



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' REPLY BRIEF

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COUNTER-STATEMENT OF FACTS AND REQUEST TO STRIKE
OR DISREGARD NON-RECORD DOCUMENTS

A. Most DelDOT Website Postings Should Not Be
Considered

Similar to the surprise, non-record evidence submitted by the Appellee ("DelDOT") at the Superior Court Order Of Possession argument, DelDOT has attempted to inject non-record materials into this appeal. But this Court's Rules bar evidence and arguments from being presented for the first time on appeal. Rule 9(a) provides that "[a]n appeal shall be heard on the original papers and exhibits which shall constitute the record on appeal." And Rule 8 generally provides that only questions fairly presented to the trial court may be presented on appeal. Consequently, the Court should either strike or disregard numerous supposed "facts" contained in Appellee's Answering Brief ("Answering Brief").

DelDOT cites to its US Route 301 Project website and submits non-record documents in its Appendix. See Answering Brief at 5-6 and Appendix To Appellee's Answering Brief ("AB App."). Only five (5) of the twenty-two (22) pages regarding the September 6, 2011 public workshop contained at B-10 through B-32 are in the trial court record. The cover and pages 6, 12, 17, 18, and 21 were attached as Exhibit E to a pleading filed by the Appellants (the "Lawsons"). A-116 through A-121.

Additionally, only seven (7) pages from the DelDOT website posting regarding a DelDOT workshop conducted to discuss possible US Route 301 design alternatives on January 8 and 9, 2007 were included in the trial court record. They were attached as Exhibit J to

DelDOT's Response In Opposition to the Lawsons' Motion to Dismiss. A-271 through A-277. As a result, twenty-one (21) pages of documents that DelDOT included in its Appendix are outside of the scope of the "record" which may be considered on appeal.

Because the only DelDOT US Route 301 Project website postings that are a part of the record on appeal are contained in the Appendix To Appellants' Opening Brief, the Court should strike or disregard the entire DelDOT Appendix. In the alternative, the Lawsons should be given an opportunity to take discovery and submit a supplemental Brief to respond to this brand new evidence.

B. As Of The March 15, 2012 Order Of Possession Hearing, DelDOT Had \$0 In Construction Funding

DelDOT once again attempts to rely upon the unsupported and false assertion contained in the Affidavit of DelDOT Secretary Bhatt which purported that "[s]ignificant Federal and State funds have already been appropriated to begin the...construction phases of the US 301 project... ." Answering Brief at 8. No documentary support exists in the trial court record for this assertion. Indeed, evidence in the record conclusively established that DelDOT had no construction funding available to build Route 301. DelDOT did not even know how it would pay for the \$543 million estimated construction cost.

Not surprisingly, DelDOT also relies yet again upon a "red herring" document submitted by surprise at the March 15, 2012 Order of Possession argument in the Superior Court. Answering Brief at 8. But DelDOT fails to explain how the advisory agency known as the Wilmington Area Planning Council ("WILMAPCO") possessed the legal

authority to appropriate funds or unilaterally amend the DelDOT Capital Transportation Program. WILMAPCO may only make recommendations. Therefore, hearsay comments by DelDOT's counsel at the March 15th argument regarding the WILMAPCO recommendation was without any factual or legal basis.

C. The Brown Appraisal Was Fatally Flawed: It Relied On The Legally Erroneous Theory That "Similar Access" Would Be Available For Commercial Development Of The Lawsons' 8.4 Acre Remainder Parcel

In its brief, DelDOT outlines its appraisal report, prepared by Charles Brown. Answering Brief at 8-11. DelDOT recites Mr. Brown's conclusory finding that the "highest and best use" of the Lawsons' remaining lands after the taking and stormwater basin construction would be "for a permitted regional commercial use." Answering Brief at 10, citing A-358. What DelDOT fails to address, however, is the invalid basis for Mr. Brown's conclusion: "the property remainder is somewhat smaller, with similar access..." A-374 (emphasis added). Instead, commercial access to the remainder parcel is legally barred.

As noted in Appellants' Opening Brief ("Opening Brief"), the New Castle County Unified Development Code ("UDC"), which governs future development of the Lawsons' remaining commercial lands, requires a minimum 22 foot wide roadway to access Strawberry Lane. Since the Lawsons have no legal right to access Strawberry Lane via a road other than the 12 foot wide curvilinear driveway DelDOT plans to install, it is evident that the "similar access" premise of Mr. Brown's Just Compensation opinion is legally infirm.

