



IN THE SUPREME COURT OF THE STATE OF DELAWARE

JACK W. LAWSON and : No. 320,2012
MARY ANN LAWSON, :
:
Defendants Below, :
Appellants, :
:
v. : Lower Court: Superior Court
: In And For New Castle County
STATE OF DELAWARE, upon the, : C.A. No. N12C-01-128 JAP
Relation of the Secretary of the :
DEPARTMENT OF TRANSPORTATION, :
:
Plaintiff Below, :
Appellee. :

APPELLANTS' OPENING BRIEF

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NATURE OF PROCEEDING

This is an interlocutory appeal of Superior Court Orders granting possession of real property owned by Appellants Jack W. Lawson and Mary Ann Lawson (the "Lawsons") to the Appellee, State of Delaware, Department of Transportation ("DelDOT") in a condemnation action brought pursuant to the Power of Eminent Domain.

A. The Initial Pleadings; Right To Take Challenged

DelDOT initiated the condemnation action against the Lawsons by filing a Complaint on January 18, 2012. A-15. On February 3, 2012, DelDOT filed an Amended Complaint and a Motion for Entry of Order Allowing it to Enter in Possession and Occupy the Property to be taken from the Lawsons. A-29 and A-39. DelDOT deposited the amount of \$133,100 with the Superior Court on February 10, 2012. A-64.

On February 16, 2012, the Lawsons filed: 1) an Answer to Amended Complaint and Objections to Taking; 2) an Opposition to DelDOT's Motion for Possession, and Motion to Dismiss; and 3) a Motion for Establishment of a Case Schedule Regarding the Right to Take. See A-65, A-70, and A-129. On February 21st, the Lawsons filed: 1) a Notice of Depositions for The Honorable Shailen P. Bhatt, Thomas Nickel, and Charles Brown; 2) a set of Interrogatories on the Right to Take; and 3) a Request for Production of Documents on the Right to Take. See A-141, A-144, and A-150.

B. DelDOT Seeks To Deny The Lawsons Discovery On The Right To Take

DelDOT filed Responses In Opposition to the Lawsons' Motion to Dismiss and for a Case Schedule on February 24, 2012. See A-154,

and A-286. In addition, DelDOT attempted to file a Motion for Protective Order on that date, but it was rejected and had to be refiled a few days later. A-395.

The Lawsons filed a response opposing DelDOT's Request for Protective Order and a Motion to Compel DelDOT's compliance with discovery obligations on February 27, 2012 and March 6, 2012, respectively. See A-437, and A-446. All Motions and Responses were scheduled to be heard at the Order of Possession hearing originally noticed by DelDOT: March 15, 2012.

C. DelDOT Files 11th Hour Supplemental Affidavits, But The Lawsons Quickly File Rebuttal Affidavits

On March 9, 2012, DelDOT submitted two (2) new Affidavits in support of its Motion for an Order of Possession: 1) an Affidavit of DelDOT Secretary Sheilen P. Bhatt; and 2) an Affidavit of DelDOT Engineer Marc Coté. See A-456, and A-461. On that same date, DelDOT filed a Response In Opposition to the Lawsons' Motion to Compel discovery. A-469.

The Lawsons' immediately filed counter-Affidavits rebutting the contents of DelDOT's new Affidavits on March 9th. See A-464, and A-502. The Lawsons also filed a Motion to Strike the DelDOT Affidavits. See A-518. The Lawsons filed an Affidavit of Douglas Salmon on March 13, 2012. See A-532.

D. Oral Argument On The Motions; The Trial Court Considers DelDOT Hearsay And "Sandbag" Evidence, And Denies The Lawsons Discovery And An Evidentiary Hearing

The Superior Court conducted an approximately one (1) hour Motion Argument on DelDOT's request for possession of the Lawsons' property on March 15, 2012. See A-541 and Cf. A-588. DelDOT was

permitted to submit previously undisclosed documents and second-hand testimony. Initially, the Superior Court ruled that the Lawsons should be permitted to have limited discovery, but the Court swiftly reversed course upon objection by DelDOT's counsel. A-578 to 579. In the end, the Superior Court ruled entirely in favor of DelDOT and against the Lawsons; denying them discovery and a hearing on the Right to Take despite a record replete with disputed material facts and statutory interpretation issues.

Two (2) months later, on May 15, 2012 and May 17, 2012, the Superior Court entered two (2) separate summary Orders confirming its oral rulings in favor of DelDOT on possession of the Lawson's land. No written Opinion was issued.

E. The Lawsons Seek And Obtain Interlocutory Appellate Review

The Lawsons commenced the process for certification of an Interlocutory Appeal on May 24, 2012. A Notice of Appeal and a Supplemental Notice of Appeal were filed in the Supreme Court on June 14, 2012 and June 21, 2012. On June 22, 2012, the Supreme Court entered an Order granting the Lawsons' request for certification of an Interlocutory Appeal.

