SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3822-15T1

CITY OF HOBOKEN,

Plaintiff-Respondent/
Cross-Appellant,

v.

PONTE EQUITIES, INC., UNITY ENVIRONMENTAL CORP., d/b/a UNITY EDUCATIONAL SYSTEMS, INC.,

Defendants-Appellants/
Cross-Respondents,

and

PUBLIC SERVICE ELECTRIC AND GAS COMPANY, LAZ PARKING NEW YORK/ NEW JERSEY, LLC and STATE OF NEW JERSEY,

Defendants.

Argued December 19, 2017 – Decided February 26, 2018

Before Judges Yannotti, Carroll and Leone.

On appeal from Superior Court of New Jersey, Law Division, Hudson County, Docket No. L-4095-12.

Daniel E. Horgan argued the cause for appellants/cross-respondents (Waters,

McPherson, McNeill, PC, attorneys; Daniel E. Horgan, of counsel; Eric D. McCullough, of counsel and on the briefs; Robert S. Lipschitz, on the briefs.)

Edward J. Buzak argued the cause for respondent/cross-appellant (The Buzak Law Group, LLC, attorneys; Edward J. Buzak and Susan L. Crawford, on the briefs).

PER CURIAM

Plaintiff City of Hoboken filed an action in the Law Division to acquire by the exercise of eminent domain property owned by defendants Ponte Equities, Inc., and Unity Environmental Corp., d/b/a Unity Educational Systems, Inc. (collectively, Ponte). The matter was eventually tried before a jury and a final judgment entered awarding Ponte $4,483,000, plus interest. Ponte appeals and the City cross-appeals from the final judgment. For the reasons that follow, we affirm on the appeal and the cross-appeal.

I.

We briefly summarize the relevant facts and procedural history. Ponte's property consists of several contiguous lots totaling .79 acres in the southwest corner of the City. The property is located in the City's I-2 zoning district, where permitted uses include food processing, storage, manufacturing, fabricating, and retail business. Conditional uses include automotive sales and services, bars, commercial garages, railroad shipping terminals, and public parking facilities. Ponte acquired

the property in 1990. It has since used the property as a commercial parking lot.

On August 23, 2012, the City filed a verified complaint and order to show cause against Ponte and other defendants to acquire the property by exercising its condemnation power. Ponte filed a motion to dismiss the complaint on the ground that the City had not engaged in bona fide negotiations. On January 3, 2013, the court granted Ponte's motion and dismissed the complaint without prejudice.

After negotiating for a time with Ponte, the City filed a motion to reinstate the action. It also sought leave to file an amended complaint. Ponte opposed reinstatement of the action and the filing of the amended complaint. Among other contentions, Ponte argued that June 11, 2008, should be the controlling date for valuation under N.J.S.A. 20:3-30 because on that day, the City allegedly took actions that substantially affected the value of the property.

On September 26, 2013, the court found that the City had cured its previous failure to engage in bona fide negotiations and entered an order granting the City's motions to reinstate the action and file an amended complaint. The court also scheduled a plenary hearing to determine the valuation date. On September 26, 2013, the City filed its amended complaint and deposited $2,937,000

in court, representing what it then believed was just compensation for the taking. The City filed a declaration of taking on September 30, 2013, and became record owner of the property on that date.

Prior to the scheduled hearing on the valuation date, the City filed a motion in limine to strike the testimony of Ponte's experts, professional planner Peter G. Steck and appraiser Maurice J. Stack, II. The City argued that the testimony of these experts lacked sufficient factual support. The motion judge conducted the hearing on January 28, 2014. The judge reserved decision on the City's motion.

Thereafter, the judge filed a written opinion addressing the City's motion and the valuation date. The judge granted the City's motion to strike the testimony of Ponte's experts, finding that both experts had presented inadmissible net opinions. The judge determined that the operative valuation date under N.J.S.A. 20:3-30 was August 23, 2012, the date upon which the City first filed its condemnation complaint. The judge memorialized his decision in an order dated February 19, 2014. Ponte filed a notice of appeal, which this court dismissed because the trial court's order was not final and could not be appealed as of right pursuant to Rule 2:2-2(a).