D. DelDOT's Legal Counsel Did Nothing But Summarily
Reject The Lawsons' Request To Correct Mr. Brown's
Fatally Flawed Just Compensation Value

DelDOT self-servingly and inaccurately represents that it remained open-minded and willing to negotiate with the Lawsons up until the time that it filed the condemnation action in the Superior Court on January 18, 2012. Answering Brief at 13. In addition, DelDOT wrongly asserts that the Lawsons had an obligation to counter-offer and negotiate with DelDOT based on DelDOT's legally invalid appraisal. *Id.*

Detailed, step-by-step explanations of the legal infirmity of DelDOT's appraisal was provided by the Lawsons. A-72, A-87, a-90, A-137, A-464 *et seq.* Their remaining 8.4 acres of land could not be developed under the applicable CR (Commercial Regional) zoning category since DelDOT left them with only a 12 foot wide serpentine driveway access to the public road. See A-94 and A-95. As a consequence, the record establishes that DelDOT close-mindedly and unreasonably refused to follow the law by obtaining a new appraisal valuation so that the parties could even commence negotiations on Just Compensation.

ARGUMENT

I. DelDOT'S CONDEMNATION OF THE LAWSONS' LAND WAS PREMATURE; IT CAN ONLY SPECULATE AS TO TIME OF ACTUAL NEED

DelDOT fallaciously asserts that the design, development, and construction plans for the Route 301 Project have been known to the public since 2005. Answering Brief at 15. Indeed, no evidence in the record supports this contention. In fact, uncontroverted record evidence proves the inverse was true.

As of September 6, 2011, DelDOT had not even completed the US 301 mainline design. A-119. On that same date, DelDOT stated that it hoped to "be in a position to move forward with construction when key factors (traffic, revenues, costs, and market conditions) result in an acceptable US 301 mainline construction financial plan to sell toll revenue bonds... ." *Id.* DelDOT even went so far to admit

We cannot provide a specific construction start date for the US 301 mainline. A-120 (emphasis added).

DelDOT also conceded that: 1) it did not have General Assembly authorization to sell the necessary toll revenue bonds to build the project; and 2) it could only estimate that construction might commence 4 years after funds were in hand. *Id.* Who knows how long it will be before legislative approval and logistical implementation of a bond issue occur? And DelDOT admits it will be about 4 years after funding is secured before it really needs the Lawsons' land.

The record also establishes that effective January 20, 2012, DelDOT had initiated a fact-gathering process in order to conduct a financial analysis to determine the feasibility of issuing revenue

bonds for construction of Route 301. A-123; See also A-126. Accordingly, DelDOT had no idea when it might construct Route 301 at the time of the March 15, 2012 Order of Possession argument in the trial court.

By its own admission, DelDOT had \$0 to spend to build Route 301 on March 15th of this year. Its legally authorized spending, contained in the Capital Transportation Program for Fiscal Years 2012 through 2017, showed that no money was projected for the estimated \$543,000,000 construction cost. A-127.

This Court may reverse the trial court's decision if there is evidence in the record of fraud, bad faith, or abuse of discretion. The record is devoid of any evidence that DelDOT had a public need within a reasonable time for the Lawsons' land. In contrast, record evidence established that DelDOT had no authorization to issue bonds and no projection of funding within the next 5+ years. At best, DelDOT could wildly guess that it might need the Lawsons' property many years into the future. Consequently, the Court should reverse the trial court on the grounds that the record contains no support for the conclusion that DelDOT had a need for the Lawsons' property within a reasonable time.

Finally, DelDOT's attempt to distinguish the holding in *State v. 0.62033 Acres of Land etc.* is unavailing. Answering Brief at 17-18. While it would be fair to characterize the attempted taking in that action as "wildly speculative," the decision does not hold that a government agency must have nothing but a pipe-dream in order to defeat a premature taking. In fact, the block quote in DelDOT's

brief contains the court's reasoning: 1) no present plans to use most of the land; and 2) no certainty that the land would be used for the purpose sought. Answering Brief at 18. The case at bar is on all fours with that rationale: 1) DelDOT has no present plan to construct the stormwater retention area on the Lawsons' land in the foreseeable future; and 2) uncertainty exists regarding construction funding and final plans. Accordingly, the Court should apply well-settled principles of Delaware Condemnation law and reverse the Superior Court's entry of an Order of Possession and dismiss the Condemnation action.