This is the Lawsons' Opening Brief on appeal.

SUMMARY OF ARGUMENT

- I. The trial court erred in allowing DelDOT to take the Lawsons' land in spite of undisputed record evidence that DelDOT had no construction funding in its 6-year Capital Transportation Plan for the \$500+ million project cost, in light of the rule that takings by eminent domain may only be made when the land will be used within a reasonable time.

- II. The trial court erred in allowing DelDOT to take the Lawsons' land despite numerous violations of the Real Property Acquisition Act and the Condemnation Act, to-wit: 1) lack of sufficient good faith negotiations; 2) failure to offer, and deposit in court, a legally valid estimate of Just Compensation; 3) premature advancement of the taking to a court condemnation action; and 4) failure to conduct a public hearing on the taking at least 6 months prior to initiating condemnation.

- III. The trial court erred in denying the Lawsons Discovery and an Evidentiary Hearing and considering hearsay and surprise evidence; numerous disputed material facts and legal interpretations necessitated a more fully developed record and discrete legal rulings.

STATEMENT OF FACTS

A. The Property, The Taking And The Remainder; DelDOT Commercially Landlocks The Lawsons

The Lawsons are the owners of an approximately 10 acre parcel of land located on the south side of Strawberry Lane in Appoquinimink Hundred, New Castle County, Delaware (the "Property"). A-94 and A-100. The Property is improved with a 1,680 square foot ranch house and detached garage and shed buildings, which is where the Lawsons have lived for nearly 25 years. A-100 and A-102-03. DelDOT has taken approximately 1.5 acres of land (the "Taking Area"), leaving the Lawsons with about 8.5 acres and the improvements (the "Remainder Parcel"). *Id.* The Property is zoned CR (Commercial Regional). A-100.

Under the New Castle County Unified Development Code ("UDC"), uses permitted on CR zoned lands include: 1) Commercial lodging; 2) Commercial Retail and service; 3) Heavy Retail and service; 4) Light automobile service; 5) Restaurants; 6) Office; 7) Shopping center; and 8) Vehicular sales, rental and service. A-590-92. UDC Sections 40.20.230 and 40.31.114C.1. require that all Streets providing access to a public road for any such development must conform to DelDOT Regulations and be approved by DelDOT. A-593 and A-596.

The Taking Area includes the entire 450+/- feet of frontage that the Property previously had along the south side of Strawberry Lane. A-94 and 95. The Taking Area will be utilized by DelDOT to install a stormwater retention area. *Id.* Because the Taking Area includes all of the Property's road frontage, the Remainder Parcel

will be almost entirely landlocked. *Id.* The Remainder Parcel's sole means of access to Strawberry Lane is a 12-foot wide curvilinear driveway that DelDOT will install on a raised earthen berm through the middle of its stormwater retention area (the "Residential Driveway"). *Id.*

The Taking Area is being condemned pursuant to DelDOT's power of eminent domain as a part of the DelDOT Route 301 Project ("301 Project"). A-31 and A-103. The stormwater management facilities that will be constructed by DelDOT on the Taking Area will include a stormwater pond, piping under the Residential Driveway, and a drainage area, all of which are below the elevation of the Residential Driveway. A-95.

B. DelDOT's Abbreviated Negotiations; It Rushes To Condemn The Minute The Lawsons Retain Counsel

On September 12, 2011, DelDOT Real Estate representatives met with the Lawsons and presented an offer to purchase the Taking Area. A-161. DelDOT's offer was based on an appraisal dated December 28, 2010, which opined that Just Compensation for the taking was \$133,100. A-165-66 and A-171-72. Of particular note in DelDOT's appraisal is the premise that the Remainder Parcel has "similar access" as the Property (prior to the taking). A-222. Clearly, this is not the case.

The Lawsons and their Realtor, Doug Salmon ("Salmon"), expressly indicated to DelDOT at the September 12th meeting that they were concerned about the Residential Driveway being sufficient to serve as a future commercial development entrance. A-161. A month later on October 12th, Salmon advised DelDOT that he had

spoken to two engineers that had advised that the Residential Driveway was not sufficient to provide for commercial access. A-162. DelDOT's representative inaccurately responded on October 21st that the DelDOT appraisal had considered the diminution in access suffered by the Remainder Parcel. *Id.*

On November 21, 2011, Salmon advised DelDOT that the Lawsons had retained attorney Rich Abbott. A-162, A-533, and A-539. Immediately after being informed that the Lawsons had retained legal counsel, DelDOT declared an impasse in negotiations and sent the matter to its legal counsel to file condemnation in Court.

A-162-63. A DelDOT email to Salmon on November 21st requested an update, but did not indicate any urgency or pose any deadline. A-533 and A-539. In fact, Salmon did not believe that the parties were at an impasse in their negotiations, and he fully expected that negotiations with DelDOT would continue via the Lawsons' new legal counsel after the Thanksgiving holiday. A-533.

