

**In the matter of the Application of the
CITY OF ROCHESTER,**

Petitioner-Condemnor,

AMENDED DECISION

Index No. 3766/08

**To acquire real property in the City of Rochester,
County of Monroe and State of New York, for public
use and purpose; to wit, premises commonly known
as: 285 E. Main St., 100 S. Clinton Ave., 18-26 S. Clinton
Ave., and 32-58 S. Clinton Ave.; owned by
MIDTOWN ROCHESTER PROPERTIES, LLC**

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APPEARANCES:

On Behalf of Petitioner-Condemnor:

MICHELE ROMANCE CRAIN, ESQ.
Municipal Attorney, City of Rochester

On Behalf of Claimant-Condemnee,
Midtown Rochester Properties, LLC:

JAMES E. METZLER, ESQ.
FRANK S. HAGELBERG, ESQ.
Boylan, Brown, Code, Vigdor & Wilson, LLP

MINARIK, J. The word “midtown” has a singular meaning to anyone from Rochester, New York and its environs. Say “midtown,” and one might conjure “the big clock,” or the monorail, or meeting friends at McCurdy’s lunch counter for a bite to eat. Our local newspapers have written articles about its past, memorializing the uniqueness of this place for posterity.

This is an eminent domain case. I am obligated to place a monetary value on a piece of downtown Rochester’s present to make way for Rochester’s future. This property

was special in a way that was unique to each of us who experienced it. I acknowledge the sadness of watching the physical vestiges of fond memories being removed and, while these memories have value to the holder, they have no value in a determination of the fair market value of land and the improvements thereon - - it's all about the bricks and mortar.

The majority of the trial testimony was provided by two appraisers, Howard C. Gelbtuch for the Claimant-Condennee and Kevin L. Bruckner for the Petitioner-Condennor. Mr. Gelbtuch prepared Exhibit A, the Midtown Rochester Properties, LLC ("Midtown") appraisal.¹ Mr. Gelbtuch consulted John Rynne, an appraiser and consultant in the Rochester area since 1973, for factual information on the real estate market in downtown Rochester, specifically, identification of Class A Office Buildings in the area surrounding Midtown, such as Xerox Square, Bausch and Lomb, Clinton Square and City Center, and adjacent neighborhood areas, such as the East End. He also identified the rehabilitation of some lower class office space into office/residential buildings, the relocation of a few suburban companies to downtown and the general state of retail in downtown Rochester.

Mr. Gelbtuch, founder of Greenwich Realty Advisors, Incorporated, had appraised one other facility in the Rochester area, the Ridgcrest Shopping Center, prior to being

¹ "Midtown" will be used in this decision to identify not only Midtown Rochester Properties, LLC, but the subject property, as well.

hired for this appraisal problem. He personally viewed Midtown twice, once on November 28, 2007 and again on March 4, 2009. He reviewed numerous documents related specifically to Midtown, such as operating agreements, leases and rent rolls. He also reviewed Rochester market information from the Rochester Downtown Development Corporation, the CB Richard Ellis 2008 Office Market Outlook, and the Pyramid Brokerage Company 2007 Market Report. He had access to government information, specifically, Monroe County tax rolls and U.S. Census statistics, as well.

Mr. Bruckner is the managing partner of Bruckner, Tillett, Rossi, Cahill & Associates of Rochester, New York. His firm has been in business since 1993; he has been an appraiser for 27 years. He testified that most of his appraisal work has been done in the Greater Rochester area with many types of properties. Mr. Bruckner personally viewed the property on December 14, 2007. He had access to Midtown's lease abstracts and rent rolls, as well as the City of Rochester's ("City") assessment files. He also obtained information about Midtown from reports prepared specifically about Midtown for the City by CMA Architecture, P.C., and Berman Associates, as well as Midtown's financial reports prepared by Broadstone Real Estate LLC. Mr. Bruckner also relied upon the Rochester Downtown Development Corporation's Annual Survey of Downtown Office Space.