ARGUMENT

II. DelDOT VIOLATED THE RPAA: IT LACKED A GOOD FAITH ESTIMATE OF JUST COMPENSATION; NO VALID OFFER, NEGOTIATIONS, OR COURT DEPOSIT, AND NO PUBLIC HEARING ON THE TAKING, EVER OCCURRED

A. DelDOT's Appraisal Was Based On A Legally Erroneous Premise

DelDOT asserts that the RPAA was not violated because DelDOT says so. Answering Brief at 20. But the unrefuted record evidence established that DelDOT's offer, negotiations, and court deposit were all based on a legally invalid appraisal of Just Compensation. Since it is legally impossible for the Lawsons' remainder lands to be developed for commercial purposes, DelDOT's appraisal was fatally flawed. Concomitantly, DelDOT's estimate of Just Compensation was in bad faith and based upon a clear abuse of its discretion.

A bogus appraisal is no different than no appraisal at all. So the record is replete with evidence establishing DelDOT's violation of RPAA § 9505(1), (3), (4), and (7). Despite months of attempts by the Lawsons to plead with DelDOT to finally get a legitimate appraisal, DelDOT ignored them and blindly forged full speed ahead with condemnation. DelDOT thereby forced the Lawsons to be subjected to court proceedings and related expenses that probably would have been avoided if DelDOT had obtained a valid appraisal of Just Compensation.

The infirmity of DelDOT's appraisal report was glaring and obvious. Since the Lawsons' remainder parcel could not be developed commercially, DelDOT's appraisal conclusion that it could be so developed was clearly erroneous. DelDOT's offer and court deposit

were not based on a good faith estimate; they were based on a knowingly bad faith legal error.

B. Post-Filing Discussions Between Counsel
And Settlement Discussions May Not Be
Considered As "Negotiations" Under The
RPAA

DelDOT asserts that the Court may rely upon discussions between counsel after the filing of condemnation and post-appeal settlement negotiations to bootstrap compliance with the RPAA. Answering Brief at 22-23 and at 23, n.7. DelDOT is wrong on both counts, based upon the express language of the RPAA and Rule 408 regarding settlement and compromise negotiations.

For starters, DelDOT did not rely upon any post-condemnation communications between counsel as a purported basis to establish good faith negotiations in the trial court. On that basis alone, the Court should reject DelDOT's argument.

Next, RPAA compliance may not be established based on negotiations that occur after an eminent domain proceeding is initiated. One of the fundamental principles underpinning the RPAA is the requirement that "[e]very reasonable effort shall be made to acquire expeditiously real property by negotiation." 29 Del. C. § 9505(1). In addition, the RPAA provides that: "in no event shall the time for negotiations or condemnation be advanced...nor any other course of action be taken to compel an agreement on the price to be paid for the property." And this Court has recognized that two of the main purposes of the RPAA are: 1) encouraging acquisition by negotiated agreement; and 2) avoidance of litigation, in order to

relieve congestion in the courts. *Key Properties Group, LLC v. City of Milford*, 995 A.2d 147, 153 (Del. 2010). Thus, the RPAA requires that negotiations be undertaken and exhausted in good faith before a condemnation action is instituted, not afterwards.

Additionally, it is black-letter law that negotiations between parties during the pendency of litigation may not be submitted as evidence in court. Rule 408 of the Delaware Uniform Rules Of Evidence provides as follows:

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. (emphasis added).

And discussions between the parties during the pendency of this appeal, undertaken in an effort to resolve the dispute, were expressly agreed to be subject to Rule 408.

The fact that DelDOT would breach such a solemn pledge and crystal clear legal bar is astounding. But it is emblematic of the disregard for the rule of law that DelDOT has exhibited throughout its dealings with the Lawsons. Bad faith and abuse of discretion aplenty has occurred, and obviously is continuing to occur at DelDOT's hands. Regardless, settlement negotiations simply cannot be considered in the RPAA compliance calculus.

C. DelDOT Failed To Comply With RPAA
§ 9505(15): No Public Hearing "Held
Specifically To Address The Acquisition"
Of The Lawsons' Land Ever Took Place

The only DelDOT workshop evidence in the record before the Court are excerpts of website postings regarding a January 8 and 9, 2007 meeting and a September 6, 2011 meeting. All of the other supposed public meetings that DelDOT cites in its Answering Brief are not before this Court, as they are not part of the record on appeal. See Answering Brief at 26-27. Consequently, the Court should disregard all contents of the Answering Brief other than any argument founded upon pages A-116 to A-121 and A-271 to A-277 regarding the January 2007 and September 2011 DelDOT workshops.

The statutory requirement DelDOT had to comply with was to conduct "a public hearing held specifically to address the acquisition" at a time "at least 6 months in advance of the institution of condemnation proceedings." 29 Del. C. § 9505(15)b. See also Answering Brief at 26. The key language at issue in this appeal is the requirement that a public hearing be "held specifically to address the acquisition" of the Lawsons' land. No such public hearing ever occurred.