On November 28, 2011 (the Monday immediately following the Thanksgiving holiday weekend of November 24-27, 2011), the Lawsons' counsel advised DelDOT that he had been retained. A-87. DelDOT was informed that the Lawsons were concerned that the Residential Driveway was inadequate to provide access for future commercial development of the Remainder Parcel, which DelDOT's appraiser failed to take into account in determining Just Compensation. *Id.* In response, DelDOT demanded that the Lawsons' counsel communicate with DelDOT's attorney, as the matter had been referred to condemnation. A-88.

Later in the day on November 28, 2011, the Lawsons' counsel communicated with DelDOT's attorney regarding a request to hold off on condemnation, expressing concern about: 1) the need for the Property within a reasonable time due to the lack of any 301 Project construction funding; and 2) the Residential Driveway being inadequate to provide commercial access for the Remainder Parcel. A-90. This communication was met with over a month of stony silence, necessitating a follow-up communication on January 5, 2012. A-91. Eight (8) days later, on January 13, 2012, DelDOT's legal counsel finally deigned to respond: DelDOT was still evaluating the situation. A-92.

C. DelDOT Files The Condemnation Action, The Lawsons Oppose The Taking, But DelDOT Handcuffs The Lawsons From Getting to The Truth

DelDOT filed its Condemnation Complaint and Amended Complaint on January 18, 2012 and February 3, 2012, respectively. A-15 and A-29. On the latter date, DelDOT also filed a Motion to Take Possession of the Taking Area. A-39.

1. The Lawsons' Object To The Taking; DelDOT Has No Money & It Violated the RPAA and Condemnation Act

On February 16, 2012, the Lawsons filed a Motion to Dismiss and Opposition to DelDOT's Motion for Possession (the "Objections To Taking"). A-70 et seq. The Objections To Taking included two (2) legal bases for dismissal: 1) DelDOT's lack of public need for the Property within a reasonable time; and 2) numerous violations of the Delaware Real Property Acquisition Act, 29 Del. C. Ch. 95 (the

"RPAA"), and related provisions of the Delaware Condemnation Act, 10 Del. C. Ch. 61 (the "Condemnation Act"). A-71-74.

Documents from DelDOT's own website established that it had no money planned through 2017 to construct the 301 Project. A-126-27. In addition, DelDOT had not even determined how it would finance the estimated \$543 million construction cost. A-123.

Documents from DelDOT's website and communications between the parties also established that:

1. DelDOT had not conducted a public hearing regarding its intent to exercise the power of eminent domain to acquire the Taking Area, as required by 29 Del. C. § 9505(15) (A-72-73 and A-116-121);
 2. DelDOT had unreasonably advanced the acquisition of the Taking Area and failed to offer Just Compensation to the Lawsons prior to initiating the condemnation action, in contravention of 29 Del. C. §9505(1), (3), (4), and (7), and § 6110(a) of the Condemnation Act) (A-72-73, A-94-95, A-103, and A-109-114); and
 3. The Residential Driveway would not provide "similar access" for Commercial development of the Remainder Parcel, contrary to a fundamental premise of the DelDOT appraisal. (*Id.*)
2. DelDOT Blocked Discovery And A Hearing; It Sought To Hide The Truth

DelDOT's counsel refused to discuss a Case Schedule to litigate the issue of the "Right to Take." A-137-39. So the

Lawsons filed a Motion to Establish a Case Schedule. A-129. In it, the Lawsons requested a time period for discovery and the scheduling of an evidentiary hearing. A-131 and 133-34. Because serious questions about DelDOT's Right to Take were presented in their pleadings, the Lawsons believed it was necessary to obtain documentary and testimonial evidence relevant to their Objections To Taking. A-137-39. The Lawsons requested an evidentiary hearing since there were material factual disputes and conflicting arguments on legal interpretations. *Id.*

The Lawsons noticed a Deposition *Ad Testificandum* and *Duces Tecum* of the DelDOT Secretary, a DelDOT Real Estate representative, and the DelDOT appraiser. A-141. They also issued short written discovery requests aimed at their challenge to DelDOT's "Right to Take," including the RPAA and Condemnation Act violations alleged and the issue of whether DelDOT had a public need to take the Lawsons' property within a reasonable time. A-144-153. But DelDOT blocked the Lawsons from taking discovery and opposed an evidentiary hearing. A-286 *et seq.* and A-395 *et seq.* DelDOT contended that the mere filing of a condemnation action and a conclusory affidavit *ipso facto* established the Right to Take, leaving nothing but the issue of Just Compensation to be decided (at trial). A-287-88.