Both appraisers agree that the valuation date is May 28, 2008.²

The appraisers also agree that the highest and best use for Midtown is a continued mix of office and retail. They both appraised the property in two segments: The Midtown Tower (Tower), Seneca Building (Seneca) and McCurdy Building (McCurdy) in Group I; Midtown Plaza (Plaza), B. Forman Building (Forman) and Euclid Building (Euclid) in Group II. The valuations of the Parking Garage and the Empire Zone benefits were handled separately by each appraiser as well. While both appraisers define “market value” in the same way, the specifics of their methodology and conclusions are strikingly different.

Description of the Property

Midtown’s property is a complex of six buildings (Exhibit H). While the appraisers agree that the land area covered by Midtown is 8.575 acres or 337,527 square feet (Exhibit A, Table 4; Exhibit 1, p. 4), they disagree on the total net rentable area:

² Mr. Bruckner’s appraisal, Exhibit 1, uses December 14, 2007 as a valuation date but, as he testified at trial, that was the date he completed the appraisal, not the date of the actual taking, which occurred on May 28, 2008. He stated that the information contained in Exhibit 1 and the conclusions he reached would be the same had he used the May 28, 2008 date in his report.

<u>Building</u>	<u>Gelbtuch</u>	<u>Bruckner</u>
McCurdy	388,620 sf	388,620 sf
Seneca	240,391 sf	220,703 sf
B. Forman	136,820 sf	140,995 sf
Midtown Tower	207,097 sf	183,000 sf
Midtown Plaza	198,170 sf	203,474 sf
Euclid	56,982 sf	60,652 sf
Total	1,228,080 sf	1,197,444 sf

The difference between the two appraisers' figures is 30,636 square feet, de minimis given the magnitude of the appraisal problem. I will adopt Mr. Gelbtuch's numbers, inasmuch as it was his client that owned and leased out the various spaces in the buildings and it appeared from the trial testimony and the appraisals that he had greater detail available from the owner/operator. I believe Mr. Bruckner's figures accurately comported with the City Assessor's Office's information, but those numbers appear to be a step removed from the actual source - the lessee. I presume that the lessee knew how many square feet it was offering for lease and nothing at trial or in the evidence submitted proved the contrary.

The McCurdy Building is a 6-story building at the northeast corner of the site, with frontage on both East Main Street and Euclid Street. Both appraisers agree that this building was built in phases, commencing more than 100 years ago. The building houses retail on the first two floors, has retail converted to office space on floors 3 and 4, and floors 5 and 6 are offices. The building is serviced by six passenger and three freight elevators. It is a steel frame and masonry building over a stone and reinforced concrete

basement. The exterior is glazed brick and granite. The roof is flat, tar and gravel with an insulated membrane system. It is heated by two gas/oil-fired boilers. Air conditioning is by way of a central chilled-water plant.

The Seneca Building is a 7-story building on the west side of the site, fronting on South Clinton Avenue between Main Street and Broad Street. Constructed between 1969 and 1973, it was designed to have retail uses on the first and second floors. The remaining five floors housed the offices of J.P. Morgan Chase until April 2007. The building has a masonry foundation and reinforced concrete walls, and is serviced by three passenger elevators and one freight elevator. The South Clinton Avenue facade is metal and single-pane glass while the remaining facade is glazed brick over concrete blocks.

The B. Forman Building also faces South Clinton Avenue and is adjacent to the south side of the Seneca Building. This building is six stories with retail on the first two floors and office space above. It was built in 1920 and renovated in 1985, and is constructed of stone, brick and reinforced concrete. The facade is painted brick and limestone, with plate-glass display windows. The building is serviced by three passenger elevators and one freight elevator.

Midtown Tower is on the south side of the site, fronting on the north side of Broad Street. It is a 17-story office building, serviced by seven passenger elevators and three freight elevators. At the time of the taking, the building was completely vacant and had been for approximately one year. The central core of the building houses the elevators,

stairwells, restrooms and mechanicals. A gas-fired boiler provides heat and a chilled-water plant provides central air. Both these facilities are housed on the building's third floor. The building is a steel-frame structure with reinforced concrete. The exterior is mostly brick over concrete block on the first 13 floors. It is metal and glass curtain wall on the floors above. Windows are single-glazed panes through the 14th floor and double-glazed panes on the floors above.

