IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

APPELLEE'S ANSWERING BRIEF

FOX ROTHSCHILD LLP

Gregory B. Williams (I.D. No. 4195)
Austen C. Endersby (I.D. No. 5161)
Mian R. Wang (I.D. No. 5685)
Citizens Bank Center
919 N. Market Street, Suite 1300
Wilmington, DE 19801
(302) 622-4211

Attorneys for Appellee
State of Delaware Department of Transportation

Dated: August 21, 2012

TABLE OF CONTENTS

TABLE OF CITATIONS

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

NATURE OF PROCEEDINGS

This is an interlocutory appeal in a condemnation action taken by Appellants, Defendants Below, Jack W. Lawson and Mary Ann Lawson (the "Lawsons") from an Order of the Superior Court of the State of Delaware in and for New Castle County ("Superior Court" or "trial court") granting Appellee, Plaintiff Below, State of Delaware Department of Transportation ("DelDOT") entry into possession of areas of the Lawsons' property sought to be taken through condemnation (the "Taking Area") for use in the construction of a state highway known as U.S. Route 301 (the "Route 301 Project").

A. DelDOT's Initial Pleadings And The Lawsons' Objections

DelDOT filed a Complaint for condemnation in the Superior Court on January 18, 2012 (A-15), and an Amended Complaint and Motion for Entry of Order Allowing It to Enter Into Possession and Occupy Property to be Taken in Condemnation ("Motion for Possession") on February 3, 2012. *See* A-29; A-39. On February 7, 2012, DelDOT deposited with the trial court the sum of $133,100—DelDOT's good faith estimate of just compensation for the Taking Area. *See* A-64.

On February 16, 2012, the Lawsons filed (1) an Answer to Amended Complaint and Objections to Taking; (2) an Opposition To Motion For Possession and Motion to Dismiss; and (3) a Motion for Establishment Of Case Schedule. *See* A-65; A-70; A-129. On February 21, 2012, the Lawsons noticed the depositions of Shailen P. Bhatt, the Secretary of DelDOT; Thomas Nickel, DelDOT's North District Real Estate Manager; and Charles Brown, the appraiser who conducted the appraisal of the

Lawsons' property for DelDOT. *See* A-141. The next day, the Lawsons served discovery requests on DelDOT. *See* A-144; A-150.

B. The Dispute Over DelDOT's Right To Take

On February 24, 2012, DelDOT filed its Response in Opposition to the Lawsons' Motion to Dismiss; its Response to the Lawsons' Motion for Establishment of Case Schedule; and a Motion for Protective Order. *See* A-154; A-286; A-395. The Lawsons responded to the Motion for Protective Order on February 27, 2012 and filed a Motion to Compel on March 3, 2012. *See* A-437; A-446.

On March 9, 2012, DelDOT filed its Response in Opposition to the Lawsons' Motion to Compel and filed the Affidavits of Shailen P. Bhatt and of Marc Coté. *See* A-469; A-456; A-461. On the same day, the Lawsons filed a Motion to Strike Affidavits and the Affidavit of Richard L. Abbott, Esquire. *See* A-518; A-464. On March 13, 2012, the Lawsons filed the Affidavit of Douglas Salmon. *See* A-532. The trial court notified the parties that all motions and responses would be heard during the good cause hearing on March 15, 2012 ("March 15 Hearing" or "the hearing").

C. The Good Cause Hearing On DelDOT's Right To Take

On March 15, 2012, the Superior Court held a good cause hearing on DelDOT's right to take and related discovery issues. *See* A-540; *see generally* 10 *Del. C.* § 6110(a); Super. Ct. Civ. R. 71.1 ("Rule 71.1").

During the hour-long hearing, the trial court heard and considered the arguments of both parties. The court ruled on the record as follows: (1) DelDOT's negotiations with the Lawsons were

adequate; (2) DelDOT's offer on the Taking Area was made in good faith; (3) DelDOT's just compensation deposit into the court was satisfactory; and (4) the Lawsons were not entitled to depose Secretary Bhatt and Mr. Coté. *See* A-578; A-579; A-582 at 43:5-6.

While the trial court was initially inclined to permit depositions of Secretary Bhatt and Mr. Coté regarding the affidavit of necessity (see A-579), the court ultimately changed its mind when DelDOT directed the court's attention to the applicable standard—namely, absent a clear showing of fraud, bad faith, or gross abuse of discretion, DelDOT's determination of necessity should not be disturbed. *See* A-580; A-582. Consequently, having found that DelDOT complied with the Real Property Acquisition Act ("RPAA"), the trial court granted DelDOT's Motion for Possession and denied the Lawsons' request for depositions. *See* A-586 at 47:3-11.

On May 15, 2012, the Court entered an Order granting DelDOT's Motion for Possession and Motion for Protective Order and denying the Lawsons' Motion to Dismiss and Motion to Compel. *See* Lawsons' Exhibit—Orders Appealed From. On May 17, 2012, the Court entered DelDOT's proposed Order on the Motion for Possession. *See id.*

D. The Lawsons Seek Appellate Review

On May 24, 2012, the Lawsons filed an Application for Certification of Interlocutory Appeal. On June 5, 2012, DelDOT filed its response opposing the Application. On June 20, 2012, the Superior Court denied the Lawsons' Application. On June 22, 2012, the Supreme Court accepted the Lawsons' interlocutory appeal. This is DelDOT's Answering Brief in opposition to the Lawsons' interlocutory appeal.

SUMMARY OF ARGUMENT

The trial court's ruling granting DelDOT's Motion For Possession should be affirmed.

I. DelDOT denies that the trial court erred in allowing it to take the Lawsons' land, and further denies that it lacked construction funding. The trial court correctly concluded that DelDOT has a public need for the Taking Area within a reasonable time. The record clearly establishes that millions of dollars in State and Federal funds have been allocated for the design, development, and construction phases of the Route 301 Project.

II. DelDOT denies that it violated the RPAA. The trial court correctly concluded that DelDOT complied with the RPAA and 10 *Del. C.* § 6110. First, DelDOT negotiated with the Lawsons in good faith for more than two-and-a-half months before initiating this action. Second, DelDOT deposited a good faith estimate of just compensation with the trial court. Third, DelDOT has conducted numerous public hearings and workshops regarding the Route 301 Project since 2005.