Just 6 days prior to the scheduled March 15, 2012 oral argument, DelDOT submitted two (2) additional Affidavits: 1) one from DelDOT Secretary Bhatt; and 2) another from DelDOT engineer Marc Coté. A-456 *et seq.* and A-461 *et seq.* The same day, the Lawsons filed counter-Affidavits which directly rebutted the two

DelDOT Affidavits. A-464 *et seq.* and A-502 *et seq.* One rebuttal Affidavit provided a detailed explanation of DelDOT Regulations which foreclosed the position taken by DelDOT's engineer as a matter of law: the Residential Driveway was at least 10 feet too narrow. A-465-67. The other rebuttal Affidavit provided an explanation and supporting documentation which disproved the assertion that DelDOT had an "immediate need" for the Taking Area contained in Secretary Bhatt's Affidavit. A-503-05, A-507, and A-516-17. Consequently, the record at that stage was in considerable dispute.

D. Oral Argument On DelDOT's Motion For Possession: No Discovery, No Evidentiary Hearing, Improper Consideration Of DelDOT "Sandbag" And Hearsay Evidence; Not Surprisingly DelDOT Prevails

At oral argument in Superior Court, DelDOT conceded that the Remainder Parcel would be set back at least 100 feet away from the public road, Strawberry Lane. A-547. DelDOT also conceded that it would only be providing access from the Remainder Parcel to Strawberry Lane via a driveway approximately 12-feet wide, running through the Stormwater Retention Area. A-545-46. When the Court asked DelDOT whether it would commit to provide the Lawsons with a 30-foot wide driveway in the future, DelDOT balked. A-564-65.

The trial court later permitted DelDOT's counsel to present hearsay testimony on the issue of access to the Remainder Parcel. A-565. Specifically, DelDOT's attorney spoke to the 301 Project Manager, Ms. Gunn, and recounted her statement to the Court:

Your Honor, Ms. Gunn tells me that it is possible for there to be expansion of the driveway in the location where the plans currently have it to 30 feet. ...She says they don't - they can't make a guarantee because

they asked for plans, they asked these guys to go through the development process, and they just haven't done it. *Id.*

At the conclusion of argument, the Superior Court ruled that the Lawsons could take the depositions of Messrs. Bhatt and Coté. A-578-79. DelDOT's counsel objected to the Court's ruling, and insisted that it reconsider. A-579-80. Then DelDOT's counsel submitted a new, non-record document that he contended showed funding was available for DelDOT to construct the 301 Project (the "Surprise Document"). A-583-85. Amazingly, the trial court reversed its position, ultimately denying the request for discovery and granting DelDOT's Order of Possession.¹ A-586.

Subsequent to oral argument, the Lawsons had an opportunity to review the Surprise Document. The Surprise Document was an amendment to the Wilmington Area Planning Council ("WILMAPCO") Transportation Improvement Program ("TIP"). A-604-08. But the WILMAPCO TIP does not constitute an amendment to the DelDOT Capital Transportation Program ("DelDOT CTP"). See A-598 and A-602 and Cf. A-126-27. The DelDOT CTP cannot be amended without approval of the Council on Transportation, pursuant to 29 Del. C. §§ 8409(3) and 8419(4).

¹ The Superior Court also indicated that a written decision would follow entry of a form of order. A-586 ("I'll write my explanation of my reasons..."). But no written decision was ever issued.

ARGUMENT

I. **DeLDOT LACKED NECESSITY FOR THE TAKING; IT DID NOT HAVE A PUBLIC NEED WITHIN A REASONABLE TIME**

A. Question Presented

Whether DeLDOT had a public need within a reasonable time for the taking of the Lawsons' land when it had no money to build the road project over the next 5+ years? The question was preserved in the Trial Court both in written pleadings A-67, A-73-74, and A-504-05, and at oral argument, A-582.

B. Standard and Scope of Review

The standard and scope of review of the Superior Court's interpretation of the condemnation statute is *de novo*. *Cannon v. State*, 807 A.2d 556, 559 (Del. 2002). The standard of review regarding the public necessity of DeLDOT's exercise of the power of eminent domain is fraud, bad faith, or abuse of discretion. *Id.* at 561.

C. Argument

1. DeLDOT Abused Its Discretion By Taking The Lawsons' Land By Eminent Domain Despite No Need Within A Reasonable Time

It is well-established in Delaware that the exercise of the power of eminent domain may not be undertaken unless the agency can establish a public need for the property within a reasonable time. *State v. Dorzback*, 1991 WL 89887, *3, Steele, J. (Del. Super., May 28, 1991), citing *State v. 0.6233 Acres of Land*, 110 A.2d 1, 6 (Del. Super. 1954), *aff'd*, 112 A.2d 857, (Del. 1955). In the case *sub*

judice, DelDOT did not establish a present need. Nor did DelDOT need the land in the next 5-6 years; it had no money to construct the 301 Project. Indeed, DelDOT's Secretary publicly conceded that DelDOT had commissioned a construction financing study to determine how it might be able to fund 301 Project construction.