Midtown Plaza is a two-level, 45 foot high space with a central open area ("Mall"). The structure is on the south side of the site, bounded by Clinton Avenue South, Broad Street and Chestnut Street. Access between the levels is by a combination of escalators, stairs and elevators. The Mall offers access to a skyway system, as well as connections to the various office buildings surrounding it.

The Euclid Building is a 4-story office building built in 1963 that fronts on Euclid Street and was originally known as the Rochester Telephone Building. It is serviced by two passenger elevators, one of which serves as a freight elevator as well. There is a central core that houses the elevators, stairs, restrooms and some mechanicals. The facade is a combination of a metal and glass curtain wall and glazed brick. All windows are double-glazed.

The complex is served by an underground parking garage with a 1,843 car capacity. People patronizing the garage have the option of parking underneath Midtown, entering the Mall and having inside access to the Midtown buildings, or, via the Skyway, the

surrounding office buildings (such as Chase Tower, Bausch and Lomb and Xerox Tower), as well as hotels and the Rochester Riverside Convention Center.

Both appraisers agree that the Income Capitalization Approach is the most reliable valuation methodology to be applied in the appraisal problem.³

They also agree, in principle, that these buildings generated some rents in 2006 and 2007 and that the owner incurred operating expenses. They do not agree, however, on the extent to which any new revenues were generated, how expenses were accounted for, in the market or otherwise, and how each variable would be introduced into the equation.

VALUATION: Claimant-Condemnee's Approach

Mr. Gelbtuch began with an analysis of the effective gross income. He had figures for actual rent rates and actual income for October 2007 and April 2008 (Exhibit A, p. 73, Table 11). And he relied on those figures when determining the effective gross income (Exhibits J and K). Specifically:

³ To the extent that the evidence submitted reflected a valuation based on the comparable sales method, I find my decision relies solely on the Income Capitalization Approach, as I found the comparable sales proffered not comparable. That's not to say the appraisers did not do a good job, it only speaks to the uniqueness of this property. For example, adjustments were very large and uses were either retail or office - not mixed use, like Midtown.

Group I:⁴

Midtown Plaza	37% occupied	\$ 1,157,199
Euclid Building	45% occupied	287,082
Forman Building	24% occupied	84,078

Group II:

Midtown Tower	1% occupied	60,849
McCurdy Building	1% occupied	72,645
Seneca Building	3% occupied	94,252

Total Actual Gross Income \$ 1,756,105

Mr. Gelbtuch then assumed that an additional percentage of the vacant space could be leased:

Group I:

Midtown Plaza	44%	\$ 1,056,000
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Group II:

Midtown Tower	60.4%	\$ 1,250,000
McCurdy Building	48.2%	1,500,000
Seneca Building	26.8%	750,000

Total Prospective Income: \$ 4,556,000

The next step involved identifying operating expenses and real estate taxes. Mr. Gelbtuch analyzed actual operating expenses and real estate taxes for each of the years 2004 through 2007. In addition, he used the first four months of 2008. The figures for

⁴ Both appraisers grouped the various buildings in the Midtown complex into these two groups. I will adopt this format for this decision.

the buildings comprising Group I are in Table 17 at page 92 of Exhibit A. Group II's are in Table 29 at page 126 of Exhibit A. Mr. Gelbtuch then applied an inflation factor and determined an annualized operating expense for each building. He also annualized the real estate taxes in the same manner.

Group I

Midtown Plaza Operating Expenses	1,180,000
Real Estate Taxes	100,000
Euclid Building Operating Expenses	175,000
Real Estate Taxes	30,000
B. Forman Building Operating Expenses	210,000
Real Estate Taxes	35,000
Sub-Total	\$ 1,730,000

Group II

Midtown Tower Operating Expenses	675,000
Real Estate Taxes	100,000
McCurdy Building Operating Expenses	415,000
Real Estate Taxes	75,000
Seneca Building Operating Expenses	900,000
Real Estate Taxes	500,000
Sub Total	\$ 2,665,000

Total Operating Expenses and Real Estate Taxes: \$ 4,395,000

Mr. Gelbtuch then set the capitalization rate at 10.5% after analyzing second quarter 2008 indicators from Korpacz⁵ and the Real Estate Research Corporation Real Estate Report for regional rates. The average on the national scale was 8.54% while the regional scale averaged 7.3% (Exhibit A, pp. 95-96). He opined that, because the location was virtually the same and the valuation dates were identical, he was comfortable applying the same capitalization rate to Groups I and II.