The case was presented to the condemnation commissioners for a decision on the compensation to be paid to Ponte for the taking

of its property. On December 19, 2014, the commissioners filed a report with their award. The City and Ponte then sought a trial de novo in the Law Division pursuant to N.J.S.A. 20:3-13(a) and (b). Prior to trial, the City and Ponte filed motions to limit or exclude testimony. The trial judge entered orders dated October 5 and 8, 2014, granting in part and denying in part the relief sought in those motions.

The case then was tried before a jury, which returned a verdict finding that Ponte was entitled to compensation in the amount of $4,483,000. The jury also responded to a special interrogatory asking whether on August 23, 2012, it was reasonably likely the City would issue a residential use variance to Ponte for the property. The jury answered, "No." On November 19, 2015, the clerk of the court entered a judgment in accordance with the jury's verdict.

Ponte filed a motion for the award of interest and entry of a final judgment. Ponte argued that the court should award it interest from August 23, 2012, when the City filed its initial complaint, at the prime interest rates in effect for various periods, ranging from 3.25 percent to 3.5 percent, compounded annually. The City opposed the motion and filed a cross-motion seeking to limit the award of interest to 1.05 percent, and to

have interest awarded from September 26, 2013, the date when it filed its amended complaint.

On March 16, 2016, the trial judge entered orders, which denied Ponte's motion and granted the City's cross-motion in part. The judge decided that the interest rate should be 1.05 percent and interest would accrue from August 23, 2012. The judge also decided that the final judgment had been entered in the case on November 19, 2015.

Ponte later filed a motion for reconsideration of the court's determination regarding the date of the final judgment. The trial judge granted the motion and determined that final judgment would be deemed to have been entered on April 29, 2016. Ponte's appeal and the City's cross-appeal followed.

In its appeal, Ponte argues: (1) the motion judge erred by deciding that the valuation date was the date the City filed its initial complaint; (2) the trial judge erred by allowing the City to rely at trial upon a resolution adopted by the City Council but later invalidated by the courts; (3) the judge should have estopped the City from changing its position on the highest and best use of the property; (4) the judge should have allowed Ponte to use the City's appraisal reports from 2009 to show that the City previously had taken the position that a residential use variance would have been granted for the property; (5) the judge erred by

permitting the City to argue before the jury that the fair market value of the property was less than its offer and good faith deposit; and (6) the judge erred by failing to award it a reasonable rate of interest on the award.

In its cross-appeal, the City argues: (1) the court erred by establishing April 29, 2016, as the date of the final judgment; (2) the appeal should be dismissed as time-barred because it was not filed within the time required by the court rules; and (3) the court erred by awarding interest from August 23, 2012, rather than September 26, 2013, the date on which the City filed its amended complaint.

II.

We turn first to Ponte's contention that the court erred by determining that the valuation date under N.J.S.A. 20:3-30 was the date the City first filed its complaint, August 23, 2012. Ponte argues that the court should have found that the valuation date was June 11, 2008, because that was the date that the City allegedly took actions that substantially affected its use and enjoyment of the property.

When the government acquires private property for public use by the exercise of its power of eminent domain, the government is required to pay "just compensation" to the property owner. Twp. of W. Windsor v. Nierenberg, 150 N.J. 111, 125-26 (1997) (citing

U.S. Const. amend. V; N.J. Const. art. I ¶ 20). The property owner is entitled to the amount of money that will make the owner "whole." Id. at 126 (citations omitted). Therefore, in a condemnation proceeding, the court must determine the "fair market value" of the property taken. Ibid. (citations omitted).

The Eminent Domain Act of 1971 (the Act), N.J.S.A. 20:3-1 to -50, provides the statutory authority for the exercise of the condemnation power by the State and its potential subdivisions. The Act provides in pertinent part that

> [j]ust compensation shall be determined as of the date of the earliest of the following events: . . . (b) the date of the commencement of the action; [or] (c) the date on which the action is taken by the condemnor which substantially affects the use and enjoyment of the property by the condemnee . . . .
>
> [N.J.S.A. 20:3-30.]