Contrary to the Affidavit Of Necessity signed by the DelDOT Secretary, DelDOT had no "immediate" need for the Taking Area. By the Secretary's own admission, DelDOT could not say when it could build the 301 Project.

The DelDOT CTP evidences the fact the DelDOT had no funding to construct the 301 Project through Fiscal Year 2017. DelDOT also had no proof that it would use the Taking Area after July 1, 2017. The lack of money to build the 301 Project within a reasonable time *ipso facto* establishes an abuse of discretion; DelDOT jumped the gun in condemning.

2. Undisputed Record Evidence
Established That DelDOT Had No
Money To Construct The 301 Project

In 2011, the DelDOT CTP was approved by, *inter alia*, DelDOT and the General Assembly, for fiscal years 2012-2017. A-507. One of the four major funding categories contained in the CTP is entitled "Road System." *Id.* The purpose of the CTP is to list projects that DelDOT is working on or plans to work on in the future. *Id.*

According to the "Helpful Hints for Reading the Charts" section contained at pages 69 through 74 of the CTP, "[t]he Project Authorization Schedule indicates anticipated authorization amount

for each project by fiscal year." A-509-14. In addition, the Project Funding Schedule indicates anticipated cash spending for each project. *Id.*

According to the "Project Authorization Schedule" found at page 342 of the CTP, no money was authorized for construction of the 301 Project. A-517. In the "Project Funding Schedule" contained at page 342 of the CTP, DelDOT admitted that it had \$0 to put toward construction of the 301 Project. *Id.* Funds were only available to acquire right-of-way and for project development and design. *Id.*

The narrative description of the 301 Project found at page 341 of the CTP states that "[d]esign and right-of-way activities are in process," and "[t]he goal is to be in a position to move forward with construction when key facts (traffic, revenues, costs and market conditions) result in an acceptable Plan of Finance to sell Toll Revenue Bonds that minimize risk to the State and the Transportation Trust Fund." A-516. DelDOT had no plan to finance construction of the 301 Project in Spring 2012. A-123. Thus, DelDOT could not say when it would actually need the Taking Area in the future.

According to the Project Authorization Schedule at page 342 of the CTP, DelDOT estimated the total cost of constructing the Route 301 Project at \$755,417,500, of which \$543 million was DelDOT's construction cost estimate. A-517. Since DelDOT still needed to come up with over half a billion dollars to construct the 301 Project, it had no "immediate" need for the Area of Taking.

Secretary Bhatt's Affidavit did not attach any documents or cite to any formally approved plan in support of its conclusory assertion that 301 Project construction funding existed or was going to be available by a date certain. Accordingly, the Superior Court erred in failing to conclude that DelDOT abused its discretion by proceeding to condemn before it needed the Taking Area within a reasonable time.

ARGUMENT

II. **DelDOT FAILED TO COMPLY WITH THE REAL PROPERTY ACQUISITION ACT AND THE CONDEMNATION ACT, WHICH REQUIRED DISMISSAL WITHOUT PREJUDICE**

A. Questions Presented

Whether the trial court erred in overruling the Lawsons' objections to the taking despite evidence of DelDOT's violations of the RPAA and the Condemnation Act? The question was preserved in the Trial Court both in written pleadings, A-67 and A-72-73, and at oral argument, A-563-64, 570-72, 574-77.

B. Standard and Scope of Review

The standard of review regarding the Superior Court's legal determinations on the Right to Take and alleged RPAA violations in a condemnation action is *de novo*. *Key Properties Group, LLC v. City of Milford*, 995 A.2d 147, 151 (Del. 2010).

C. Argument

1. The RPAA And Decisional Law Direct Dismissal Of A Condemnation Action For Unexcused Violations

DelDOT's exercise of its power of eminent domain is subject to certain conditions, including the requirements of the RPAA. Specifically, § 9505(1), (3), (4), (7), and (15) provide as follows:

- (1) every reasonable effort must be made to expeditiously acquire property by negotiation;
- (2) prior to initiating negotiations, DelDOT must establish an amount which it reasonably believes constitutes just compensation;
- (3) no property owner will be requested to surrender possession of property until the provisions of 10 Del. C. Ch. 61 are complied with;

(4) the time for negotiations or condemnation cannot be advanced in an effort to pressure a property owner to agree on value; and

(5) at least six (6) months prior to the initiation of condemnation proceedings, a recognized public use purpose must be established pursuant to a certified planning document, a published report, or a public hearing.

While the RPAA provisions are directory rather than mandatory, non-compliance without a valid excuse warrants the remedy of dismissal without prejudice. *City of Dover v. Cartanza*, 541 A.2d 580, 583 (Del. Super. 1988). And when DelDOT has filed a condemnation proceeding before reasonable efforts at exhausting negotiations, the Superior Court has not hesitated to dismiss the action. *State v. Amin*, 2007 WL 1784187, Witham, J. (Del. Super., April 26, 2007). Indeed, the Superior Court has dismissed an action where there were only a few unexcused violations of the Act. See *State v. Dorzback, supra*.

