

Eminent Domain Proceedings and the Scope of the Project Rule: Navigating a Misunderstood Valuation Doctrine

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Introduction

After much pause and policy debate, a municipality determines that it is necessary to exercise its condemnation powers to achieve an essential public purpose. You, as the municipal attorney, have an internal appraisal commissioned to estimate the cost to the municipality. Based upon the appraisal, your legislative leaders vote to proceed with the taking and make the advance payment. Two years later, you find yourself in a full-blown valuation proceeding, only to hear for the first time that the claimant is asserting that its property is worth millions of dollars more than your appraisal based upon the ongoing revitalization of the area, and mention of this arcane legal doctrine known as the “scope of the project” rule.

This article provides a framework for potentially avoiding the above-described scenario.

Typically, the value of a property reflects market conditions on the day the condemnation authority acquires title to the subject property. When calculating value, one should look at the amount as of the “vesting date” that a hypothetical purchaser and seller, possessing knowledge of relevant real estate market conditions, would be willing to exchange in an arms-length transaction.¹ Importantly, the acquired property must be valued *without* reference to the project for which the condemnation occurred. The longstanding general rule, announced by the United States Supreme Court in *U.S. v. Miller*, and often known as the “scope of the project” rule, is that the value of a condemned property cannot be enhanced (or decreased) to reflect the economic effects attributable to the project for which the property was condemned.²

If, for example, a project included rezoning a former industrial waterfront property from a manufacturing zone to a mixed-use higher-density district, then the *Miller* rule requires that the property be valued as if it were still in the area zoned for manufacturing uses. On the other hand, if the waterfront revitalization project occurred over multiple phases, and the subject property was not included in the project until after the first phase was completed, then the court may enhance the value of the property to reflect the site’s proximity



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to the successful gentrifying urban waterfront neighborhood.

The proper application of the *Miller* rule can create significant value savings, or costs, for a municipality. The problem that trial counsel often face is that the project planning phase can occur many years prior to the trial. Condemnation trial counsel are often hamstrung with project maps and other documentation prepared by the condemning authority well before the parties were focused on whether the *Miller* rule may be invoked.

If the original plans for condemnation were narrowly drawn to avoid attracting too much opposition at

public hearings, the trial record may support the conclusion that the subject property was not within the project scope. As a result, the property owner may be entitled to an award that reflects the value-adding attributes of the project.

It is important, therefore, for municipal officials to appreciate how New York courts apply the “scope of the project” rule before embarking on any project that will involve the exercise of eminent domain authority. While municipal officials understandably want to avoid the unnecessary alarming of property owners by preparing overbroad condemnation maps at the project planning stage, some level of flexibility and awareness of potential project expansions can be valuable. Preparing project maps, Eminent Domain Procedure Law (EDPL) Determination and Findings Statements, and other documentation with an understanding of the factors a court will employ when determining if a particular property was included within the project scope at any subsequent valuation trials, is not only essential, but is often overlooked.

What Is the Scope of the Project Rule?

As the Supreme Court held in *Miller*:

If a distinct tract is condemned . . . other lands in the neighborhood may increase in market value due to the proximity of the public

improvement erected on the land taken. Should the government, at a later date, determine to take these other lands, it must pay their market value as enhanced by this factor of proximity. If, however, the public project from the beginning included the taking of certain tracts but only one of them is taken in the first instance, the owner of the other tracts should not be allowed an increased value...³

Under the *Miller* rule, a parcel must be valued as if “the redevelopment plan did not exist.”⁴ In *In re Queens West Development Corp.*, for example, the City of New York acquired a claimant’s undeveloped industrial-zoned property in connection with a plan to transform the area into an upscale residential neighborhood. This would be accomplished by rezoning the area to a high-rise residential district. The claimants’ appraiser valued the property at \$12 million, treating the site as if it were located in a newly gentrifying residential neighborhood. The Second Department, however, rejected the appraiser’s methodology.

