condemnation. This statute further requires that in no event shall the offer be less than the taking agency's approved appraisal of the fair market value of such property. The court found no prohibition against an offer which exceeded the appraised value, declaring such an action to be appropriate in the course of bona fide negotiations. Condemnees, subject to minor taking of property interests, can ill afford to hire attorneys and appraisers whose fees are typically not recoverable in condemnation proceedings. The government has an overriding obligation to deal forthrightly and fairly with property owners.

The court went on to say that "the state can be educated during negotiations. It may learn that its comparable

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sales are not the best available, that its calculations are incorrect or that it has overlooked important information. It must remember that its appraisal is an opinion not a fact. The use of comparable sales for appraisal purposes invariably involves the adjustment of sales figures in order to make them comparable. Adjustments are based upon the frequently differing opinions of experts." The court, despite the fact that adjustments supposedly affected the validity of the offer, found that no information concerning comparable sales adjustments were provided to Hancock or his attorney.

Subsequent to the *Hancock* decision, state negotiators provided the owner or agent with a copy of the approved appraisal, even though the state might have secured one or more additional appraisals prior to arriving at the fair market value and establishing just compensation. The percentage of settlements increased, with a commensurate decrease in cases being submitted for condemnation. The owner's ability to structure a reactive appraisal, contrary to the state's argument in *Hancock*, seemed to encourage rather than discourage settlements.

DISCLOSURE OF ALL APPRAISALS

No sooner had the state become accustomed to sharing its approved appraisal with the owner during pre-litigation negotiations, in 1989, the Law Division of the Superior Court in the case of *State by Commissioner of Transp. v. D'Onofrio* held that "the reasonable disclosure aspect of bona fide negotiations requires the condemnor to provide the owner with all appraisals in its possession which have been obtained for the purpose of making its condemnation offer." Their decision rested upon *New Jersey Statutes Annotated* 20:3-6 which requires that the owner be provided with reasonable disclosure of the manner in which the compensation has been calculated. In the court's

opinion, the manner of calculation could easily be read to mean the rejection of one appraisal and the acceptance of another.

The state once again attempted to argue that disclosure of all appraisals would encourage litigation. The court, in dismissing the argument, held that the state's position underestimated the capacity of the owner to be reasonable once the condemning agency provided all valuation information.

The use of comparable sales for appraisal purposes invariably involves the adjustment of sales figures in order to make them comparable.

The court went on to say that "the scope of required disclosure, as part of pre-litigation bona fide negotiations, has expanded dramatically in recent years; that the power to take property through eminent domain is one of the most intrusive aspects of sovereignty, since real estate is frequently irreplaceable because of its uniqueness; and therefore the state should not be heard to complain when the property owner seeks the fullest vindication of the rights of ownership."

Further, the court found that "if the judicial process of determining just compensation is equitable, the state loses nothing by disclosing additional information; it merely satisfies the legislative objective to ensure that every reasonable consideration is given to a property owner before the invasive power of eminent domain is exercised. No official policy directs the state to be miserly in giving meaning to the term reasonable disclosure. The state should err on the side of openness, thereby bringing the property owner closer to an equal bargaining position with the taking authority."

The court concluded, stating that "the right of the owner to accompany the condemnor's appraiser during the site inspection is made more meaningful if the resulting appraisal is

revealed so that the owner can verify that it reflects what was seen during the site inspection."

The *D'Onofrio* decision, arising as it did from the Law Division of Superior Court, served as precedent only in the jurisdiction in which it was heard. The state continued to provide an owner with only a copy of the "approved" appraisal report, making the decision not to embrace the compelling arguments to provide all appraisals.

BONA FIDE NEGOTIATIONS

In 1991, the case of *State by Commissioner of Transp. v. Carroll* was heard in the Superior Court Appellate Division. The Appellate Court affirmed the trial court's holding that the state's filing of the condemnation action was premature under *New Jersey Statutes Annotated* 20:3-6, which provides that no action to condemn shall be instituted unless bona fide negotiations have been completed. The court reasoned that the fundamental purpose behind the legislation was to encourage acquisitions without litigation.