III. DelDOT denies that the trial court erred in denying the Lawsons discovery and a full evidentiary hearing prior to granting DelDOT's Motion for Possession. DelDOT further denies that the trial court improperly considered hearsay and surprise evidence. The trial court did not abuse its discretion in denying the Lawsons' request for discovery on the right to take, in considering publicly-available, non-hearsay evidence during the good cause hearing, and in declining to conduct a full evidentiary hearing on DelDOT's Motion for Possession.

STATEMENT OF FACTS

A. The Parties

DelDOT is a department of the State of Delaware that is responsible for building and maintaining Delaware's transportation system, including state highways. *See* 29 *Del. C.* § 8401. DelDOT has powers of eminent domain delegated from the General Assembly. *See* 17 *Del. C.* § 137(a); 29 *Del. C.* § 8406(1)(a).

Jack W. Lawson and Mary Ann Lawson are record owners of a parcel of real property (the "subject property") located at 323 Strawberry Lane, Middletown, New Castle County, Delaware. *See* A-338. DelDOT condemned portions of the subject property for the Route 301 Project.

B. The Route 301 Project

Delawarians have been well acquainted with the Route 301 Project for several years. Stated succinctly, the "[n]eed for this project is founded in an existing roadway system that lacks capacity for current and future traffic volumes and that has had sections appear almost yearly on DelDOT's list of High Accident locations."[1]

---

[1] http://www.deldot.gov/information/projects/us301/pages/overview.shtml. *See* B-1-2. This Court may take judicial notice of facts that are publicly available on DelDOT's website, as such information is "not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." D.R.E. 201(b). *See also, e.g., Baylis v. Wilmington Medical Center, Inc.*, 477 A.2d 1051, 1058 n.9 (Del. 1984) (taking judicial notice of the fact that the FDA approved the drug thiabendazole in 1967).

1. Numerous public hearings and workshops were held between 2005 and 2011.

The Route 301 Project began in 2005. According to DelDOT's website, DelDOT "develop[ed] a Project Purpose and Need document and a Potential Range of Alternatives that were presented to the public at workshops on June 20 and 21, 2005." B-1. "Over 800 people attended these workshops and over 450 comments were received." *Id.*

Over the next few years, DelDOT held several more public hearings and workshops to share new developments with the public and to allow them to voice any concerns. For example, on January 8 and 9, 2007, DelDOT held public hearings and workshops "to present to the public the refined retained alternatives, including DelDOT's recommended preferred alternative for a new U.S. Route 301." A-271.[2] During these hearings/workshops, the public was "provide[d]...the opportunity to give...comments or testimony." A-271.

These hearings/workshops took place in the Middletown Fire Hall in Middletown, Delaware—the Lawsons' local fire station. DelDOT's most recent public hearing regarding the Route 301 Project took place on September 6, 2011. *See* A-158; *see also* B-33.

2. Significant State and Federal Funds have been allocated for the Route 301 Project.

DelDOT has taken concrete steps toward advancing the Route 301 Project. In 2008, the Federal Highway Administration approved the Record of Decision for the Project, which was a necessary step towards

[2] DelDOT has attached a more legible copy of A-271-77. *See* B-3-9.

preparing construction bids and acquiring right-of-ways. *See* B-1-2.[3] In the same year, the General Assembly directed DelDOT to implement the Route 301 Project. *See id.* In 2010, the General Assembly authorized the sale of $125 million in bonds to fund the final design of the Project and right-of-way acquisitions. *See* B-17.[4] DelDOT estimates that construction of the US 301 Mainline will be completed about 3.5 to 4 years after the General Assembly authorizes the sale of toll revenue bonds. *See* A-120.

In 2011, Secretary Bhatt issued the DelDOT Capital Transportation Program ("CTP") for fiscal years 2012-2017. *See* A-503; A-507. The cover letter accompanying the CTP explains that "[t]he CTP lists projects and services we are already working on and plan to work on in the future...." A-507. The CTP's "Project Authorization Schedule" and "Project Funding Schedule" clearly show that millions of dollars in Federal funds have been scheduled to be allocated for the Route 301 Project. *See* A-279-80. GARVEE[5] bonds have already been sold "[i]n order to complete design and right of way activities for US 301." A-279. Notably, the Lawsons' counsel acknowledged in an affidavit dated March 9, 2012, that "GARVEE bonds in the amount of $59,401,100 were

---

[3] This Court may take judicial notice of this fact. *See supra* n.1.

[4] US 301 Project Development Public Workshop September 6, 2011, Slide 8, *available at* http://www.deldot.gov/information/projects/us301/pdfs/Workshop_Presentation_091511.pdf. An excerpt of this slideshow (specifically, slide nos. 6, 12, 17, 18, and 23) was attached as Exhibit E to the Lawsons' Opposition to Motion for Possession and Motion to Dismiss. *See* A-115-121. The entire slideshow has been included in DelDOT's Appendix for the sake of completeness. *See* B-10-32.

[5] Acronym for Grant Anticipation Revenue Vehicles.

issued to acquire right-of-way. And additional amounts are on hand to perform project development and design." A-503-04.

Funds are available for the construction phase of the Route 301 Project as well. In an affidavit dated March 8, 2012, Secretary Bhatt stated that "[s]ignificant Federal and State funds have already been appropriated to begin the acquisition and construction phases of the U.S. 301 project and DelDOT has been legislatively mandated to acquire the property interests necessary for the U.S. 301 project." A-457.

Further, according to the Wilmington Area Planning Counsel's Resolution dated January 12, 2012 (A-604-08) (the "January 12 Resolution"), a publicly-available document which the Lawsons inappropriately characterize as a "Surprise Document," "this STIP amendment is to utilize $2.5 million of previously authorized GARVEE funding for Advanced Utility work to continue to clear the U.S. 301 Corridor." A-605. As DelDOT explained to the trial court during the good cause hearing, "that was a transfer that's just recently took place, January 2012, $2.5 million. These are existing funds that are ready to be spent today that go to the construction phase of this project." A-584 at 45:4-6.