The court found that the appraiser sought to improperly “increase the size of [the] award” by relying on the beneficial attributes of the rezoning associated with the project in which the site was acquired.⁵ The court found that, under the *Miller* rule, the property had to be valued as if it were still located in the pre-project industrial neighborhood, resulting in a final award far below the property owner’s \$12 million claim.⁶

In contrast, where a condemnee can establish that a rezoning was not part of the project for which its property was acquired, the *Miller* rule will not apply. In *In re State of New York (KKS Properties, LLC)*⁷, a claimant sought compensation for a partial taking of its property in connection with a road widening project that improved access to the Town of Bethlehem, where the property was located.⁸ Several months prior to the taking, the town had rezoned the claimant’s property from residential to “hamlet” commercial.⁹ The claimant’s appraiser valued the property in accordance with the new zoning, which resulted in a far higher value. The state asserted that the claimant’s valuation violated the *Miller* rule because without the road widening project, the property would not have been rezoned.

The Third Department rejected the state’s argument. The court focused on testimony elicited at trial from a town official who stated that the town had a “longstanding desire” to develop a master plan for the community.¹⁰ The official indicated that the town’s master plan had always included rezoning claimant’s property. While the state’s road widening project may have facilitated the implementation of the town’s

master plan by improving access to the commercial hamlet, the rezoning was not within the “scope” of the road project. Rather, the rezoning was part of a prior, independent town rezoning project. As such, the claimant was entitled to an award far higher than the state’s proffered compensation because the claimant could value the property as a site located within the town’s commercial hamlet.¹¹

The distinct financial outcomes for the municipalities in the two cases above illustrate the importance of identifying what is included in the “scope” of the project when preparing trial appraisals. As explained below, identifying the project scope involves a two-step analysis. First, the court must determine *when* the municipality first “committed” to undertaking the project. Second, the court must decide whether acquiring the subject property was included as part of the project at that time.

Step One: When Did the Government “Commit” to the Project?

The “commitment” analysis was first utilized by the U.S. Supreme Court in *Miller*.¹² Isolating the point of governmental commitment to the project in *Miller* was a relatively straightforward task since the project (the re-routing of the Central Pacific Railroad) ultimately required federal funding and formal Congressional appropriation. While preliminary layouts and approval for the re-routing occurred at the California state level in 1932, the “project” was not authorized to proceed until the United States Congress approved a final budget and full appropriation in August 1937.¹³ The Supreme Court considered Congress’ appropriation the “final and definite authorization” as the point in which the government had committed to the “project.”¹⁴

Most local municipal projects, of course, do not require Congressional budgetary authorization. As a result, ascertaining the line between preliminary planning and “final and definite authorization” may not be as clear as it was in *Miller*. The U.S. Supreme Court subsequently acknowledged that its “commitment” standard was subjective, requiring the use of a court’s “discriminating judgment” on a case-by-case basis.¹⁵

New York courts have taken a fairly practical approach in applying the Supreme Court’s “discriminating judgment” standard, drawing a line between conceptual planning phases and final approval for projects. Conceptual plans and descriptions of potential projects prepared prior to any formal vote approving a final project are typically not treated as dispositive.

The Third Department, for example, found that a claimant’s property was not included within the initial scope of a phase of the St. Lawrence Seaway project.¹⁶ Although the subject property appeared on maps during the initial planning stages, and was even included

in an appraisal prepared to calculate likely acquisition costs, New York State ultimately approved a final plan that excluded claimant's parcel. Although the state later acquired claimant's property in connection with an ensuing phase of the project, the court found that the claimant could value its property with reference to the value enhancing attributes of the project's first phase which occurred on adjacent lots.¹⁷

Even where a formal vote has occurred, a municipality may not have committed itself to a particular project. In *In re City of Glen Cove Industrial Development Agency (Doxside Industries, Inc.)*,¹⁸ the City of Glen Cove rezoned a series of waterfront properties from industrial to commercial/residential. The rezoning was enacted in furtherance of the city Industrial Development Agency's (IDA's) longstanding general vision to revitalize the waterfront and attract a master developer to reurpose it.