In New Jersey Sports & Exposition Authority. v. Giant Realty Associates, 143 N.J. Super. 338, 353 (Law Div. 1976), the court observed that "[a] substantial effect upon the use and enjoyment of property is occasioned when the condemnor takes action which directly, unequivocally and immediately stimulates an upward or downward fluctuation in value and which is directly attributable to a future condemnation."

Our Supreme Court later stated that the rule set forth in Giant Realty "falls short of prescribing a precise matrix against

which subsequent cases may be judged." Nierenberg, 150 N.J. at 136. The Court stated that the Legislature's objective in N.J.S.A. 20:3-30(c) "was to identify events that affected the value of property so significantly that it would be unfair, either to the condemnor or the condemnee, to allow the post-event fluctuation in value to be reflected in the condemnation award." Id. at 136-37.

The Court noted that "[t]he question of whether and when a landowner's use and enjoyment of his or her property has been 'substantially affected' under N.J.S.A. 20:3-30(c) is a mixed question of law and fact." Id. at 135. Resolving such a question requires application of a rule of law to the facts. Ibid. (citing 5 C.J.S. Appeal & Error § 703d (1993)).

The trial court's factual findings on this issue are binding on appeal if "supported by adequate, substantial and credible evidence." Ibid. (citing Rova Farms Resort, Inc. v. Investors Ins. Co. of Am., 65 N.J. 474, 484 (1974)). However, it is well established that an appellate court owes no deference to the trial court's ruling on an issue of law. Manalapan Realty, LP v. Twp. Comm., 140 N.J. 366, 378 (1995) (citations omitted).

Here, Ponte argues that the valuation date should be June 11, 2008, because on that date, the Council took several actions, which Ponte claims substantially affected its use and enjoyment

of the property. On June 11, 2008, the Council introduced Ordinance DR-366, which would have rezoned various properties, including Ponte's property, as open and recreational space.

The Council also adopted Resolution 08-206, which requested the City's Zoning Board of Adjustment (zoning board) to defer consideration of any applications for development concerning certain properties, including Ponte's property. Resolution 08-206 also directed the zoning board to consider the Council's intent and not grant any variances that would hinder or make more costly to rezone the properties.

In addition, the Council adopted Resolution 08-207, which retained McGuire Associates, LLC (McGuire) to prepare appraisals of certain properties, including Ponte's property. The Council indicated that it intended to include the appraisals in an application to the Hudson County Board of Chosen Freeholders (Freeholders) for a grant of funds from the County's Open Space Trust Fund. The City would use any monies provided to acquire certain properties, including Ponte's property.[1]

In March 2009, McGuire completed an appraisal, which valued Ponte's property at $10,170,000. McGuire stated that the highest

[1] The Freeholders later approved the application and awarded the City $3 million, but this was insufficient to fund acquisition of all of the properties identified in the application.

and best use of the property was residential, and Ponte could obtain a use variance permitting residential development of the site.

In January 2012, McGuire completed a second appraisal, which appraised the property at $2,350,000. McGuire used a November 21, 2011 valuation date, and concluded that as of that date, the highest and best use of the property was for surface parking. In the appraisal report, McGuire pointed out that the City's master plan reexamination report of 2010 recommended against residential development in industrial areas or areas not zoned for residential development.

At the trial court's hearing, Steck testified that prior to June 11, 2008, variances for residential development were routinely granted for properties in the I-2 zone. Steck stated, however, that this was not the case after June 11, 2008, and it then became "riskier" to seek such a variance. Steck testified that the Council's June 11, 2008 resolution sent a message to the zoning board to deny all variances for residential development in the I-2 zone.

Stack testified that June 11, 2008, was the correct date to value the property because the Council's resolutions indicated to the public that the City was interested in acquiring the Ponte property, thereby making it unmarketable for any use other than

those permitted in the I-2 zone. According to Stack, at that point, the City became the only potential buyer of the property.

Stack concluded that the Council's actions on June 11, 2008, substantially decreased the value of Ponte's property. He testified that he agreed with McGuire's 2009 appraisal, which valued the property at $10,170,000, based on the assumption that its highest and best use was residential development.