The last part of Mr. Gelbtuch's analysis was the application of a reserve for replacements, leasing commissions and tenant build-out costs. The reserve for replacements are future one-time capital expenses, such as a new roof or HVAC equipment. His market research indicated that a \$0.10 per square foot of leasable space was appropriate. The leasing commissions were set at 6% of the prospective income generated by the planned new tenancies. In addition, the new tenants would require improvements to the new space to be occupied, and Mr. Gelbtuch set aside \$10.00 per square foot. These values were used for all buildings in Groups I and II:

Group I:

Reserve for replacements	391,972 sf @ \$0.10/sf	\$ 39,200
Leasing Commissions @ 6% on \$1,056,000		63,360
Tenant Improvement for 88,000 sf @ \$10.00/sf		880,000

⁵ National rates.

Group II:

Reserve for replacements	836,914 sf @ \$.10/sf	\$ 83,600
Leasing commissions @ 6% on \$3,500,000		210,000
Tenant Improvement for 350,000 sf @ \$10.00/sf		3,500,000

Given the variables stated above, Mr. Gelbtuch estimated a value of \$7,154,192 for the buildings in Group I (Exhibit A, p. 97) and a value of \$6,337,314 for the buildings in Group II (Exhibit A, p. 131). Mr. Bruckner's analysis produced a much lower value.

VALUATION: Petitioner-Condemnor

While Mr. Bruckner agrees with Mr. Gelbtuch that the highest and best use of Midtown is as a continuation of mixed use office and retail, Mr. Bruckner's approach to the valuation problem departs drastically from Mr. Gelbtuch's at this juncture. Mr. Bruckner proposes separating the Tower, Seneca and McCurdy buildings (Group II) from the Mall, Forman and Euclid buildings (Group I) and relocating the few tenants occupying the Group II buildings to the Mall. Mr. Bruckner proposes leaving the Group II buildings vacant until such time that they can be demolished, converted or renovated. He analyzed the actual income generated and the actual expenses, noting that the Group II buildings had a negative operating income despite the existing tenants, while the Group I buildings generated a profit (Exhibit 5).

In further support of this approach, he also analyzed the average Class B office space vacancy rates in the downtown real estate market, specifically the "Central Business District," the area within the Inner Loop. He opined that the Rochester Downtown

Development Corporation (RDDC) provided the most accurate and comprehensive surveys on an annual basis. He testified he has been looking at these surveys over a 20-year period. He relied on RDDC's information for this appraisal problem, especially their 2007 survey. Overall, he opined that the Class B Market has not changed much in the last two decades, referring to the state of the market as "stagnant," or another way to describe it would be "stable." Mr. Bruckner cited the fact that over the last 10 years, some of the Class B office space was converted to residential space. He used the Temple Building, a building adjacent to the Midtown parcel, as an example of a former Class B office building that was experiencing a high office vacancy rate, and becoming uncompetitive in that market, but was able to find another life as residential space. Mr. Bruckner opined that the "stability" or the stagnation borne out by the RDDC surveys was not a result of a growing demand for Class B space but was, instead, a shrinking supply of Class B office space as owners convert their holdings to residential units. Given this explanation, Mr. Bruckner then proceeded to do an Income Capitalization analysis for the Group I buildings.

Mr. Bruckner began by analyzing actual rental income then included the actual rent being paid by the existing tenants in Group II, incorporating their leased space in the Group I analysis. Next, rather than developing an overall market rent for the vacant space in the Mall, he took defined areas of vacant space, for example, the space formerly occupied by Wegmans, and applied a rent that already existed; the Wegmans' space

would be given a rental value the same as Peebles Department Store. He then took the remaining "inline" space in the Mall, averaged the current rents paid by actual tenants, and then applied that value to the vacant inline space. The office space in the Mall was valued at \$10.00 per square foot, in Mr. Bruckner's opinion, rent at the "lower end of existing market rental for office space." (Exhibit 1, p. 39). An average market rental for similar sized spaces was used for the remaining vacant space. He attributed no income to floors 3 through 6 of the Forman Building because it was undeveloped space (Exhibit 1, p. 37). He concluded that the potential gross income for Group I was \$2,944,432.00 (Exhibit 1, p. 40).