C. The Subject Property

The subject property is an irregularly shaped parcel totaling about 10.10 acres situated along the south side of Strawberry Lane. *See* A-330; A-345. Existing improvements on the parcel include a ranch house, a garage, and a shed. *See* A-330. Additional improvements include a blacktop driveway approximately 12 feet in width, concrete walks, fencing, and landscaping. *See* A-345.

The subject property is zoned CR, Regional Commercial District by New Castle County. *See* A-353. Properties zoned as CR are intended for community and regional commercial activities with a number of permitted uses—e.g., commercial retail, restaurants, office, and shopping center. *See id.* The property's present use as a single-family residence is, thus, legally non-conforming. *See id.* **Notably, the subject property has been on the market for sale as commercial land since 2007.** *See* A-351.

D. The Effects Of The Taking On The Subject Property

DelDOT sought to condemn two areas on the Lawsons' property: 1.51 acres as a fee acquisition and 0.14 acres as a temporary construction easement. *See* A-374. After the taking, the Lawsons will have approximately 8.42 acres of land remaining (the "remainder parcel"). *See id.* A stormwater management pond will be constructed on the Taking Area parallel to Strawberry Lane. *See id.* Prior to the taking, the Lawsons' 12-foot driveway was used to access Strawberry Lane. *See* A-545 at 6:20-23. As a result of the taking, the Lawsons' 12-foot driveway will be relocated to another part of the remainder parcel, and they will still be able to access Strawberry Lane. *See* A-545 at 6:9-12. The remainder parcel is still zoned CR. *See* A-377.

E. DelDOT Obtains An Appraisal From An Accredited Real Estate Appraiser

DelDOT's real estate appraiser, Charles Brown, MAI, CBA, CRS, of the Brown Appraisal Company, conducted an appraisal of the Lawsons' property. *See* A-383. DelDOT's purpose in obtaining an appraisal from a duly qualified appraiser was to ascertain a reasonable, good faith

estimate of just compensation. Mr. Brown issued his appraisal of the Lawsons' Property (the "Appraisal") on December 28, 2010. *See* A-324.

In a cover letter accompanying the Appraisal, Mr. Brown stated that the Appraisal was "completed in accordance with the Uniform Standards of Professional Appraisal Practice (USPAP), adopted by the Appraisal Standards Board of the Appraisal Foundation and with the Code of Professional Ethics and Standards of Professional Practice of the Appraisal Institute." A-325. Mr. Brown further certified that he "personally inspected the property...and that [he had] afforded the property owner the opportunity to accompany [him] at the time of the inspection." A-327.

Mr. Brown understood that "[i]n a partial taking case such as this, just compensation is calculated by computing the difference in value of the whole property before the taking and the value of the remainder after the taking." *Acierno v. State*, 643 A.2d 1328, 1332 (Del. 1994); *see also* A-380-81. Thus, to calculate just compensation, Mr. Brown first determined the fair market value of the entire property as unaffected by the taking: $550,000 (the "Before Taking Value"). *See* A-373.

Next, taking into account numerous relevant factors, including the legal description and physical characteristics of the subject property, the real estate market in the region/county, the population density of the neighborhood, and applicable zoning regulations, Mr. Brown concluded that the "highest and best use" of the remainder parcel after the taking "is for a permitted regional commercial use." A-358. Based on this assumption, Mr. Brown determined that the fair

market value of the remainder parcel after the taking would be $420,000 (the "After-Taking Value"). *See* A-379.

Finally, to calculate the fair market value of the Taking Area, Mr. Brown subtracted the After-Taking Value from the Before Taking Value ($550,000 - $420,000 = $130,000), and added this amount to the value of DelDOT's temporary construction easement ($3,080), for a total of $133,080. *See* A-380-81.

Based on the Appraisal, DelDOT determined that the sum of $133,100 constituted a good faith estimate of just compensation. *See* A-41.

F. DelDOT Negotiated With The Lawsons In Good Faith

As in all condemnation proceedings, DelDOT kept a detailed "Negotiation Record" of its dealings with the Lawsons. *See* A-161-63. The Negotiation Record reflects that two representatives from DelDOT met with the Lawsons and their Real Estate Representative, Doug Salmon, on September 12, 2011, to present and discuss DelDOT's good faith offer of just compensation. *See* A-161. During that meeting, DelDOT provided the Lawsons with a copy of the Appraisal and a letter dated September 9, 2011 ("September 9 Letter") which discusses DelDOT's offer of $133,100. *See* A-165-67.

The September 9 Letter begins by describing DelDOT's plans "to improve the US 301 Corridor from the Maryland State Line to SR 1." A-165. The September 9 Letter then explains that certain portions of the Lawsons' land must be acquired by the State "in order to accomplish this initiative." *Id.* Next, the September 9 Letter explains that the approved Appraisal "was used to determine the fair

market value" offer of $133,100 and summarizes how the appraiser calculated that amount. *Id.* Importantly, the September 9 Letter makes clear that "[a]ny counteroffers, which [the Lawsons] wish the Department to consider, will need to be fully documented in accordance with the same format as the [A]ppraisal...." A-166. DelDOT discussed each and all of these issues with the Lawsons and Mr. Salmon during their meeting on September 12, 2011.

After the September 12 meeting, DelDOT representatives made several attempts to contact the Lawsons to schedule a follow-up meeting. Between September 26 and October 12, 2011, DelDOT left at least five voicemails for the Lawsons. The Lawsons never returned any of those calls. *See* A-162.

Mr. Salmon eventually contacted DelDOT on behalf of the Lawsons on October 12, 2011, and made a counteroffer of $550,000. *See* A-162. In DelDOT's view, this counteroffer was grossly over-inflated and unreasonable. In fact, the Lawsons' $550,000 counteroffer is equal to the Before Taking Value of the entire property as determined by Mr. Brown, the accredited independent appraiser. *See* A-324. The Lawsons provided no appraisal of their own or backup data of any kind to substantiate their counteroffer. Despite the extreme difference in the parties' respective positions, DelDOT continued to correspond with Mr. Salmon via e-mail and by phone between mid-October and mid-November 2011 in an effort to reach a mutually agreeable resolution. *See* A-162.