In his decision, the judge found that the testimony of Ponte's experts lacked adequate factual support. The judge noted that Steck had not opined as to whether the City's actions on June 11, 2008, had substantially affected Ponte's use and enjoyment of the property within the meaning of N.J.S.A. 20:3-30(c). In addition, Stack's opinion that the Council's actions substantially affected Ponte's property was based on unfounded speculation. The judge therefore determined that Ponte's experts had presented inadmissible net opinions.

The judge concluded that his decision on the City's motion to strike the testimony of Ponte's experts was dispositive and required denial of Ponte's motion to have June 11, 2008, declared the valuation date. The judge nevertheless considered the testimony, as though it was admissible, and made additional and detailed findings of fact. The judge concluded that the City's actions of June 11, 2008, did not substantially affect Ponte's use

and enjoyment of its property, and therefore June 11, 2008 was not the date of valuation under N.J.S.A. 20:3-30(c).

In his opinion, the judge noted that Ponte had not presented any evidence showing that the value of its property fell as a result of the Council's June 11, 2008 actions. The judge pointed out that the testimony of Ponte's appraiser supported the opposite conclusion because Stack testified he agreed with McGuire's 2009 appraisal of the Ponte property, which valued the property at $10,170,000. This was one year after the Council's actions.

The judge also pointed out Ordinance DR-366 was only a proposed zoning change that was never adopted. As such, the proposed ordinance was unlikely to have a significant effect on Ponte's use and enjoyment of its property. In addition, Resolution 08-206, which recommended that the zoning board postpone consideration of applications for development, had no legal force or effect, which Steck had conceded.

Moreover, although the Council had retained McGuire to appraise certain properties for the City's Open Space Trust Fund application, the application was not completed on June 11, 2008. In addition, there was no assurance the County's Freeholders would grant the application and provide funds sufficient to acquire the Ponte property. The judge concluded that

> [e]ven taking all three of Hoboken's actions on June [11], [2008] cumulatively . . . they are still insufficient to invoke N.J.S.A. 20:3-30(c). The three actions taken by Hoboken may have merely put potential buyers on guard, but did not substantially affect the Property indicating a reasonable certainty that it would be soon condemned. Therefore, the court finds that Hoboken's actions on June 11, 2008 did not have a substantial effect upon the use and enjoyment of the Ponte Property, and these actions did not directly, unequivocally and immediately stimulate an upward or downward fluctuation in value, which was directly attributable to a future condemnation. As a result, the court holds, even assuming, arguendo, that Ponte's experts' testimony and opinions were admissible, the proper valuation date would remain the date on which Hoboken filed its complaint in condemnation — August 23, 2012 — pursuant to N.J.S.A. 20:3-30(b).

We are convinced that the judge did not err by striking the testimony of Ponte's experts, Steck and Stack. The judge correctly found that they had presented net opinions, which lacked the necessary factual support and were based on speculation. See Davis v. Brickman Landscaping, 219 N.J. 395, 410 (2014) (noting that net opinion rule precludes an expert from offering an opinion that is unsupported by factual evidence); Grzanka v. Pfeifer, 301 N.J. Super. 563, 581 (App. Div. 1997) (net opinion rule bars speculative testimony).

The judge correctly determined that his ruling striking the testimony of Ponte's experts was dispositive on Ponte's motion to establish June 11, 2008, as the valuation date. Nevertheless, the

judge considered the experts' testimony, as though admissible, and found that Ponte had not established that the City had taken actions on June 11, 2008, which had a substantial effect on its use and enjoyment of the property. The judge found that under N.J.S.A. 20:3-30, the date of valuation was the date the City filed its initial complaint, August 23, 2012.

On appeal, Ponte argues that the judge's rationales for his decision are erroneous. Ponte contends the judge essentially ignored the provision of Resolution 08-206, which directed the zoning board to take the Council's intent to rezone certain properties for open space and recreation into account when voting on variance applications. Ponte asserts the zoning board would likely have considered the City's intent, which was inconsistent with the grant of a residential use variance for its property.

Ponte further argues that at trial, the City took the position that the property's highest and best use was as surface parking because residential use was inconsistent with the City's intent to preserve the I-2 zone for open and recreational space. According to Ponte, the City claimed that certain of its pre-complaint actions showed that it intended to preserve the I-2 zone. Ponte contends the City inconsistently took the position the Council's resolutions of June 11, 2008, had no effect on the property's value.

