

Bona Fide Negotiations in New Jersey

by Lester G. Finch

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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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