At the time of the rezoning in 1999, no developer had yet been selected. Nor did the city have a clear redevelopment plan for the waterfront. When the city eventually entered into a land development agreement with a master developer several years later, a specific master development plan was prepared for the waterfront. During this planning process, it was determined that claimant's property would be acquired to support a portion of the commercial use planned.¹⁹

In the ensuing valuation trial, the claimant argued that its property should be valued as a former industrial site (which, interestingly would have allowed for a higher value under the unique circumstances of this case), rather than under the commercial/residential zoning adopted in 1999. The Trial Court rejected this argument, finding that there was no evidence the city had committed to any "concrete, definite plan" when it adopted the zoning in 1999. At best, the rezoning was a preliminary step that did not commit the city to any specific project. The court relied heavily upon the fact that when the city adopted the zoning plan, it had not selected any master redeveloper, let alone issued approvals to redevelop the waterfront.²⁰

The trial court's threshold for identifying the indicia of project commitment is instructive. It appears that if in 1999 the city had prepared "specific" plans for the redevelopment of its waterfront and had identified a particular developer to pursue the project illustrated on those plans, then the court would have found in favor of the property owner. The lack of "documentary evidence" in the administrative record demonstrated that the city had a "concrete" plan in mind when it

adopted the rezoning in 1999. This is what likely led to the application of the *Miller* rule in favor of the city.²¹

Step Two: Was the Acquisition of the Subject Property "Probably" Part of the Project When the Government Committed to the Project?

The next step in the analysis is determining whether acquiring the subject property was included within the "project scope" when the government committed to the project. Once again, the Supreme Court in *Miller* provided a standard to guide practitioners. The test requires one to determine whether the subject property was "probably" within the project scope when the municipality committed to the project.²²

New York courts have subsequently provided more direction for applying the *Miller* "probably" standard. Significantly, claimants bear the burden of demonstrating that their property was "probably" within the initial scope of the project when the municipality committed to it.²³

Whether a claimant has met its burden is generally governed by a multi-factor test first identified by the New York Court of Claims in *Mattice v. State*.²⁴ *Mattice* involved the appropriation of a claimant's property by the power authority in order to construct a new power plant, reservoirs, and adjacent recreational amenities.²⁵ The power authority initially prepared preliminary maps delineating the "approximate project boundary" in its application to the Federal Power Commission, which included acquiring approximately 60 acres of the claimant's property.²⁶ When the power authority commenced the formal EDPL acquisition process, however, it appropriated only a small portion of the claimant's land, well below the 60 acres appearing on the preliminary maps.

As many municipal law practitioners know, projects are often subject to modification as the development process proceeds. The power authority's project in *Mattice* was no exception. Eight months after taking a small portion of the claimant's land, the power authority revised its plan to include the remainder of claimant's land.²⁷ In the valuation trial, claimant's appraiser asserted that the value of the claimant's land acquired in the second taking had been enhanced by the power authority's proposed improvements on the portion it had taken previously. New York State objected to this valuation methodology, asserting that the claimant's entire property was "probably" within the project scope from the beginning and therefore should be valued as if the power authority's project had not occurred.

Surveying both state and federal precedent, the court identified the following factors to determine whether the claimant's entire property was "probably" within the project scope from its inception:

The Claimant's Knowledge of Whether the Subject Parcel Was Included in the Original Project Scope

The threshold inquiry was whether the claimant knew, or reasonably should have known, that its property would be acquired as part of the project. The court of claims recognized that “proof that a claimant or the general public could or did have knowledge” that the subject property was probably within the scope of the project would tend to “negate any enhancement.”²⁸

The level of proof on this threshold issue must be substantial. In *Mattice*, there was deposition testimony indicating that the power authority had engaged in pre-taking negotiations with the claimant that covered the entire 60 acres owned by the claimant. The court of claims found that this testimony was insufficient to establish claimant's knowledge, particularly since there was no documentary proof corroborating the power authority's allegation that the claimant knew that his property would be acquired before they committed to the project. Significant to the court was the fact that the power authority had not adopted a formal project map showing the claimant's entire property until after the first taking occurred.

Whether Original Project Maps Included the Subject Property

Where there is no direct documentary proof of knowledge, the court will look to other circumstantial evidence to evaluate whether the subject property was “probably” within the project scope. Although it is not necessary that the subject property be expressly identified in the initial description of a project scope prepared by the condemning authority, the *Mattice* Court advised that the presence of a certain parcel in maps prepared “at an early planning stage” are relevant.²⁹

In *Mattice*, the various “preliminary” maps filed by the power authority before the first taking covered much of the claimant's land. While not dispositive, the court of claims found this evidence tended to support the conclusion that the claimant's entire property was “probably” within the scope of the project from the start.³⁰

In contrast, the absence of a parcel on project maps can serve as the *sine qua non* for a claimant to establish that its property was not included in the original project scope. In *Brubaker v. State*, a claimant owned a 365-acre property bisected by a highway.³¹ Here, New York State acquired the northern portion of the property in 1955. As shown on the state's project maps prepared in the preliminary planning stages, the boundary of this acquisition ceased at the highway. Two years later, the state appropriated claimant's remaining property to the south of the highway. The Third Department permitted the claimant to enhance the value of this south-

ern parcel to reflect the improvements on the northern portion, because the preliminary maps “fully demonstrate” that the project did not include the southern property when the first taking occurred in 1955.