Ponte also argues that the City's assertion that the highest and best use of the property was surface parking is "patently absurd." Ponte argues that the City's intent changed from encouraging residential use to preservation of the I-2 zone. Ponte thus argues that the valuation date should be fixed at the point when the City's intent changed, which was June 11, 2008. Ponte contends the City acted improperly to deprive it of the fair market value for its property.

We are convinced, however, that there is sufficient credible evidence to support the trial court's findings of fact and conclusions of law. We affirm the trial court's order of February 19, 2014, setting the valuation date as August 23, 2012, substantially for the reasons stated by the motion judge in his opinion of February 19, 2014.

The record supports the court's determination that Ponte failed to show that the City's actions on June 11, 2008, which "directly, unequivocally and immediately stimulate[d] an upward or downward fluctuation in value and which is directly attributable to a future condemnation." Giant Realty, 143 N.J. Super. at 35. Ponte also failed to show that the City's actions "affected the value of [its] property so significantly that it would be unfair, either to the [City] or [Ponte], to allow the post-event

fluctuation in value to be reflected in the condemnation award." Nierenberg, 150 N.J. at 136-37.

III.

Ponte argues that the trial judge erred by allowing the City to rely at trial upon a Council resolution which the Court in Kane Properties, LLC v. City of Hoboken, 214 N.J. 199 (2013), held was invalid. The court permitted the City to rely on the resolution for a limited purpose on the issue of whether it was reasonably probable Ponte would obtain a use variance for its property.

"[I]n determining the fair market value of condemned property as a basis for just compensation, the jury may consider a potential zoning change affecting the use of the property provided the court is satisfied that the evidence is sufficient to warrant a determination that such a change is reasonably probable." Borough of Saddle River v. 66 East Allendale, LLC, 216 N.J. 115, 138-39 (2013) (quoting State v. Caoili, 135 N.J. 252, 265 (1994)). The evidence must "indicat[e] beyond a mere possibility that a change of use is likely and, further, that such a change would be an important factor in the valuation of the property." Id. at 138 (quoting Caoili, 135 N.J. at 264).

The trial court should perform a "gatekeeping function" and screen out "potentially unreliable evidence and [admit] only evidence that would warrant or support a finding that a zoning

change is probable." Ibid. (quoting Caoili, 135 N.J. at 264). The trial court must make a preliminary finding that there is a reasonable probability of a zoning change. Ibid. (citing Caoili, 135 N.J. at 264).

Thereafter, the jury determines whether "a buyer and seller engaged in voluntary negotiations over the fair market value of the property [would reasonably believe] that a change may occur and will have an impact on the value of the property." Id. at 139 (quoting Caoili, 135 N.J. at 264-65). The jury may consider "future variance approval and potential subdivision of the property in the valuation analysis." Ibid. (citing Caoili, 135 N.J. at 265).

In Kane, a developer moved for a zoning variance to construct a residential building in Hoboken's I-2 zone. Kane, 214 N.J. at 205. The owner of a neighboring property, who was represented by an attorney, challenged the variance application. Id. at 208. After the zoning board granted the variance, the neighboring property owner appealed to the Council. Id. at 209. By the time the Council heard the appeal, the attorney who had previously represented the neighbor was then serving as corporation counsel for the Council. Ibid.

Previously, the Council had adopted an ordinance that allowed it to review decisions of the zoning board approving applications for development. Id. at 225-26 (citing N.J.S.A. 40:55D-70(d)). The

Council issued a resolution reversing the zoning board's decision to grant the variance. Id. at 211. The developer then appealed to the trial court, which upheld the Council's action. Id. at 214. We reversed the trial court's judgment and remanded the matter to the Council to consider the matter anew. Id. at 216.

The Supreme Court found the Council's action was "irretrievably tainted" by the "incomplete recusal" of the Council's attorney. Id. at 224. The Court determined that the matter should not be remanded to the Council but remanded to the trial court, which was directed to conduct a de novo review of the zoning board's decision. Id. at 231.