Mr. Bruckner then estimated a vacancy rate. He created a "blended" rate of 36% by using 8% for the occupied space; 100% for the very large space left vacant by Chase and 15% for the small store space. He computed the actual vacancy rate at 42.7% (Exhibit 1, p. 41). The effective gross rental income is \$1,884,436.00 in Mr. Bruckner's analysis. He also analyzed other income from 2004 through 2006, as well as part of 2007, to make a projection of other income to be added to the effective gross income. This income included money received by the landlord, for example utilities, HVAC and CAM recoveries.⁶ He projected an additional \$399,200.00 in revenue, making the total effective gross income \$2,223,636.00 (Exhibit 1, p.42).

⁶ See chart on page 42, Exhibit 1, for full list.

Mr. Bruckner then took historical operating expenses for 2004 to 2007 and estimated that the operating expenses would be \$1,724,000.00.⁷ This leaves a net operating income of \$499,636.00 (Exhibit 1, p. 43).

At this point in his analysis, Mr. Bruckner added additional income from the operation of the parking garage. As explained earlier in this decision, the parking garage will be valued separately. Thus, the net operating income remains \$499,636.00 for this decision.

Mr. Bruckner used a capitalization rate of 10.5% on the Group I properties, the same rate used by Mr. Gelbtuch. The net operating income of \$499,636.00 capitalized at 10.5% leaves a market value of \$5,246,178.00.

Given that the Group II tenants were moved to the Group I buildings, Mr. Bruckner applied the Income Capitalization Approach to Group II as vacant buildings. He established market rental rates for Class B space in the range of \$10 per square foot to \$12 per square foot and assigned the former department store space in the McCurdy building at \$2.25 per square foot, with the remaining office space at \$10 per square foot. In his opinion, the Seneca Building could be rented at \$10 per square foot as well as the Tower's lower third. Mr. Bruckner testified that the office space above the lower third of the building in the Tower would command higher rates; \$11 per square foot for the middle

⁷ The only figure included in the operating expenses not based on historical data was an amount for Reserves for Replacement. See chart at page 42, Exhibit 1.

third and \$12 per square foot for the upper third (Exhibit 1, p. 46).

<u>Building</u>	<u>PGI</u> ⁸
McCurdy	\$2,882,265
Seneca	\$2,207,030
Tower	\$2,013,000

Then he applied a 22% vacancy rate, noting that rate was supported by RDDC survey for Class B downtown office space and computed the effective gross income (EGI):

<u>Building</u>	<u>Vacancy & Loss</u>	<u>EGI</u>
McCurdy	634,098	2,248,187
Seneca	208,091	1,721,483
Tower	442,860	1,570,140

Next, he estimated operating expenses based upon the historical information supplied by Claimant-Condemnee leaving the real estate taxes to be built into the capitalization rate: McCurdy: \$2,332,323; Seneca: \$1,367,722; Tower: \$1,087,357 (Exhibit 1, p. 47).

Mr. Bruckner then subtracted estimated tenant build-out costs and leasing commissions, resulting in negative operating income for the McCurdy and Seneca buildings that, when capitalized, result in a market value of “zero” for each of those buildings. Only the Tower has a positive operating income in this analysis, specifically

⁸ Potential Gross Income.

\$11,887. Mr. Bruckner then used a capitalization rate of 12%, reflecting a greater risk given the physical condition of these buildings, in addition to a full value tax rate of 5.5% for a total capitalization rate of 17.5%. This leads to a valuation of \$67,923 for the Tower (Exhibit 1, p. 48).

ASSESSED VALUE and ABSORPTION

Both parties acknowledge that the assessed value of a condemned property is a factor to be considered in the valuation process (*Matter of City of New York [Boston-Secor Houses - Rusciano]*, 25 N.Y. 2d 430). The valuation date for this particular property is May 28, 2008. The assessed value on the 2008 tax status date was \$13,685,000.00 (Exhibit A, p. 42).⁹ The assessed value on the 2007 tax status date was also \$13,685,000.00 (Exhibit 1, p. 8-9). The parties provided strenuous debate in their respective post-trial briefs about the weight this Court should give the assessed value in this action.