Lapse of Time Between First and Subsequent Acquisitions

The length of time between takings is also relevant. Although the *Mattice* court found that an eight-month period between the acquisitions was not significant,³² a long delay between project phases may allow a property owner to rely on the value enhancing features of the first project phase. A 31-year lapse between appropriations for a highway improvement project, for example, was far too long of a period for New York State to claim that the two takings were within the same project scope.³³

This is not to say that the courts rely on a strict temporal test to evaluate whether two phases can be considered to be within the same project scope. Courts will also evaluate practical considerations, such as funding lapses, which may necessarily extend the period between acquisitions without excluding later phases from the overall project scope. This often arises in large-scale neighborhood revitalization projects.

A useful illustration occurred in connection with New York City's Lincoln Square urban renewal program in the 1960s.³⁴ In applying for federal funding, the city prepared a proposed project map that included a claimant's property. The federal authorities initially limited the amount of funding it would provide, thereby requiring the city to exclude the claimant's property from the first round of acquisitions. However, later in the year, the federal authorities approved a second round of funding, which allowed the city to “enlarge” the project scope to include the claimant's property.³⁵ The city was thus able to acquire claimant's property eight months after the first round of condemnation had been completed.

The Supreme Court rejected the claimant's subsequent attempt to apply a 50% value enhancement to its property on the theory that the city's selection of the neighborhood for revitalization significantly increased the market value of the property. The court recognized that the primary reason claimant's property was not appropriated in the first phase of the renewal project was the shortage of federal funding. Since there were strong indicia that the city always intended to include claimant's property in the project (e.g., the map provided to the federal authorities in connection with the first application), claimant could not rely upon the lapse in time between takings to apply an enhancement under *Miller*.³⁶ Under these circumstances, the lapse in time did not undermine an argument that the claimant's property would “probably be condemned” in the future.³⁷

Proximity of the Subject Property to the Remainder of the Project Site

Another significant factor identified by the court of claims in *Mattice* was the “physical location of the subject lands,” and their proximity to the remainder of the project area.³⁸

Proximity was a “critical” factor in *Mattice* because the portion of the claimant’s property acquired in the second taking was adjacent to numerous parcels acquired in the initial project phase. This close proximity made it likely that any project enlargement would encompass claimant’s property. In addition, the adjacent property taken in the first project phase was used by the power authority to create public recreational amenities, such as hiking trails. The court observed that the claimant’s property was “ideally suited” for recreational purposes, and thus, it should have been obvious to the claimant that its property might also be acquired for additional recreational space. The claimant, therefore, was placed on constructive notice that its property would “probably” be acquired as part of the project.³⁹

A Demonstrated Government Policy Making It “Obvious” That Additional Lands Would Be Acquired in Furtherance of the Project

Finally, the court of claims indicated that a “demonstrated change in government policy or the showing that a particular [project] need was obvious” may be relevant in identifying the project scope.⁴⁰ This was a relevant factor in *Mattice* because the claimant argued that the project scope should be limited to the purpose the public improvements were intended to achieve, i.e., the building of a power plant. Claimant contended that the acquisition of his second property for recreational amenities should be viewed as a separate “[land] banking” project.⁴¹

The court of claims rejected the claimant’s argument because a survey of other public improvement projects at the time demonstrated that federal and state agencies were focusing on incorporating “proper consideration of environmental and recreational needs” in such project designs. In furtherance of this policy, recreational areas adjacent to power projects had become “commonplace and [were] considered an integral part to the entire scope of the project.”⁴² This demonstrated policy supported the power authority’s position that acquiring claimant’s additional land for recreational amenities was “probably” within the scope of the project from its inception.