In this case, the trial judge permitted the City to rely upon the resolution invalidated in Kane for the limited purpose of establishing "the Council's reasoning with regards to the I-2 district." On appeal, Ponte argues the judge erred by doing so. Ponte contends the Court in Kane held that the Council's action was "irretrievably tainted" by a conflict of interest, and the judge should not have permitted the City to rely in any manner upon that resolution.

Ponte further argues that the trial judge compounded the error by preventing its attorney from cross-examining the City's witnesses on the fact that the Supreme Court found that the Kane resolution was "irretrievably tainted." Ponte contends the trial

judge also erred by instructing the jury that in its decision, the Supreme Court in Kane had been referring to "a conflict issue with the attorneys." Ponte contends these errors require reversal and remand for a new trial.

We review the trial court's evidentiary rulings under an abuse of discretion standard, so long as the court's ruling is consistent with the applicable law. Hisenaj v. Kuehner, 194 N.J. 6, 12 (2008); Verdicchio v. Ricca, 179 N.J. 1, 34 (2004). We are convinced the trial judge did not abuse his discretion by permitting the City to rely upon the resolution at issue in Kane for the limited purpose of showing that the Council intended to retain the existing I-2 zone and that retention of the I-2 zone was not a matter of inaction.

The judge noted that although the Supreme Court in Kane found that the Council's action was "irretrievably tainted," the Court's decision was based on a conflict of interest on the part of the Council's attorney. The judge stated that the conflict had "poisoned the well" with regard to the Council's consideration of the application at issue, but the resolution nevertheless was probative of the Council's policy regarding development of the I-2 zone.

The judge cited our later opinion from the trial court's order following the remand in Kane, and noted that the City had

consistently taken the position that its decision not to alter the zoning in the I-2 zone to include residential uses was intentional and not due to inaction. In our opinion, we observed that there was nothing in the record on remand which supported the conclusion that the City's position in this regard was a product of, or influenced by, the receipt of generic legal advice at the Board's March 2010 meeting, when it reversed the zoning board's grant of the variance. See Kane Properties, LLC v. City of Hoboken, No. A-2500-13 (App. Div. June 30, 2015) (slip op. at 8-9).

We therefore conclude that the trial judge did not err by allowing the City to rely upon the resolution invalidated in Kane, with regard to the issue of whether it was reasonably probable Ponte would obtain a use variance to allow residential development of the property. We are convinced that the judge's ruling was consistent with the law and it was not an abuse of discretion.

We have considered Ponte's other arguments on this issue and conclude that they lack sufficient merit to warrant discussion in this opinion. R. 2:11-3(e)(1)(E).

IV.

Ponte raises three arguments with regard to certain other evidentiary rulings that the trial judge made. As noted, we must determine whether the rulings are consistent with the law and, if

so, whether they are a proper exercise of discretion. Hisenaj, 194 N.J. at 12; Verdicchio, 179 N.J. at 34.

A. Estoppel

Ponte contends the judge should have precluded the City from asserting different positions with regard to the highest and best use of the property. Ponte cites McGuire's 2009 appraisal, which was based on its determination that the highest and best use of the property was residential. At trial, the City took the position that a variance was not likely and the highest and best use was as surface parking.

The trial judge correctly determined that the City was not bound by McGuire's 2009 appraisal. At trial, the City relied upon an appraisal by a different expert that was based on the highest and best use of the property as of August 23, 2012, the date of valuation. McGuire's earlier appraisal was based on the highest and best use of the property as of April 3, 2009.

We are convinced that the judge did not abuse his discretion by allowing the City to rely upon the 2012 appraisal. The 2009 appraisal did not estop the City from securing a new expert to prepare a new appraisal based on the court-determined date of valuation, rendering the earlier appraisal obsolete, irrelevant, and non-binding. In addition, the judge properly found the jury

would be confused if it were presented with a report of an expert who was no longer in the case.

B. Use of McGuire's 2009 Appraisal

Ponte further argues that the judge erred by precluding it from using McGuire's 2009 appraisal at trial. Ponte asserts that in a pre-trial ruling, the judge had permitted it to use McGuire's 2009 appraisal for the limited purpose of establishing the highest and best use of the property. According to Ponte, at trial, the judge summarily rejected any use of the 2009 appraisal. Ponte contends the 2009 appraisal was an adopted admission and, therefore, admissible under the exception to the rule against hearsay in N.J.R.E. 803(b)(2).