Two (2) purposes of the RPAA include: 1) encouraging acquisition by negotiated agreement; and 2) avoidance of litigation, in order to relieve congestion in the Courts. *Key Properties Group, supra*. at 153, citing *Cartanza, supra*. at 582. The RPAA's procedural requirements are intended to achieve these purposes. *Key Properties Group* at 153.

Section 6110(a) of the Condemnation Act and the RPAA combine to require the deposit into Court of a reasonable estimate of Just Compensation as a prerequisite to the entry of an Order of Possession. Consequently, a condemnation deposit based on a legally

invalid appraised value of Just Compensation *ipso jure* bars entry of an Order of Possession.

2. The 12-Foot Wide Residential
Driveway Is Inadequate For
Commercial Development Of The
Remainder Parcel

DelDOT has adopted the "Standards And Regulations For Subdivision Streets And State Highway Access" (the "Regulations"). Title 2 (Transportation) Delaware Administrative Code, 2300. Under § 1.0 of the Regulations, it is expressly provided that "[a]ll commercial entrances...are to be designed and constructed in accordance with these requirements." A-107. The Regulations are adopted pursuant to, *inter alia*, 17 Del. C. § 146, by which the General Assembly has expressly delegated the authority to control access to State roads to DelDOT. *Id.*

Section 3.6.1 of the Regulations mandates that the width of right-of-ways must be in accordance with Figure 3-2. A-109. In turn, Figure 3-2 provides that Type I and II subdivision streets must have a minimum right-of-way width of 50 and 60 feet, respectively. *Id.* A Type I subdivision street is defined in § 1.0 of the Regulations as one that will experience average daily traffic of 500 trips or less. A-108. And Type II has 501 trips to 3,000 per day. *Id.*

Pursuant to § 5.2.8 of the Regulations, the constructed roadway width shall be consistent with Figure 5.12. A-110. And Figure 5.12 prescribes the required pavement width (without curb and gutter) for Type I and II subdivision streets as 22 and 32 feet

wide, respectively. A-114. Thus, development of the Remainder Parcel would require a 22 or 32 foot wide paved asphalt access road to be approved by DelDOT. As a result, the Residential Driveway is 10 to 20 feet short of the legally required width.

Pursuant to UDC § 40.31.114, a development plan for the Remainder Parcel cannot be approved without a "[l]etter of approval from DelDOT regarding transportation related matters." Thus, commercial development of the Remainder Parcel is not legally possible.

Additionally, the 12-foot wide Residential Driveway is also inadequate as a practical matter for a commercial development. Two large size trucks could not pass one another on a 12-foot wide drive. They are wider than 6 feet each; state and federal law permits truck widths of up to 102 inches, or 8.5 feet. 21 Del. C. § 4502(b)(1) and 23 CFR § 658.15.

Consequently, it is literally impossible as a practical matter and as a matter of law for the Remainder Parcel to be developed with a commercial use permitted under the applicable CR zoning designation.

3. DelDOT Violated Five (5) Separate RPAA Requirements And Presented No Excuse

DelDOT conclusorily rejected attempts to negotiate and insisted condemnation was inevitable. And it did not offer or negotiate based on a reasonable estimate of Just Compensation. Thus, DelDOT failed to comply with § 9505(1), (3), and (7).

DelDOT also failed to comply with the requirements of 29 Del. C. § 9505(4) and 10 Del. C. § 6110. DelDOT did not deposit a reasonable estimate of Just Compensation prior to seeking a court order of possession. DelDOT's appraiser failed to consider the legal bar to commercial development of the Remainder Parcel caused by the overly narrow Residential Driveway.

No certified planning document or DelDOT report supported DelDOT's taking of the Taking Area. And DelDOT did not conduct a public hearing on the taking of the Taking Area. Consequently, DelDOT also failed to comply with RPAA § 9505(15).

DelDOT's position regarding its just compensation offer to the Lawsons was taken in bad faith and constituted an abuse of discretion. Just compensation equates to fair market value. *State v. Roseann H. Harkins Revocable Trust*, 732 A.2d 246, 250 (Del. Super. 1977). And just compensation in a partial taking case is based upon the "before and after" approach to value. *Acierno v. State*, 643 A.2d 1328, 1332 (Del. 1994). But the "highest and best use" of the Remainder Parcel could not be for Commercial use, as DelDOT's appraisal alleged. Accordingly, DelDOT did not offer, negotiate, or deposit Just Compensation in violation of the RPAA and the Condemnation Act.

4. DelDOT Abused Its Discretion, Violating The RPAA Without Excuse, Thereby Requiring Dismissal

DelDOT was made aware of the fact that the Remainder Parcel could not be developed with commercial uses. DelDOT declined to reappraise the Taking Area and engage in negotiations with the

Lawsons based upon a legitimate estimate of Just Compensation. As a result, dismissal without prejudice was warranted.