The DelDOT workshop conducted in January of 2007 presented "refined retained alternatives, including DelDOT's recommended preferred alternative for a new US Route 301." A-271. A "draft environmental impact statement" was also available at the hearing. *Id.* The final alternative was not yet approved by federal and state agencies. Thus, no final construction plans existed to show the Lawsons what, if any, of their land would be taken. As a

consequence, the January 2007 DelDOT meeting cannot constitute a public hearing on the taking of the Lawsons' land as required by § 9505(15)b.

The DelDOT public workshop conducted in September of 2011 also failed to address the taking of the Lawsons' land. Instead, it discussed the US 301 design sections and refinements to alternative Route 301 routes. A-117 and A-118. Design plans were not yet complete. A-119. So obviously no discussion of the taking and DelDOT stormwater basin took place. As a result, the undisputed record evidence establishes that DelDOT failed to comply with its obligations under RPAA § 9505(15) by conducting a public hearing that addressed the taking of the Lawsons' land at least 6 months before commencing this condemnation action on January 18, 2012.¹

D. DelDOT Cannot Be Excused From Its
Failure To Comply With § 9505(15)

DelDOT suggests that even if it violated § 9505(15) by instituting this condemnation action too soon, it should be excused from compliance since it followed the spirit of the RPAA. Answering Brief at 28. But DelDOT fails to explain how it even complied with the spirit of the RPAA. Instead, DelDOT attempts to shift the burden to the Lawsons to show how non-compliance frustrated the purpose of the RPAA or had a discernible impact on the course of negotiations. *Id.* DelDOT's argument is completely off the mark.

¹ Even assuming *arguendo* that the September 6, 2011 workshop constituted a sufficient public hearing to comply with § 9505(15), it is clear that DelDOT jumped the gun in initiating condemnation proceedings only 4+ months later.

RPAA § 9505(15) was an add-on to the RPAA in 2005. 75 Del. Laws, c.88 (Senate Bill No. 217, 143rd General Assembly). Its language certainly evidences an intent by the General Assembly that it should be mandatory, not directory like the predecessor provisions of the RPAA. The General Assembly used the overarching language "[n]otwithstanding any other provision of law to the contrary." (emphasis added). That sure sounds mandatory.

Additionally, parts of the synopsis of the legislation enacting § 9505(15) supports a finding that compliance with its provisions is mandatory: 1) the legislation "addresses various abuses and uncertainties relating to the exercise of the State's power of eminent domain and the protection of private property rights"; and 2) the legislation will insure that the "power of eminent domain only be exercised for purposes of a recognized public use" described in a formal writing or at public hearing specifically held to address the acquisition. (emphasis added). § 9505(15) is a mandatory limitation on the exercise of the power of eminent domain, not a directory proviso. Accordingly, the Court should conclude that strict, mandatory compliance with the 9505(15) is required, regardless of any excuses for non-compliance.

If strict compliance is required, it is obvious from the record that DelDOT failed to meet the public hearing requirement of § 9505(15). Therefore, reversal and dismissal of the action is warranted.

Regardless, the Lawsons were denied their opportunity to comment on the impact of DelDOT's proposed taking of their property.

Instead, they were presented with a *fait accompli* in DelDOT's September 2011 offer. Had they been provided with DelDOT's plans for the taking and stormwater basin construction 6 months prior to the institution of this action, many of the disputes and issues between DelDOT and the Lawsons could have possibly been worked out through the engineering and design process, rather than in heated litigation. Consequently, the Court should conclude that the intent and purpose of § 9505(15) was violated by DelDOT's unexcused, premature initiation of this action.

ARGUMENT

III. THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING ALL DISCOVERY AND CONSIDERING SURPRISE, HEARSAY EVIDENCE IN RENDERING ITS DECISION

DelDOT argues that the Lawsons were not entitled to discovery because DelDOT swore that it needed to take their property. Answering Brief at 30-32. But DelDOT ignores the record evidence refuting each and every material factual assertion presented in its Affidavits of Necessity. A-464 *et seq.* and A-502 *et seq.* And the Superior Court Civil Rules entitled the Lawsons to deposition discovery.

DelDOT also contends that it was perfectly fine for it to sandbag the Lawsons at oral argument with new and hearsay evidence. Answering Brief at 32-34. The procedural requirements of the Condemnation Act and Rule 71.1., however, provide otherwise.