The party offering an alleged adoptive admission must show that "the party to be charged" was "aware of" and understood the content of the statement purportedly adopted and "unambiguously assented" to the statement. McDevitt v. Bill Good Builders, Inc., 175 N.J. 519, 529-30 (2003) (citing State v. Briggs, 279 N.J. Super. 555, 562–63 (App. Div. 1995)). In Skibinski v. Smith, 206 N.J. Super. 349, 353-54 (App. Div. 1985), discussing an earlier version of N.J.R.E. 803(b)(2) and (3), we noted that if a party incorporates an expert report in an answer to interrogatories, the report will be considered an adoptive admission.

Here, Ponte argues that the City retained McGuire and relied upon the McGuire appraisal in the open space application it submitted to the County's Freeholders. According to Ponte, this is tantamount to incorporating an expert report in the answer to interrogatories. We disagree. Ponte failed to show that the City purposely and unambiguously adopted the 2009 McGuire appraisal for use at trial. The 2009 appraisal was not admissible under N.J.R.E. 803(b)(2) as an adoptive admission. Moreover, as noted previously, it was obsolete, irrelevant, and non-binding.

C. The City's Argument Regarding Fair Market Value

The record shows that the City initially offered Ponte $2,350,000 for the property but did not deposit that amount with the court because its initial complaint was dismissed. When the action was reinstated, and the City filed an amended complaint, it made an offer of $2,937,000 and deposited that amount in court. Later, at trial, the City relied upon a subsequent appraisal by Paul Beisser, who valued the property at $2,415,000.

On appeal, Ponte argues that the judge should have precluded the City from arguing to the jury that the fair market value of the property was less that the $2,937,000 the City had deposited in court. In support of this argument, Ponte relies upon State of New Jersey, Department of Environment Protection v. Fairweather, 298 N.J. Super. 421 (App. Div. 1997).

In Fairweather, the State sought to condemn a property, and hired an appraiser, who valued the property at $23,000. Id. at 423. Before trial, the first appraiser died and a second appraiser valued the property at $21,000. Ibid. The trial judge excluded evidence of the first, higher valuation, and the jury awarded defendant $21,000 for the property. Id. at 424. We reversed the judgment, holding that the State was estopped from "taking a different position at trial concerning the value of the property from that which it had assumed when it made its offers and deposited with the court clerk what it considered to be the property's fair market value." Id. at 425.

We are convinced that Ponte's reliance upon Fairweather is misplaced. Here, the $2,937,000 offer, which the City made in 2013, was based upon a valuation date of May 21, 2013. The Beisser appraisal of $2,415,000 valued the property as of August 23, 2012, which was the controlling valuation date, as determined by the judge in his February 19, 2014 opinion and order.

The trial judge therefore found that the City could rely upon the Beisser appraisal at trial, and the City was not bound by the higher deposit or offer. We conclude the judge's ruling was consistent with the law and not an abuse of discretion.

V.

Ponte argues that the court erred by awarding it simple interest at a rate of 1.05 percent. The Act does not specify the amount of interest that should be awarded in a condemnation case. See N.J.S.A. 20:3-32. Rather, the Act confers broad discretion upon the trial court to decide the appropriate rate and amount of interest. Borough of Saddle River v. 66 East Allendale, LLC, 424 N.J. Super. 516, 540 (App. Div. 2012) (citing Casino Reinvestment Dev. Auth. v. Hauck, 317 N.J. Super. 584, 594 (App. Div. 1999)), rev'd on other grounds, 216 N.J. 115 (2013).

The trial judge "should consider the prevailing commercial interest rates, the prime rate or rates, and the applicable legal rates of interest." Ibid. (quoting Hauck, 317 N.J. Super. at 594). The judge should then "select that rate or rates of interest which will best indemnify the condemnee for the loss of use of the compensation to which he has been entitled from the date on which the action for condemnation was instituted, less interest on all amounts previously deposited." Ibid. (quoting Hauck, 317 N.J. Super. at 594).

In its motion, Ponte asked the court to award it interest at the prime interest rates ranging from 3.25 to 3.50 percent, compounded annually. The certification that Ponte submitted in support of its motion also stated that it had earned net income

from the property from August 23, 2012, until the City filed its declaration of taking on October 3, 2013.