Under the RPAA and the Condemnation Act, DelDOT was required to deposit a reasonable estimate of Just Compensation with the Superior Court as a prerequisite to being entitled to an Order of Possession. But DelDOT deposited an amount which was woefully inadequate due to the erroneous appraisal premise that the Remainder Parcel could be applied to the same panoply of commercial uses that it could before the taking due to allegedly "similar access." The Residential Driveway was legally too narrow to provide a commercial access pursuant to DelDOT's own Regulations. Accordingly, the Superior Court erred in granting DelDOT possession of the Taking Area.

ARGUMENT

III. THE SUPERIOR COURT ERRED BY DENYING THE LAWSONS' DISCOVERY AND AN EVIDENTIARY HEARING, AND BY CONSIDERING SURPRISE AND HEARSAY EVIDENCE

A. Questions Presented

Whether the Superior Court erred in denying the Lawsons the opportunity to take some discovery, declining to conduct an evidentiary hearing on the disputed record, and permitting DelDOT to submit non-record evidence and hearsay testimony? The discovery and evidentiary hearing questions were preserved in the Trial Court both in written pleadings, A-131 and 133-34, and at oral argument, A-567-70. And the surprise and hearsay evidence questions were preserved at oral argument. A-568 and A-585.

B. Standard and Scope of Review

The standard of review regarding pretrial discovery rulings is abuse of discretion. *Coleman v. Price-WaterhouseCoopers, LLC*, 902 A.2d 1102, 1105 (Del. 2006). But discretion regarding discovery "is guided by the rule that discovery should be permitted unless the Court 'is satisfied that the administration of justice will be impeded by such an allowance.'" *Mann v. Oppenheimer & Co.*, 517 A.2d 1056, 1061 (Del. 1986) (emphasis added). The abuse of discretion standard also applies to review of a trial judge's decision to admit or exclude evidence. *Capano v. State*, 781 A.2d 556, 586 (Del. 2001).

Declining to conduct an evidentiary hearing is a matter of judicial discretion akin to a decision to grant or deny a continuance, which is reviewed based upon the abuse of discretion

standard. *Roache v. Charney*, 38 A.3d 281, 286 (Del. 2012). A trial judge commits an abuse of discretion where he or she "exceeds the bounds of reason in light of the circumstances or has ignored recognized rules of law or practice to produce injustice..." *Id.* at 287 (emphasis added). Abuse of discretion also exists where a decision is arbitrary or capricious. *Id.* at 286.

C. Argument

Under Superior Court Civil Rule 81(a), the Superior Court discovery rules, Rules 26-37, generally apply to condemnation and eminent domain matters. Those Rules broadly and liberally permit discovery. And under the Superior Court's special condemnation rule, Rule 71.1, a property owner is impliedly permitted to take "depositions" in order to "show good cause why [an] order of possession should not be entered forthwith."

The Superior Court has previously held that the Civil Rules generally apply in condemnation actions. *Del. Solid Waste Auth. v. 5.552 Acres of Land*, 1985 WL 189274, *2, Taylor, J. (Del. Super., Sept. 19, 1985). The Mississippi Supreme Court has further held that "[t]he discovery tools, rules, and procedures available in other civil proceedings are available in eminent domain proceedings." *Brown v. Mississippi Transp. Com'n*, 749 So.2d 948, 957 (Miss. 1999). Accordingly, the Lawsons were entitled to at least some discovery in support of their objections to DelDOT's Right to Take.

The Lawsons presented Affidavits and documents rebutting DelDOT's contention of Public Need Within A Reasonable Time and

showing violations of the RPAA which justified dismissal. Faced with such well-founded Objections To Taking, the trial court should have allowed discovery and conducted an evidentiary hearing.²

1. The Lawsons' Weighty Objections To DelDOT's Right To Take Entitled Them To Some Discovery

The Lawsons filed: 1) an Answer To Amended Complaint and Objections to Taking; and 2) an Opposition To Motion For Possession And Motion To Dismiss. The Lawsons also filed Affidavits which directly rebutted those submitted by DelDOT in support of its request for possession. The filings challenged DelDOT's Right To Take pursuant to the power of eminent domain due to lack of compliance with conditions imposed upon that power by the RPAA, the Condemnation Act, and decisional law interpreting those statutes. Thus, the record before the Court at the oral argument on March 15th was a hotly disputed set of material facts and legal contentions.