The Court of Claims Decision: Claimant’s Property Was Within the Initial Project Scope, and Therefore, the *Miller* Rule Applies

Weighing all the above factors, the court of claims concluded that the claimant failed to establish that

the acquisition of its entire property was not within the original property scope. According to the court, the record demonstrated that the entirety of the claimant’s property was not only “probably” within the original project scope, it was “actually” within the original project scope because “it became evident during the early planning or construction that [his] land would be needed for the public use.”⁴³

A theme running throughout the court’s analysis was the recognition that the *Miller* “probability” standard must be applied in a flexible manner so as to include not only land that was actually specified in the preliminary planning process, but also to parcels that were *reasonably likely* to be included within the project in order to complete it.⁴⁴ The court understood that projects are often modified during the course of planning or original construction, and may require the taking of additional land to complete. Throughout the power authority’s planning process, there were multiple indications that the claimant’s entire property would be acquired, such as the initial negotiations, the proximity to other condemned parcels, and clear governmental policy encouraging the acquisition of property for recreational amenities in power projects. Under these circumstances, the property owner could not claim that when the power authority committed to the project, its property was “probably” outside the project scope.

Perhaps the most interesting observation about the court of claims holding in *Mattice* is the deference it provided to the power authority. The court of claims appeared to provide the power authority with every benefit of the doubt, taking the position that the condemnee should have known that its property would be taken based on draft plans, statewide policies, and the site’s proximity to other properties condemned for recreational purposes. While the burden of proof is on the condemnee to prove that the *Miller* rule is not applicable, courts will often favor property owners in applying the doctrine. There are several more recent cases where courts have not been so kind to the condemning authority.⁴⁵ In these cases, the courts allowed condemnees to apply value-enhancing market factors that were arguably attributable to the project in furtherance of which its property was taken. The split precedent emphasizes the risk of ignoring the *Miller* rule’s implications during the project planning stage.

Lessons Learned

The primary lesson learned from *Mattice* and its progeny is the need to document as early as possible all properties that are reasonably likely to be included within the scope of the project. The EDPL, in fact, requires that the condemnor identify “the approximate location for the proposed public project” in its pre-taking Determination and Findings Statement.⁴⁶ The

Determination and Findings Statement is an opportunity for a municipality to carefully define its project scope to ensure that all potential properties that may be acquired are identified. Using preliminary project maps, SEQRA impact analyses, and other planning documentation will be helpful. As illustrated in *Mattice*, these plans can provide the evidence necessary for a court to conclude that a specific parcel was “probably” included within the project scope when the government committed to the project.

Of course, condemning authorities will need to balance the objective of broadly defining its project scope with the often-resultant risk of generating unnecessary opposition from potentially affected landowners and the public in general. Land use and economic development practitioners can attest to the correlation between the scope of the project and intensity and impacts of large confrontational opposition. Thus, the value of proactively identifying all potential parcels that may need to be acquired for a project in accordance with subsequent valuation trials must be balanced against unnecessarily alarming owners of property potentially outside the reasonably likely boundary of the project.

It is also good practice for municipal officials (or the project sponsor) to document all negotiations it conducts with landowners in the early project design stages. This documentation may prove valuable during a subsequent valuation trial should the landowner claim ignorance of the project scope.

Finally, condemning authorities should attempt to make clear the policy goals of a particular project when developing project planning documents. The articulation of project goals may bolster a claim that various properties were “probably” within the project scope from its inception. A declaration that a waterfront revitalization project is intended to reclaim and repurpose underutilized industrial sites, for instance, would likely put owners of abandoned factory sites outside the immediate project plans that their properties will be considered to be “probably” within the project scope. Although the articulation of project goals may not be the dispositive factor as the *Mattice* court recognized, identifying the policies underlying a revitalization effort will provide the public (and the reviewing court) with a better understanding of what properties are “necessary and integral” to designing the overall objectives of the project scope that are necessary to meet the municipality’s redevelopment goals.⁴⁷

Conclusion

While the valuation limitations imposed by the *Miller* rule can be a critical tool for valuation trial attorneys, the facts which permit a court to apply the rule are developed by the condemning authority well before trial. It is thus important for the condemn-

ing authority to proceed through the EDPL process with a critical understanding and foresight towards the factors for identifying the scope of the project for valuation purposes. The *Miller* rule can significantly impact a determination of what constitutes “just and fair compensation,” and save or cost the municipality enormous sums.