Based on that information and the jury's valuation finding, the City determined that Ponte's annualized net income from the property was 1.05 percent of the property's value. In addition, for purposes of comparison, the City noted that the post-judgment rate calculated pursuant to Rule 4:42-11 was 2.25 percent, and the average rates for one-year certificates of deposit in the relevant time ranged from .5 to .7 percent.

The trial judge determined that Ponte should be awarded interest at a rate of 1.05 percent. The judge found that Ponte had not established any basis for use of the prime interest rate, compounded annually.

On appeal, Ponte argues the rate of interest selected by the court was "unjustifiably low." It argues that the judge should have awarded interest at the prime rate, compounded annually. We disagree.

As noted, under the Act, the amount of interest to be awarded in a condemnation action is committed to the sound discretion of the court. Here, there is sufficient credible evidence in the record to support the court's determination that interest at 1.05 percent was sufficient to provide just compensation to Ponte for

the taking of its property. Ponte's arguments on this point lack sufficient merit to warrant further comment. R. 2:11-3(e)(1)(E).

VI.

We turn to the issues raised by the City in its cross-appeal.

The City argues that the trial judge erred by establishing the date of the final judgment as April 29, 2016, rather than November 19, 2015. The City contends Ponte's appeal should be dismissed because it was not filed within forty-five days after November 19, 2015, as required by Rule 2:4-1(a).

As noted previously, the clerk of the court entered a judgment on November 19, 2015, after the jury returned its verdict. See R. 4:47(a). However, under our court rules, appeals may only be taken as of right from final judgments of the trial court. R. 2:2-3(a). Further, a judgment is final and appealable as of right only when it is final as to all parties and all issues. Janicky v. Point Bay Fuel, Inc., 396 N.J. Super. 545, 549-50 (App. Div. 2007) (citing S.N. Golden Estates, Inc. v. Cont'l Cas. Co., 317 N.J. Super. 82, 87 (App. Div. 1998)).

The November 19, 2015 judgment did not resolve all issues as to the parties because the court had not yet addressed the amount of interest to be awarded. Therefore, an appeal could not be taken as of right from that judgment. See Twp. of Piscataway v. South Washington Ave., LLC, 400 N.J. Super. 358, 366 (App. Div. 2008)

(holding that judgment entered in condemnation action after jury's verdict is not final and appealable because trial judge had not yet resolved the issue of interest).

Thus, the trial judge correctly found that the final judgment was not entered in this action until April 29, 2016. We conclude Ponte's appeal was filed within the time required by Rule 2:4-1(a).

Next, the City argues that the judge erred by awarding interest from August 23, 2012, when it filed its initial complaint. The City contends interest should run from September 26, 2013, when the City filed its amended complaint.

As noted, N.J.S.A. 20:3-31 governs the payment of interest in a condemnation proceeding. The statute provides in pertinent part that the interest shall be paid "from the date of the commencement of the action until the date of payment of the compensation." Ibid.

Here, the judge correctly found that the action was commenced when the City first filed its complaint. The record shows that the court dismissed City's initial complaint and the City did not thereafter commence a new action. Rather, the trial court's order of September 26, 2013, reinstated the action and the action continued under the same docket number. The court permitted the City to file an amended complaint, but the amended complaint was

filed in the same action that the City had commenced on August 23, 2012.

The City argues, however, that the August 23, 2012 accrual date contravenes the Legislature's intent and the purpose for which interest is awarded in a condemnation action because after the initial complaint was dismissed, Ponte remained in possession and control of the subject property. The City therefore argues that Ponte was not deprived of the profitable use and enjoyment of its property until the City filed its declaration of taking and became record owner of the property on October 3, 2013.

We are not persuaded by these arguments. As we stated previously, the award of interest is committed to the sound discretion of the trial court. Here, the court did not mistakenly exercise that discretion by awarding interest from the date the City initially commenced the action, which was August 23, 2012.

The City's arguments on this point lack sufficient merit to warrant further comment. R. 2:11-3(e)(1)(E).

Affirmed on the appeal and cross-appeal.