The Lawsons' Interrogatories, Requests for Production, and depositions were aimed at obtaining information about, *inter alia*: 1) compliance with the RPAA and the Condemnation Act; 2) DelDOT's alleged "immediate" need for the Taking Area; and 3) the severely limited access of the Remainder Parcel. Written discovery requests sought information and documents to further buttress the Lawsons' well pled Objections to Taking, which they were required to assert pursuant to 10 Del. C. § 6107. The Lawsons sought the depositions

² Indeed, all condemning government agencies other than DelDOT and DNREC are automatically subject to an evidentiary hearing on the Right to Take pursuant to 10 Del. C. § 6110(e) and 29 Del. C. § 9501A.(d).

of the DelDOT Secretary who signed the Affidavit of Necessity, the DelDOT Appraiser, and the DelDOT Real Estate Section Supervisor that oversaw the abbreviated negotiations with the Lawsons.

Receiving discovery was essential to the Lawsons. Without it, they were handicapped. Brief, limited discovery was all that was needed in order to establish that DelDOT had no immediate need for the property on the grounds that it had no money to commence construction of the 301 Project. In addition, such discovery was needed in order to establish that DelDOT's estimate of Just Compensation was based on the invalid premise that the thin Residential Driveway was not sufficient for Commercial development of the Remainder Parcel.

2. Surprise And Hearsay Evidence Was
Erroneously Relied Upon

The Superior Court also abused its discretion by considering new and hearsay evidence in support of DelDOT's request for possession. At oral argument on March 15th, the Court allowed DelDOT's counsel to submit new documents which purported to establish that DelDOT had miraculously obtained a few million dollars to commence utility relocation work, which was alleged to be a component of 301 Project "construction." A-583-84. DelDOT was also permitted to "sandbag" the Lawsons via a "whisper down the lane" commentary by its counsel based upon an in-Court conference with DelDOT's 301 Project Engineer. A-565. In addition, the Court considered hearsay testimony of DelDOT's counsel: he asserted for

the first time that "utility relocation" was "scheduled to begin this summer." A-551.

The Lawsons' counsel objected to DelDOT's sandbag and hearsay evidence. A-568 and A-585. Permitting submission of evidence by ambush constituted an abuse of discretion by the trial judge.

3. The Superior Court Abused Its Discretion In Denying All Discovery And Failing To Conduct A Hearing

Normally under circumstances where a landowner disputes material facts and presents well-founded Objections to Taking, the Superior Court allows: 1) a reasonable opportunity to take some discovery; and 2) an evidentiary hearing on DelDOT's right to take. All objections and defenses to the taking must be resolved before the case proceeds to the final issue of Just Compensation. 10 Del. C. § 6107. Indeed, it is well-established that objections to the right to condemn must be disposed of *in limine*. *1.678 Acres of Land v. State*, 225 A.2d 763, 765 (Del. 1967).

Serious questions existed regarding DelDOT's alleged need for the Taking Area within a reasonable time. In addition, DelDOT's virtually complete denial of access to the public road network from the Remainder Parcel established the illegitimacy of DelDOT's appraised value and of the concomitant offer and deposit of purported Just Compensation.

Some discovery was reasonably necessary in order for the Lawsons to be able to prove their well-founded challenges to DelDOT's Right To Take. And the voluminous material factual disputes established the need for an evidentiary hearing, so that

the trial court could weigh the evidence and adjudge the credibility of the witnesses. Consequently, the Superior Court abused its discretion in denying all discovery and declining to hold an evidentiary hearing.

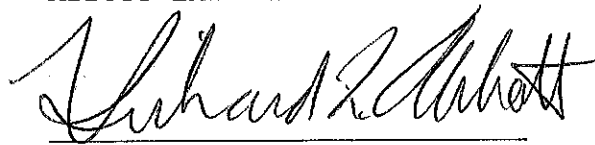
CONCLUSION

Based on the foregoing, the Lawsons respectfully request that the Court reverse the Superior Court and remand with instructions to enter an Order dismissing the action without prejudice.

The record evidence was unrefuted that DelDOT lacked public need within a reasonable time for the partial taking of the Lawsons' land; DelDOT admitted that it did not know how it was going to fund the more than \$500 million construction cost for the 301 Project, and it had no committed construction funding over the next 5+ years. In addition, DelDOT committed numerous violations of the Real Property Acquisition Act and the Condemnation Act, to-wit: 1) failing to offer, negotiate, or deposit a reasonable estimate of Just Compensation due to the legally invalid appraisal; 2) DelDOT's unreasonable advancement of the matter to condemnation before using all reasonable efforts to negotiate a voluntary sale, and use of condemnation litigation as a coercive tactic; and 3) DelDOT's failure to have any study, report, or public hearing addressing the taking from the Lawsons. Finally, the trial court abused its discretion by: 1) completely denying discovery; 2) declining to conduct an evidentiary hearing; and 3) considering last-minute and hearsay evidence from DelDOT.

DelDOT abused its power of eminent domain by proceeding with condemnation despite the lack of any immediate need for the Lawsons' property and by failing to obtain a legitimate appraisal and providing an opportunity for the Lawsons to negotiate based thereon. Accordingly, reversal and dismissal without prejudice are warranted.

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