Endnotes

1. *U.S. v. Miller*, 317 U.S. 369 (1943); see *Keator v. State*, 23 N.Y.2d 337, 339, 296 N.Y.S.2d 767, 769 (1968).
2. *Miller*, 317 U.S. at 373-74; see *In re Queens West Development Corp.*, 289 A.D.2d 335, 336, 734 N.Y.S.2d 208, 209 (2d Dep’t 2001) (stating that “[i]t is well settled that a condemnee may not receive an enhanced value for its property where the enhancement is due to the property’s inclusion within a redevelopment plan.”).
3. *Miller*, 317 U.S. at 376-77.
4. *Queens West Development Corp.*, 289 A.D. 2d at 336, 734 N.Y.S. 2d at 209.
5. *Id.* at 336, 734 N.Y.S.2d at 209.
6. *Id.*
7. *In re of State of N.Y. (KKS Properties, LLC)*, 119 A.D.3d 1033, 990 N.Y.S.2d 105 (3d Dep’t 2014).
8. *Id.*
9. *Id.* at 1034, 990 N.Y.S.2d at 106.
10. *Id.*
11. *Id.* at 1036, 990 N.Y.S.2d at 108.
12. *Miller*, 317 U.S. at 376-77.
13. *Id.* at 371.
14. *Id.* at 377.
15. *U.S. v. Reynolds*, 397 U.S. 14, 21 (1970).
16. *Brubaker v. State*, 17 A.D.2d 519, 236 N.Y.S.2d 395 (3d Dep’t 1963).
17. *Id.* at 522-23, 236 N.Y.S.2d at 399.
18. *In re City of Glen Cove Industrial Development Agency (Doxside Industries, Inc.)*, No. 01761405, 2013 N.Y. Slip Op. 34075(U) (Sup. Ct. Nov. 08, 2013).
19. *Id.* at 1.
20. *Id.* at 6.
21. *Id.* at 8-9.
22. *Reynolds*, 397 U.S. at 21 (citing *Miller*, 317 U.S. at 377).
23. *Brubaker*, 17 A.D.2d at 522, 236 N.Y.S.2d at 397.
24. *Mattice v. State*, 89 Misc.2d 330, 391 N.Y.S.2d 271 (Ct. Cl. 1976).
25. *Id.* at 335, 391 N.Y.S.2d at 276.
26. *Id.* at 335, 391 N.Y.S.2d at 276-77.
27. *Id.*
28. *Id.* at 333, 391 N.Y.S.2d at 274.
29. *Id.* at 334, 391 N.Y.S.2d at 275.
30. *Id.* at 338, 391 N.Y.S. at 278.
31. *Brubaker*, 17 A.D.2d at 520, 236 N.Y.S.2d 395 at 396.
32. *Mattice*, 89 Misc.2d at 336, 391 N.Y.S.2d at 277.
33. *815 Assocs., Inc. v. State*, 271 A.D.2d 398, 399, 705 N.Y.S.2d 630, 632 (2d Dep’t 2000).

34. *In re Addition to Lincoln Square Urban Renewal Project*, 22 Misc.2d 619, 198 N.Y.S.2d 248 (Sup. Ct.1960).
35. *Id.* at 621, 198 N.Y.S.2d at 251.
36. *Id.* at 623-24, 198 N.Y.S.2d at 252-53.
37. *Id.*
38. *Mattice*, 89 Misc.2d at 334-36, 391 N.Y.S.2d at 275-77.
39. *Id.*
40. *Id.* at 334, 391 N.Y.S.2d at 275.
41. *Id.* at 339, 391 N.Y.S.2d at 280.
42. *Id.*
43. *Id.* at 338, 391 N.Y.S.2d at 278.
44. *Id.* at 336-38, 391 N.Y.S.2d at 276-278.
45. See, e.g., *Vill. of Haverstraw v. AAA Electricians, Inc.*, 114 A.D.3d 955, 957, 981 N.Y.S.2d 436, 439 (2d Dep't 2014); *Vill. of Port Chester v. Bologna*, 95 A.D.3d 895, 896-97, 943 N.Y.S.2d 575, 578 (2d Dep't 2012).
46. N.Y. Eminent Domain Proc. L. § 204(B)(2).
47. *Mattice*, 89 Misc.2d at 339, 391 N.Y.S.2d at 280.

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