On November 22, 2011, Mr. Salmon informed DelDOT that the Lawsons had retained legal counsel. *See* A-162. After two-and-a-half months

of what DelDOT considered to be reasonable, good faith negotiations, DelDOT indicated on its Negotiation Record that the parties had reached an impasse. *See* A-163.

Even though DelDOT indicated on its Negotiation Record that the parties had reached an impasse as of November 23, 2011, DelDOT did not immediately file a condemnation action against the Lawsons. Rather, correspondence with the Lawsons' counsel continued until mid-January 2012. *See* A-91-92; *see also* A-242. Throughout this timeframe, DelDOT remained willing to work with the Lawsons to reach a reasonable compromise. DelDOT's outside counsel requested on several occasions that the Lawsons provide an appraisal to substantiate their counteroffer. Instead of providing a counter-appraisal, the Lawsons via their counsel simply responded that DelDOT's appraisal was wrong and DelDOT needed to do a new appraisal. *See* A-87; A-241; A-487; A-491. The parties were ultimately unable to reach a mutually agreeable resolution, and, thus, DelDOT commenced this condemnation action on January 18, 2012.

ARGUMENT

I. DelDOT Has An Immediate Need For The Lawsons' Property Within A Reasonable Time.

A. Question Presented

Whether DelDOT had a public need within a reasonable time for the taking of the Lawsons' property in connection with the Route 301 Project?

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). In addition, "[t]he General Assembly's exercise of [the] power [of eminent domain] through delegation to an administrative agency [such as DelDOT] may be reviewed by the courts only to ensure that the power is not wielded punitively or arbitrarily." *Id.* at 561. Thus, this Court's "standard of review mirrors that of the Superior Court." *Id.*

The Superior Court applies the following standard in determining whether there is a public need for the subject property within a reasonable time:

> When a reasonable possibility of need for a proper public purpose exists, there is no room for further judicial inquiry into the question of necessity for the taking. In addition, the property must be put to a public use within a reasonable time after the taking. The doctrine of reasonable time prohibits the condemnor from speculating as to possible needs at some remote future time.

State v. Dorzback, 1991 WL 89887, at *3 (Del. Super. May 28, 1991), citing *State v. 0.62033 Acres of Land in Christiana Hundred*, 110 A.2d

1 (Del. Super. 1954), *aff'd*, 112 A.2d 857 (Del. 1955). Accordingly, this Court must "review[] DelDOT's determination that the [Lawsons'] land is necessary for the Route [301] highway project for fraud, bad faith, or abuse of discretion." *Cannon*, 807 A.2d at 561.

Further, in his concurring opinion in *Cannon*, then Chief Justice Veasey noted that "the issue is not whether we would agree in the first instance with DelDOT's determination of necessity or even whether, in the second instance, we would have come to the same conclusion as did the trial judge on this record." *Id.* at 563 (Veasey, C.J., concurring). Rather, this Court's "task is as follows":

> In exercising our power of review, we have the duty to review the sufficiency of the evidence and to test the propriety of the findings below. We do not, however, ignore the findings made by the trial judge. If they are sufficiently supported by the record and are the product of an orderly and logical deductive process, in the exercise of judicial restraint we accept them, *even though independently we might have reached opposite conclusions*. It is only when the findings below are clearly wrong and the doing of justice requires their overturn that we are free to make contradictory findings of fact.

Id (citing cases).

C. Argument

1. *State and Federal funds have been allocated for the Route 301 Project.*

DelDOT has progressed well beyond the stage of "speculating as to possible needs at some remote future time." *Dorzback*, 1991 WL 89887, at *3. The design, development, and construction plans for the Route 301 Project are concrete and definite, and have been well known to the public since 2005. Further, State and Federal funds have been

allocated for each phase of the project. Thus, the trial court's conclusion that DelDOT "made the necessary showing to have possession of the [Lawsons'] limited tract" should be affirmed. A-586 at 47:4-5.

As DelDOT explained to the trial court, millions of dollars of Federal funds in the form of GARVEE bonds have been sold "[i]n order to complete design and right of way activities for US 301." A-279. Indeed, the Lawsons' counsel has acknowledged that "GARVEE bonds in the amount of $59,401,100 were issued to acquire right-of-way. And additional amounts are on hand to perform project development and design." A-503-04.

While the Lawsons admit that "[f]unds were...available to acquire right-of-way and for project development and design," they assert that "no money was authorized for construction of the 301 Project." Op. Br. at 15, citing A-517. The Lawsons thus appear to be advocating that there is a legally significant distinction between funding for right-of-way acquisitions, project development, and design activities, on the one hand, and funding for the construction phase, on the other hand. Yet the Lawsons cite to no authority in support of their position, and DelDOT is aware of none. Moreover, it is for good reason that certain government projects receive funding in stages throughout the course of the project; it would be next to impossible to make much progress on such projects if the government were required to secure all of the necessary funding at the outset.

In any event, the Lawsons' contention that DelDOT lacks construction funding is not supported by the record. First, Secretary Bhatt's March 8 affidavit explains that "[s]ignificant Federal and

State funds have already been appropriated to begin the acquisition and construction phases of the U.S. 301 project...." A-457.

Second, the January 12 Resolution clearly shows that $2.5 million in Federal funds have been allocated for the Advanced Utilities portion of the construction phase. *See* A-608. As DelDOT explained to the trial court, "[t]hese are existing funds that are ready to be spent today that go to the construction phase of this project." A-584 at 45:5-6.

The trial court correctly concluded, based on the foregoing evidence, that DelDOT has a public need for the Taking Area within a reasonable time. The Lawsons' attempt to manufacture an alleged factual dispute regarding the availability of construction funding is nothing more than a distraction designed to contradict the clear record—a record that supports the conclusion that DelDOT has, as a matter of law, established a public need for the Taking Area within a reasonable time. *See Cannon*, 807 A.2d 556; *Dorzback*, 1991 WL 89887; *0.62033 Acres*, 110 A.2d 1.