The assessed value of a property certainly is evidence of the property's value to be considered "along with other evidence of value" (*In re Matter of Vil. of Irvington v Sokolik*, 13 Misc 3d 1220[A], 2006 WL 2882587 [N.Y. Supp.], citing *City of Buffalo v Irish Paper Co.*, 31 AD2d 470 [4th Dept. 1969], *aff'd*, 26 NY2d 869 [1970]). There are circumstances where condemning authorities "may be bound by the assessed values they impose on property" (*Irvington v Sokolik*, 13 Misc 3d 1220[A]). Municipalities can be so bound when the

⁹ It appears that the Equalization Rate in 2007 was 96.5%. Applying the Equalization Rate to the assessed value would yield a fair market value of \$14,180,000.00 for tax assessment purposes.

municipality establishes one value for taxation and a much lower value for condemnation (e.g. *Matter of Golden City Park Corp. v Board of Standards & Appeals of City of N.Y.*, 29 N.Y.S. 2d 837 [Kings Sup. 1941], *rev'd on other grounds*, 263 AD 52, *aff'd*, 289 NY 720 [1942]).

Here, Petitioner-Condempnor argues that the assessed value should be given little weight because in April 2007, J. P. Morgan Chase (Chase), who occupied floors 3 - 7 in the Seneca Building, left the premises. Because the tax status date for 2007 is February of that year, and Chase was still a tenant, the position is that Midtown was properly assessed at \$13,685,000.00. However, by February 2008, the next tax status date, the assessed value remained the same and Claimant-Condempnee's position is that Midtown was over-assessed. I agree that Chase's departure did have a negative impact on the income generated by Midtown, effectively devaluing the property. Nothing in the record reflects a willingness on the part of Petitioner-Condempnor, the taxing authority, to reduce the assessed value for 2008, even though Chase, by that time, had been gone almost 10 months. Also, there is nothing in the record suggesting Claimant-Condempnee asked for a reduction for the 2008 tax year. It would be speculation on my part if I were to assume what could have happened to the assessed value in 2008 if the assessment had been challenged. However, what I can explore is whether Petitioner-Condempnor's position that the \$13,685,000.00 value was reasonable when Chase was a tenant and also, whether the value presented by Petitioner-Condempnor for condemnation purposes, \$5,890,000.00,

represents a reasonable reduction in Midtown's value, given Chase's departure. Thus, the question becomes: "Was Chase's tenancy worth \$7,795,000.00?"

While I agree in principle with Petitioner-Condempnor that Chase's departure did reduce Midtown's fair market value, I have difficulty accepting their view that Chase's exit prompted an approximate 60% reduction in total value. Chase was the major tenant in the Seneca Building. In 2006, the Seneca Building was 92.4% occupied. This figure dropped to 7.7% in 2007 once Chase departed (Exhibit 5), an approximate 85% reduction in that building's occupancy rate. Yet, the Seneca Building accounts for only 19.5% of the leasable space at Midtown.¹⁰ Reducing the assessed value by 19.5% gives a value of \$11,016,425.00. What this tells the Court is that the \$5,890,000.00 value proposed by Petitioner-Condempnor is too low. But, while I have no issue with Claimant-Condemnee's methodology regarding how he computed the potential gross income, I am concerned that the expectations regarding the ability of these buildings to attract tenants to the extent anticipated in their appraisal has been overstated, especially regarding the predictions for the Plaza space.

Regarding the Plaza, Mr. Gelbtuch testified that this retail portion of the property could be leased up to a total of 81.8 percent of its capacity. He supported this contention with the 2007 Retail Market Rent Review, which showed occupancy rates for the

¹⁰ As determined earlier in this decision, the Seneca Building has 240,391 square feet of leasable space, which is approximately 19.5% of the total 1,228,080 square feet.

Rochester Metropolitan area at 90 percent. In addition, he felt that the iconic nature of the Plaza itself and the memories of more prosperous days would also draw more tenants to this retail space.¹¹ His approach to the leasable space in the buildings comprising Group II was based on different criteria.