The state argued that since the owner did not provide an appraisal report, the state had no obligation to continue negotiations or to change its offer of just compensation. The *Carroll* court, in rejecting the state's argument, held that the owner is not required to offer any proof during pre-litigation negotiations to support the contention that the state had undervalued the property. In the court's opinion, the whole thrust of the eminent domain process is that the state should act differently from an open-market, arms-length buyer.

The court stated that the state's "one price policy denies flexibility, fixing its position in advance and making negotiations, in the true

sense, impossible." The court stated that the full fair offering price should not be made on a take-it-or-leave-it basis, with no serious efforts made to resolve reasonable differences of opinion concerning the value of property.

The federal regulations acknowledge that individual appraisers and appraisals are not infallible and, for that reason, place the responsibility on the acquiring agency to determine, in advance of negotiations, an amount which it regards as the fair market value of the property. The mere presentation of the comparable sales used in the appraisal, without an accompanying explanation, does not ensure that the appraisal process will be clearly understood by the owner.

The *Carroll* court also held that the companion question of whether the

owner is entitled to access to neighboring appraisals during pre-litigation negotiations was not properly at issue in the case, leaving the decision on discoverability of neighboring appraisals to the litigation phase of the condemnation process.

In 1991, in the case of *State by Commissioner of Transp. v. Testa*, the state asked that the Appellate Division reject the Law Division's holding in *D'Onofrio* that would require the production of all appraisals obtained for the purpose of making the offer. The *Testa* court stated that "we are persuaded that fair dealing by the state requires disclosure of all appraisals of the subject property undertaken pursuant to the *Eminent Domain Act*."

The court continued that "it would ill serve the appearance of fair dealing if the landowners were told that

they could not have pre-negotiation access to the report of an appraiser that they had accompanied on an inspection of their property. Reasonable disclosure must include the report of an appraiser employed by the state even if the state does not intend to call the appraiser as an expert witness." "We are unable to perceive how the state's calculation of the compensation to be offered would not, of necessity, include consideration of all appraisals which it had obtained in an effort to arrive at its good faith determination of the full fair market value."

The court found no compelling reason to reverse the trend of recent decisions regarding fair dealing and liberal disclosure in pre-complaint negotiations. It reasoned that "this trend flows from the premise that the

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public interest is better served by providing prospective condemnees with access to appraisals obtained by the state so that the property owner may feel confident that the condemning authority is acting in good faith and not abusing its awesome power of condemnation."

Since the *Testa* decision in 1991, at the time of the fair market value offer, the state has been providing the owner with copies of all its appraisal and/or specialist reports which were prepared to establish just compensation. Interestingly, there has been an increase in the percentage of cases being settled during the bona fide negotiations stage of our acquisition process.

NEIGHBORING APPRAISALS

In 1991, the state had adjusted its negotiations procedure in response to


Testa when the state appealed the Appellate Division decision in *State by Commissioner of Transp. v. Town of Morristown* to the New Jersey Supreme Court. The state appealed the Appellate Division ruling that would have obligated it to produce neighboring appraisals, if the information was proved relevant, whether the request was made at the pre-litigation commission hearing or trial phase.

The Supreme Court reversed the Appellate Division, finding that "such action improperly involved the judiciary in the bona fide negotiations stage because it interpreted the condemnor's pre-complaint disclosure obligation too broadly. The bona fide negotiations stage was created to preclude judicial involvement in the hope of avoiding it entirely."

The Supreme Court went on to say that the Court rules should not be

construed to require the disclosure of neighboring appraisals. Absent a court order, a condemnor need not disclose information unrelated to the manner of calculating the offer, even in the condemnation complaint, and the condemnor's pre-complaint disclosure obligation can be no broader than its obligation during litigation."

Additionally, the court held that "the state need not furnish neighboring appraisals during the pre-litigation bona fide negotiations phase, unless it used or considered those appraisals in calculating the amount offered. While appraisals of neighboring properties could become germane and discoverable in later condemnation proceedings, the state need not furnish them with the pre-negotiations appraisals."

No one can project what future court decisions may mandate; however, New Jersey has found that by providing full disclosure of its appraisal valuation information early in the acquisition process, it has increased its credibility with its clients, the property owners, and taken a substantial step toward ensuring that truly bona fide negotiations are an integral part of the eminent domain process. 

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