2. The Lawsons' position is not supported by case law.

The Lawsons' reliance on *0.62033 Acres* is misplaced. Unlike DelDOT, the plaintiff in *0.62033 Acres* had "no definite plans, resolutions, proposals or appropriations regarding the future construction of a four-lane highway...." *0.62033 Acres*, 110 A.2d at 5. Rather, the plaintiff merely "thought that a four-lane highway [would] probably be needed there at some time within the next three decades." *Id.* In concluding that the plaintiff had failed to

establish a need for the subject property within a reasonable time, the court in *0.62033 Acres* noted the following:

> [T]he Department has no present plans for utilizing most of that land and it is unable to state positively that it will ever use the land for the purpose for which it is sought. A mere contemplation of a road improvement at some indefinite time within the next thirty years is too speculative and too remote to justify the exercise of the power of eminent domain.

Id. at 7.

DelDOT's concrete, definite plans for the design, development, and construction of Route 301 are very different from the speculative road improvement "plans" that were held insufficient "to justify the exercise of the power of eminent domain" in *0.62033 Acres*. *Id.*

Because DelDOT has established that more than a "reasonable possibility of need for a proper public purpose exists, there is no room for further judicial inquiry into the question of necessity for the taking." *Id.* at 6. Thus, even if this Court "independently...might have reached opposite conclusions," the trial court's decision must be affirmed because it is "sufficiently supported by the record and [is] the product of an orderly and logical deductive process." *Cannon*, 807 A.2d at 563 (Veasey, C.J., concurring); *see also* A-271-77; A-279-82; A-456-57; A-604-08.

ARGUMENT

II. DelDOT Has Fully Complied With The RPAA And 10 *Del. C.* § 6110.

A. Question Presented

Whether the trial court correctly concluded that DelDOT has complied with the provisions of the RPAA and 10 *Del. C.* § 6110?

B. Standard And Scope Of Review

This Court "review[s] the Superior Court's legal determinations [on the Right to Take and alleged RPAA violations] *de novo*." *Key Properties Group, LLC v. City of Milford*, 995 A.2d 147, 150 (Del. 2010). "Factual findings, however, will not be disturbed if they are sufficiently supported by the record and are the product of an orderly and logical reasoning process." *Id.*

The RPAA applies to "the acquisition of real property by state and local land acquisition programs or projects in which federal, state, or local funds are used." 29 *Del. C.* § 9501. "Section 9505 of the RPAA prescribes policies that an agency shall follow in acquiring real property that include conducting an appraisal of the property before the initiation of negotiations." *City of Dover v. Cartanza*, 541 A.2d 580, 581 (Del. Super. 1988). "The purposes of the RPAA...are to encourage and expedite real property acquisitions by agreements with owners, to assure consistent treatment of property owners, to promote public confidence in land acquisition practices, and to avoid litigation and thereby relieve congestion in the courts." *Id.* at 582.

Importantly, "the RPAA guidelines are directory rather than mandatory." *Id.* at 583. "Therefore, noncompliance may in certain circumstances be excused." *Id.*

C. Argument

The Lawsons contend that the Superior Court erred in concluding that DelDOT complied with Sections 9505(1), (3), (4), (7), and (15) of the RPAA. According to the Lawsons, DelDOT violated the RPAA by:

> 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.

Op. Br. at 29.

As explained in detail below, DelDOT fully complied with the provisions of the RPAA. Accordingly, the Lawsons' arguments should be rejected and the Superior Court's ruling should be affirmed.

1. DelDOT negotiated with the Lawsons in good faith.

The Lawsons assert that DelDOT violated 29 *Del. C.* §§ 9505(1) and (7) by "conclusorilly [sic] reject[ing] attempts to negotiate and insist[ing] condemnation was inevitable." Op. Br. at 20. In making this assertion, the Lawsons ignore the two-and-a-half month period during which DelDOT earnestly attempted to negotiate with them before concluding that the parties had reached an impasse. *See* A-155-56; A-161-63; A-165-67.[6] Based on its review of the record, the Superior Court correctly concluded "that there have been adequate negotiations in this case." A-578 at 39:20-21.

---

[6] By comparison, the Federal Highway Administration recommends a thirty-day period to attempt good faith negotiations. *See* Appendix A to 49 CFR 24 Subpart B, § 24.102(f).

The Negotiation Record details DelDOT's numerous attempts to negotiate with the Lawsons in good faith between September 12 and November 22, 2011. DelDOT met with the Lawsons and Mr. Salmon on September 12, 2011, to discuss DelDOT's good faith offer of $133,100. During that meeting, DelDOT provided the Lawsons with a copy of the Appraisal and the September 9 Letter. *See* A-155-56; A-161-63; 165-67; A-171-239. Following the September 12 meeting, DelDOT left at least five voicemails for the Lawsons to schedule a follow-up meeting. None of those calls were returned by the Lawsons. *See* A-162.

Mr. Salmon eventually returned DelDOT's phone calls on October 12, 2011, to deliver a message on behalf of the Lawsons: they would accept nothing less than $550,000. *See* A-162. Despite requests from DelDOT, no backup documentation was ever provided to attempt to justify this grossly over-inflated counteroffer. Without any substantiation whatsoever, the Lawsons apparently felt justified in asking DelDOT to pay an amount for the 1.51-acre Taking Area that equaled the Before Taking Value of the entire 10.10-acre property. The Lawsons' failure to substantiate their counteroffer weighs against their assertion that DelDOT's offer was not made in good faith. *See State v. Teague*, 2009 WL 929935, at *5 (Del. Super. Apr. 3, 2009) ("In contrast to DelDOT's efforts, the Teagues never submitted a counteroffer to DelDOT nor did they ever provide a rationale to DelDOT why their property was worth more than DelDOT's offer. Indeed never obtained their own appraisal of their property. Under these circumstances, the Court is satisfied that DelDOT has more than

fulfilled its obligation to negotiate in good faith with the Teagues.").

On November 22, 2011, after engaging in reasonable negotiations for two-and-a-half months, DelDOT indicated on its Negotiation Record that the Lawsons had retained attorney Rich Abbott and that the parties were at an impasse. *See* A-162-63. The Lawsons make much of this fact, stating that "[i]mmediately 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." Op. Br. at 7, citing A-162-63.