A. The Superior Court Civil Rules Applied

Superior Court Civil Rule 81(a) expressly provides that "condemnation and eminent domain" proceedings "shall conform to these Rules so far as practicable and to the extent that this will not contravene any applicable statute." In addition, 10 Del. C. § 6103 expressly provides as follows:

The Rules of the Superior Court shall govern, insofar as applicable, all condemnation proceedings of real and personal property under the power of eminent domain, except as otherwise provided in this chapter.

So generally speaking, all Superior Court Civil Rules applied in this action.

B. The Lawsons Were Entitled To Take
 Deposition Discovery Under The Rules

Under 10 Del. C. § 6107, all objections and defenses to the taking asserted by a defendant shall be disposed of prior to the cause proceeding forward to a trial on the issue of Just Compensation. Superior Court Civil Rule 71.1 requires that the property owner establish objections and defenses to the taking "by affidavits, depositions, and/or verified answer" showing good cause why an Order of Possession should not be entered. The Rule also contemplates that a hearing may be conducted on the issue of good cause "on such affidavits, depositions, and/or verified answer."

In turn, the Lawsons' ability to take depositions in support of their defenses and objections to the taking was secured by Rule 30, which provides that "[a]fter commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination." (emphasis added). And the Superior Court Civil Rules expressly contemplate that depositions may be relied upon at a motion hearing or any interlocutory proceedings (i.e. oral argument or an evidentiary hearing). See Rule 32(a).

C. Some Deposition Discovery Should Have
 Been Permitted; Otherwise Objecting
 Private Property Owners Have Little
 Chance

A landowner is admittedly required to meet a heavy burden to overcome the presumption of regularity attendant to the filing of a condemnation action and an accompanying Affidavit of Necessity. See Rule 71.1. And so it is incumbent upon the Court to permit a party

to take at least some deposition discovery in order to have a shot at meeting its legal burden. How can an owner comply with Rule 71.1 by presenting "depositions" if no deposition discovery is permitted? The "Catch 22" holding of the Superior Court runs directly counter to the Superior Court Civil Rules and basic logic. Therefore, reversal is in order.

DelDOT correctly notes that the standard to defeat a taking by eminent domain requires a showing of fraud, bad faith, or an abuse of discretion. Answering Brief at 30. A limited number of depositions were needed in order to allow the Lawsons a reasonable opportunity to vet the conclusory statements contained in the Affidavits submitted by DelDOT in support of their request for entry of an Order of Possession. The depositions of Messrs. Côté and Secretary Bhatt would have cemented the facts that : 1) DelDOT had no idea when it was actually going to construct the project on the Lawsons' land; 2) the 12-foot driveway access for the Lawsons' remainder parcel was inadequate to develop it commercially; and 3) Mr. Brown's Just Compensation conclusion was not valid. As a consequence, reversal is appropriate under the circumstances.

D. Surprise And Hearsay Evidence Was
 Improperly Considered By The Trial Court

Finally, DelDOT's attempt to justify its "sandbag" of the Lawsons with new documents and hearsay statements should be rejected by the Court. See Answering Brief at 32-34. The Superior Court expressly declined to allow testimony by DelDOT's witnesses, which deprived the Lawsons of the opportunity to cross-examine them in

order to bring the truth out. But the Court did permit counsel for DelDOT to restate comments whispered to him by a DelDOT engineer. The trial court also allowed DelDOT to submit documents for the first time at oral argument.² The Superior Court thereby contravened the requirements of Rule 71.1, which requires DelDOT to proceed on its Affidavit(s) of Necessity filed before the good cause hearing. In sum, the trial court's reliance on DelDOT's sandbag evidence constitutes reversible error.

² DelDOT plays more misleading semantics games in its brief regarding the timing of its submission of the WILMAPCO documents. It asserts that "DelDOT provided the Lawsons with a courtesy copy of an exhibit binder containing the January 12 Resolution before the March 15 Hearing." (emphasis added). In fact, DelDOT provided the binder at court, immediately prior to the Judge taking the bench.

CONCLUSION

Based on the foregoing, the Lawsons respectfully request that this Court reverse the trial court and remand this matter with instructions to enter an Order dismissing the condemnation proceeding. The trial court erred: 1) DelDOT did not need the Lawsons' land within a reasonable time; 2) DelDOT violated RPAA provisions by failing to offer, negotiate, and deposit a valid estimate of Just Compensation; 3) DelDOT failed to comply with RPAA § 9505(15) by conducting a public hearing specifically addressing the taking of the Lawsons' land on or before July 18, 2011; 4) the Lawsons were entitled to discovery and an evidentiary hearing; and 5) the trial court improperly relied upon surprise and hearsay evidence presented by DelDOT.

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