Mr. Gelbtuch started with income in place in April 2008 for an average of \$15.32 per square foot (Exhibit A, p. 100). Then, he analyzed historical occupancy rates in the buildings in 2005 and 2006 (Exhibit A, p. 101), as well as the market occupancy rate for Class B Office Space and Non-traditional Office Space in Rochester as determined by the RDDC surveys. I note that Mr. Gelbtuch included historical and market data for 2007 in his analysis as well, but did not rely upon it, denominating the data an aberration because, by the Fall of 2007, it was clear this property would be condemned and Chase, an extremely large tenant, had already moved out of the building. Here, the projected occupancy rates would go from 1.2% actual occupancy in the Tower to 61.6%; 1.2% actual occupancy in McCurdy to 39.8%; and 3.3% actual occupancy in Seneca to 34.4%. Comparatively speaking, Downtown Class B office space was 61.5% occupied in 2007 and Downtown Non-traditional office space was 59.9% occupied in 2007. Mr. Gelbtuch's occupancy figures for the Group II buildings are below market (Exhibit A, p. 101).

Supply and demand for Class B Office Space and Non-traditional Office Space,

¹¹ The remaining buildings in Group I, Euclid and Forman, would remain at actual percentage of leased space in this analysis.

within the Central Business District of Rochester, plays an important role in evaluating the feasibility of Mr. Gelbtuch's proposed occupancy rates. Mr. Bruckner opines that, over the past 20 years, the Class B market has not changed - it has been relatively stagnate. He testified that the reason for the stagnation was a shrinking supply of that type of office space; not a growing supply of that more tenants desiring that type of space. For example, some Class B space has been converted to residential space, such as the Temple Building. The RDDC Survey of Downtown Office Space appears to support that position.¹²

The May 2007 RDDC survey provides a chart detailing how many square feet of Class B Office Space was "absorbed" over the previous year (Exhibit 10, "Absorption, 1998-2007"). It appears from the chart that, after May 2005, Class B office space was being vacated and left on the market, that is vacant and seeking tenants: 63,576 square feet in 2006 and 312,687 square feet in 2007. RDDC opined that 307,471 square feet of the space in 2007 was attributable to Midtown alone. This figure also includes a net reduction in Class B space of 19,820 square feet when changes in occupancy were made in two other office buildings. The figures improved in 2008.

¹² Mr. Gelbtuch's appraisal does use the 2008 RDDC survey in its description of the Rochester Market Overview (Exhibit A, p. 39, Table 5). Also, I noted that Mr. Gelbtuch did consult with local appraiser John C. Rynne, a member of the RDDC, familiar with its surveys.

“The permanent closure in early 2008 of three (and part of a fourth) Class “B” office buildings at Midtown has significantly impacted all the figures for “B” space, with the lowest negative absorption figure in three years (near zero). As a result, vacancy dropped from a ten-year high in May 2007 (38.5%) to one of two ten-year lows in 2008 (24.9%).” Exhibit 7, “Executive Summary”

Thus, the picture brightened because Midtown was taken off the market and was no longer counted in the RDDC survey.¹³

I am hard pressed to accept Claimant-Condemnee’s position that Midtown should be valued based on the occupancy rates set forth in its appraisal (Exhibit A, pp. 77, 102), specifically, the assumption that Midtown’s occupancy rate can be increased from 37.4% (the rate in 2007) to 81.8%, or 88,000 square feet is leasable, and the assumption that the Tower’s occupancy rate can be increased from 1.2% (the rate in 2007) to 61.6%, or 125,000 square feet is leasable. I base this conclusion on the evidence presented regarding the state of the market in downtown Rochester at the time of the taking, disregarding the more optimistic picture painted regarding the greater metropolitan area that office and retail space in the suburbs are enjoying a higher rate of occupancy. This part of Rochester was not experiencing the joy.

¹³ Claimant-Condemnee acknowledges this fact in its own description of the Rochester market in its appraisal (Exhibit A, p. 38).