The Lawsons fail to acknowledge, however, that DelDOT—rather than filing suit right away—continued to communicate with them through counsel until January 2012. *See* A-91-92; *see also* A-242. Throughout this timeframe, DelDOT remained willing to reach a reasonable compromise with the Lawsons. Yet, the Lawsons never provided an appraisal or other documentation from an independent professional to support their counteroffer. Unfortunately, the parties were unable to reach a mutually agreeable resolution, and, thus, DelDOT commenced this condemnation action.

Furthermore, negotiations continued even after DelDOT filed suit. Throughout February and March 2012, DelDOT informed the Lawsons that it was willing to consider a more reasonable offer if substantiated. *See* A-242; A-244; A-488; A-492. In response to DelDOT's continued efforts to negotiate, the Lawsons never provided a revised counteroffer, an appraisal, or any other documentation from an

independent professional to support their original counteroffer.[7] *See* A-87; A-241; A-487; A-491.

Based on the record, DelDOT has without question satisfied the directives of the RPAA to negotiate with the Lawsons in good faith. Indeed, the Superior Court in *Teague*, upon consideration of a similar negotiation record, concluded that "DelDOT ha[d] more than fulfilled its obligation to negotiate in good faith." 2009 WL 929935, at *5.

Moreover, the *Cartanza* and *Amin* decisions cited by the Lawsons are inapposite. Unlike the instant case, the plaintiff in *Cartanza* failed to perform an appraisal before filing suit. *See Cartanza*, 541 A.2d at 582. Further, unlike here, the plaintiff in *State v. Amin* "did not even ask the Defendant to make a counteroffer before filing the condemnation action." 2007 WL 1784187, at *5 (Del. Super. Apr. 26, 2007). DelDOT did both in this action whereas the Lawsons failed to substantiate their counteroffer and refused to otherwise negotiate.

2. DelDOT's offer was based on a reasonable estimate of just compensation.

The Lawsons contend that that DelDOT failed to comply with 29 *Del. C.* §§ 9505(3) and (4), as well as 10 *Del. C.* § 6110, because "it did not offer or negotiate based on a reasonable estimate of Just Compensation" or "deposit a reasonable estimate of Just Compensation prior to seeking a court order of possession." Op. Br. at 21. The

[7] DelDOT has met with the Lawsons and their counsel on at least two additional occasions since the March 15 Hearing to attempt to negotiate and acquire the Taking Area by agreement. The Lawsons continue to refuse to provide DelDOT with a revised counteroffer, an appraisal, or other documentation from an independent professional to support their original offer.

Lawsons' position, however, is based on a misguided view of the State's obligations under the RPAA.

DelDOT's just compensation estimate of $133,100 is based on the reasoned analysis and conclusions of its duly certified appraiser, Charles Brown, as set forth in the approved Appraisal that Mr. Brown completed in accordance with the Uniform Standards of Professional Appraisal Practice. DelDOT's reliance on the Appraisal to formulate its good faith offer is more than adequate under the RPAA. Based upon the record, the trial court appropriately concluded as follows:

> [T]he offer on the property which is to be taken was made in good faith. And the reason for that is it is supported by an appraisal from a qualified appraiser and there is nothing in the record so far as I can tell to dispute it. Therefore, the deposit made by the State into this Court, in my view, was satisfactory for the purposes of today's proceeding.

A-578-79 at 39:22-40:6.

In an apparent attempt to divert this Court's attention from the real issue before it—whether DelDOT made an offer that it reasonably believed to be just compensation—the Lawsons argue that DelDOT's estimate of just compensation is not reasonable because it is based on an invalid Appraisal. According to the Lawsons, "DelDOT's appraiser failed to consider the legal bar to commercial development of the Remainder Parcel caused by the overly narrow Residential Driveway." Op. Br. at 21.

This argument should be rejected, as it relates to "questions of valuation" which "are not appropriate at this stage of the action." *Dorzback*, 1991 WL 89887, at *3. As DelDOT pointed out to the trial court, it appears that the Lawsons are really attempting to circumvent

the condemnation procedure by prematurely litigating the issue of just compensation under the guise of an alleged RPAA compliance issue. *See* A-288-89. The trial court quite appropriately disregarded these premature valuation arguments. *See State v. Teague*, 2009 WL 1076834, at *1 (Del. Super. Apr. 21, 2009) ("[I]t is important to keep in mind the current stage of the proceedings. The Court is not now required to determine the final compensation due the Teagues. Rather the issue currently before the Court is whether DelDOT made an offer which **it** reasonably believed is just compensation.") (emphasis added).

This Court likewise should reject the Lawsons' attempt to inject valuation arguments into these proceedings at this stage. Indeed, the fact that the Lawsons chose not to move for a stay pending appeal pursuant to Supreme Court Rule 32 speaks volumes about their actual priorities: this is a fight over valuation and not the propriety of the taking.

As DelDOT explained to the trial court, the issue of whether the Lawsons' remainder parcel will be suitable for commercial development is a fact specific inquiry that is not determined solely by the measurement of the driveway's width. *See* A-290. Also, the record contained, and the trial court considered, the Affidavit of Marc Coté, DelDOT's Subdivision Engineer who is responsible for evaluating and approving applications for commercial entrances. *See* A-461-63. In Mr. Coté's March 8 affidavit, he explained that he "disagree[s] with Rich Abbott's contention that it would be impossible for a commercial entrance to be approved by DelDOT on the remainder of the Lawson property after the taking." A-462. Mr. Coté further stated that:

> The taking by DelDOT would not make it impossible for the remainder of the Lawson property to obtain approval for a commercial entrance. The width of the driveway to the remainder of the Lawson property would not preclude a commercial entrance and would not be solely determinative of the issue....There are reasonable circumstances under which a commercial entrance could be approved on the remainder of the Lawson property after the taking.

A-462-63.

Finally, given the Lawsons' refusal to obtain their own competing appraisal, they should not be heard to complain that "DelDOT declined to reappraise the Taking Area...." Op. Br. at 21; *see Teague*, 2009 WL 929935, at *5 (noting that the Teagues had "never obtained their own appraisal of their property").

In light of the foregoing, the trial court correctly concluded that the "offer on the property which is to be taken was made in good faith." A-578 at 39:21-23.

3. DelDOT conducted numerous public workshops and public hearings throughout 2005-2011, thus complying with 29 Del. C. § 9505(15).

Pursuant to 29 *Del. C.* § 9505(15), public notice of "[t]he acquisition of real property through the exercise of eminent domain" shall be given "at least 6 months in advance of the institution of condemnation proceedings": (1) "[i]n a certified planning document"; (2) "at a public hearing held specifically to address the acquisition"; or (3) "in a published report of the acquiring agency."

DelDOT conducted numerous public hearings and workshops between 2005 and 2011 regarding the public purpose of the Route 301 Project, and, thus, has fully complied with Section 9505(15). For example, on January 8 and 9, 2007, DelDOT held public hearings and workshops "to

present to the public the refined retained alternatives, including DelDOT's recommended preferred alternative for a new U.S. Route 301." A-271.[8] These hearings and workshops took place at Middletown Fire Hall in the Lawsons' hometown. The public was "provide[d]...the opportunity to give...comments or testimony" during these hearings/workshops. *Id.* Prior to 2007, other public hearings and workshops on the Route 301 Project were conducted on June 20 and 21, 2005; September 12, 13 and 19, 2005; December 5, 6 and 7, 2005; February 22 and 23, 2006; and April 10 and 11, 2006. *See* B-33.[9]

In an attempt to establish that DelDOT did not conduct any public hearings "at least 6 months in advance of the institution of condemnation proceedings," 29 *Del. C.* § 9505(15), the Lawsons point to a PowerPoint presentation showing that a public hearing was held on September 6, 2011—only five months before DelDOT brought this condemnation action. *See* Op. Br. at 9, citing A-72-73 and A-116-21; Op. Br. at 21. As DelDOT explained to the trial court, however, "[t]he September 2011 meeting that Defendants refer to in their motion was simply the most recent public meeting on the Route 301 project." A-158 (emphasis added). The Lawsons' attempt to convince this Court that the September 2011 public hearing was the first of its kind should be rejected out of hand.

---

[8] DelDOT has attached a more legible copy of A-271-77. *See* B-3-9.

[9] U.S. Route 301 Project Development Public Workshop, *available at* http://www.deldot.gov/information/projects/us301/pages/workshops.shtml (listing all previously held Route 301 Project workshops). This Court may take judicial notice of this fact. *See supra* n.1.

4. *Even if DelDOT were not in strict compliance with the RPAA, the Superior Court was still correct in granting DelDOT's Motion for Possession.*

Because "the RPAA guidelines are directory rather than mandatory," *Cartanza*, 541 A.2d at 583, "[w]hen the departure from the guidelines does not frustrate the purpose of the Act and has no discernable impact on the course of the negotiations, the Court will excuse the agency's failure to strictly comply." *Teague*, 2009 WL 929935, at *3. Accordingly, even if this Court were to conclude that DelDOT was not in strict compliance with the letter of the RPAA, it should nonetheless hold that DelDOT followed the spirit of the RPAA, as the record demonstrates that DelDOT's actions were at all times consistent with the purposes of the RPAA.[10]

Notably absent from the Lawsons' Opening Brief is an explanation as to how DelDOT's purported RPAA violations "frustrate[d] the purpose of the Act and...[had a] discernable impact on the course of the negotiations." *Id.* Any minor deviations from the RPAA, if they exist, should therefore be excused.

[10] The purposes of the RPAA are discussed *supra* at 19.

ARGUMENT

III. The Superior Court Did Not Abuse Its Discretion In Denying The Lawsons' Request For Discovery On The Right To Take, In Considering Publicly-Available, Non-Hearsay Evidence During The Good Cause Hearing, And In Declining To Conduct A Full Evidentiary Hearing.

A. Question Presented

Whether the Superior Court abused its discretion in denying the Lawsons' request for discovery on the right to take, in considering publicly-available, non-hearsay evidence, and in declining to conduct a full evidentiary hearing?

B. Standard And Scope Of Review

This Court reviews discovery rulings for abuse of discretion. *See Coleman v. Pricewaterhousecoopers, LLC*, 902 A.2d 1102, 1106 (Del. 2006). The same standard of review applies to decisions to admit or exclude evidence.[11] *See Spencer v. Wal-Mart Stores East, LP*, 930 A.2d 881, 886 (Del. 2007). The admission of evidence results in reversible error only if there is an "error in the ruling" and "a substantial right of the party is affected." *See Mercedes-Benz of N. Am., Inc. v. Norman Gershman's Things to Wear, Inc.*, 596 A.2d 1358, 1365 (Del. 1991).

When reviewing the trial court's exercise of judicial discretion, "the reviewing court may not substitute its own notions of what is right for those of the trial judge, if his judgment was based upon conscience and reason, as opposed to capriciousness or arbitrariness." *Chavin v. Cope*, 243 A.2d 694, 695 (Del. 1968). This Court has

[11] Although the March 15 Hearing was not a full evidentiary hearing, these principles still apply.

explained that legal discretion is not abused "when [the trial] court has not exceeded the bounds of reason in view of the circumstances and has not so ignored recognized rules of law or practice so as to produce injustice." *Coleman*, 902 A.2d at 1106.

C. Argument

The trial court did not abuse its discretion in any of its discovery and/or evidentiary rulings. Because of the broad deference afforded to authorized condemnors under 10 *Del. C.* § 6110, Rule 71.1, and well-established case law, property owners such as the Lawsons do not have an automatic right to discovery on the State's right to take.

The strong presumption in favor of a condemnor's right to take is inherent in Section 6110. Pursuant to 10 *Del. C.* § 6110(a), the trial court may enter an order of possession ex parte and without notice to the property owner upon receipt of the authorized condemnor's reasonable just compensation deposit. And in cases where this presumption is challenged by the property owner, Rule 71.1 still affords deference to the authorized condemnor by placing the burden on the property owner "to overcome the presumption of regularity and the prima facie case of necessity for a public use...." *Id.*; *see also Cannon*, 807 A.2d at 561 (noting Rule 71.1's deferential standard).