COURT'S VALUATION

Group I totals

Income in place	Plaza	37%	1,157,199
	Euclid	45%	287,082
	Forman	24%	84,078
	Plaza vacant	22%	<u>528,000</u>
			2,056,359
	Expenses		(1,730,000)
	Net operating income		326,359
	Capitalization Rate @ 10.5%		\$3,426,769
	Capital items		
	Tenant improvements 44K sf @ \$10		\$440,000
	Leasing commissions 6% [\$528,000]		31,680
	Reserve for Replacements		<u>39,200</u>
	Value:		\$2,915,889

Group II totals

Income in place	Tower		\$ 60,849
	McCurdy		72,645
	Seneca		95,252
To be leased	Tower	45%	931,291
	McCurdy	48.2%	1,500,000
	Seneca	26.8%	<u>750,000</u>
			\$3,410,037
	Expenses		(2,665,000)
	Net operating income		745,037
	Capitalization Rate @ 10.5%		\$7,822,885
	Capital items		
	Tenant improvements 281,250 @ \$10		\$2,812,500
	Leasing commissions 6% [31,812]		190,877
	Reserve for Replacements		<u>83,600</u>
	Value:		\$4,735,908

PARKING GARAGE

Beneath the subject property is a three-level, 1,843-space parking garage. It is undisputed that this facility is owned by the City of Rochester but has been operated by Midtown. The Operating Agreement admitted in evidence was executed by the City and Midtown in July 2004, for the term July 2004 to June 2006. Thereafter, the parties extended the operating agreement several times up through June 30, 2008 (Exhibit D). It is also undisputed that Claimant-Condemnee has the right of first refusal should the City decide to lease to a third party (Exhibit A, p. 134). The evidence submitted and the testimony taken indicated that whatever entity owned Midtown, from 1959 to the date of taking, operated the garage, with one exception. During a prior owner's foray into federal Bankruptcy Court, the City did operate the parking garage. The parking garage will be valued as part of the subject property and this Court adopts Mr. Gelbtuch's analysis (Exhibit A, pp. 135 - 138), and attributes a value of \$2,100,000.00 to that portion of the property.

EMPIRE ZONE STATUS

What value and/or consideration should be ascribed to the status of Midtown Rochester Properties, LLC as a Qualified Empire Zone Entity (QEZE)? In *Molly, Inc. v County of Onondaga* (18 Misc 3d 1126[A], 2007 WL 4877907), the court concluded that an appraiser's opinions to the value of a surface parking lot were in error, as the appraiser erroneously assumed that the property in question was NOT within the boundaries of an Empire Zone. The *Molly* court opined that "this factor would be considered by any prospective investor or developer with regard to purchasing the Property . . ." (*Id.* at HN 6), and referred to the omission as a "glaring error" that created a "substantial negative impact on the property valuation" set forth by that appraiser (*Id.* at HN 7).

Here, it is undisputed that Midtown is located in an Empire Zone and that Midtown Rochester Properties, LLC is a QEZE that received Empire Zone tax credits for each year from 2002 to 2007 and was still in effect up to the date of the taking.¹⁴ According to *Molly*, Claimant-Condemnee's position that Midtown's placement in an Empire Zone must be considered when valuing a property is correct. Mr. Gelbtuch did speak to that fact in his appraisal (Exhibit A, p. 44). However, reliance on *Molly* to support the position that benefits conferred by such placement are part of the appraisal problem is misplaced - *Molly* does not go that far.

¹⁴ In addition, it appears that the status conferred would have remained with Midtown until 2012 had this proceeding not intervened.

To the extent that the evidence presented addresses the tax consequences of QEZE, I have heard one side call those benefits a break on real estate taxes owed and the other refer to it as income tax credits. I have no conclusive evidence as to whether it is one or the other or both. If these benefits were real estate tax related, it could have been reflected in the portions of the valuation problem related to that issue; they were not. If these benefits were income tax related, then I agree with Mr. Bruckner that those benefits go to the property owners and do not have an impact on the property, thus they would not be part of the property valuation. Therefore, I am denying Claimant-Condempnee's request for \$2.7 million dollars as compensation for the loss of Empire Zone tax benefits.

CONCLUSION

Therefore, I find:

Group I (Plaza, Euclid, Forman)	\$ 2,915,889
Group II (Tower, McCurdy, Seneca)	\$ 4,735,908
Parking Garage	\$ 2,100,000
Total Fair Market Value:	\$ 9,751,797

DATED: September 19, 2011
Rochester, New York



HON. RENÉE FORGENSI MINARIK
ACTING SUPREME COURT JUSTICE