Indeed, this Court has previously held that the exercise of the power of eminent domain by an administrative agency may be "reviewed by the courts only to ensure that the power is not wielded punitively or arbitrarily." *Id.* Thus, absent a showing of "fraud, bad faith, or gross abuse of discretion," the agency's determination must not be disturbed. *See id.* at 561 (citing *State ex rel. Sharp v. 0.62033*

Acres of Land, 110 A.2d 1, 6 (Del. Super. 1954), *aff'd*, 112 A.2d 857 (Del. 1955)). There is no need for the court to conduct a full blown evidentiary hearing. *See State v. Amin*, 2007 WL 3105895, at *1 (Del. Super. Aug. 8, 2007).

Given the strong presumption in favor of authorized condemnors, it follows that there is no automatic right to discovery on the right to take prior to the Rule 71.1 hearing. Accordingly, the trial court did not abuse its discretion in making its discovery and/or evidentiary rulings.

1. The Superior Court's decisions denying the Lawsons discovery were not capricious or arbitrary.

The Lawsons argue that they were entitled to discovery on (1) whether there was an immediate need for the property to be taken in condemnation; and (2) whether DelDOT's estimate of just compensation was valid. *See* Op. Br. at 26. The Lawsons' overly broad view of discovery in condemnation cases was rightly rejected by the trial court. Guided by well-established principles of Delaware law in view of the circumstances of this action, the trial court acted well within its discretion in denying the Lawsons' requested discovery.

On the issue of necessity, the trial court afforded DelDOT's determination of "immediate need" the proper deference under the "fraud, bad faith, or gross abuse of discretion" standard and, thus, denied discovery on that issue. The trial court initially appeared to be inclined to permit the Lawsons to depose DelDOT officials on the issue of necessity, agreeing with the Lawsons that "[they] ought to at least have some chance to determine whether this is really necessary, some limited chance." A-579 at 40:8-17. The trial court, however,

amended its ruling on the record and denied discovery after DelDOT directed the court's attention to the "fraud, bad faith, or gross abuse of discretion" standard. *See* A-580-82 at 41:6-43:6. Satisfied that the Lawsons had not made a sufficient showing of "fraud, bad faith, or gross abuse of discretion," the trial court recognized that there was no room for further judicial inquiry and properly denied discovery on that basis. The trial court's decision in this regard was neither capricious nor arbitrary.

On the issue of the validity of DelDOT's just compensation estimate, the trial court denied discovery because it concluded that the offer was made in good faith. *See* A-578 at 39:21-23. In the trial court's view, DelDOT's just compensation offer was "supported by an appraisal from a qualified appraiser and there [was] nothing in the record so far as [the court could] tell to dispute it." A-578-79 at 39:23-40:3. This conclusion was patently reasonable, as trial courts routinely accept the opinions of qualified experts on specialized subjects. Thus, the trial court's denial of discovery on the reasonableness of DelDOT's just compensation offer was neither capricious nor arbitrary.

2. *DelDOT did not "sandbag" the Lawsons with surprise and hearsay evidence. Moreover, there is no reversible error in the trial court's evidentiary rulings because the court did not rely upon the so-called surprise and hearsay evidence.*

Contrary to the Lawsons' hyperbolic and accusatory assertions, DelDOT did not "sandbag" them with any surprise evidence regarding the funding of the Route 301 Project at the March 15 Hearing. The January 12 Resolution—which the Lawsons refer to as a "Surprise Document"—is

a public document accessible on the Internet, and DelDOT provided the Lawsons with a courtesy copy of an exhibit binder containing the January 12 Resolution before the March 15 Hearing.

Nor did DelDOT "sandbag" the Lawsons with any hearsay. According to the Lawsons, the trial court erred in: (1) permitting DelDOT's counsel to (a) confer off the record with Route 301 Project Manager Diane Gunn regarding the feasibility of widening the Lawsons' driveway, and then (b) relay the substance of their discussion to the court (the "off-the-record colloquy"); and (2) permitting DelDOT's counsel to report that "utility relocations" were "scheduled to begin this summer." Op. Br. at 26-27, citing A-551.

As an initial matter, the Lawsons made no effort to preserve their hearsay objections. Although the Lawsons assert that the "hearsay evidence questions were preserved at oral argument" (Op. Br. at 23, citing A-568 and A-585), no hearsay objections were ever made during the hearing. Nor have the Lawsons "state[d] why the interests of justice exception to Rule 8 may be applicable." Del. Sup. Ct. R. 14(b)(vi)A.(1).

Furthermore, the Lawsons' argument lacks merit for at least two reasons. First, a time-honored rationale for the rule against hearsay—unavailability of the declarant to be cross-examined (*See* 2 McCormick on Evidence § 245 (Kenneth S. Broun ed., 2006))—was not an issue during the March 15 Hearing, as Ms. Gunn and other DelDOT representatives were present during the hearing and willing to testify. *See* A-551 at 12:2-5.

Second, neither the alleged, off-the-record colloquy nor the "utility relocations" update had any bearing on the court's decision to deny discovery. The trial court had already been apprised of both issues when it initially made the determination to grant the requested depositions. The court's ultimate decision to deny these depositions was guided by the "fraud, bad faith, or gross abuse of discretion" standard. *Se* A-579 at 40:8-13; A-580 at 41:13-41; A-582 at 43:5-6. Thus, even if the court erred in permitting the off-the-record colloquy and "utility relocation" update, such rulings constituted harmless error.

3. The Superior Court did not abuse its discretion in declining to conduct a full evidentiary hearing.

Finally, the Lawsons argue that the Superior Court abused its discretion in failing to conduct a full evidentiary hearing on DelDOT's right to take. *See* Op. Br. at 27. A full evidentiary hearing, however, is not the only available mechanism for disposing of objections to a taking. For example, affidavits may be submitted in lieu of an evidentiary hearing. *See State ex rel. Secretary of Dept. of Transportation v. Jefferic Enterprises, Inc.*, 1990 WL 199502, *1 (Del. Super. Nov. 19, 1990). In addition, in *Amin*, the Superior Court explained that Rule 71.1 does not require a full blown evidentiary hearing; rather, the rule only requires a good cause hearing on why an order of possession should not be entered. *See Amin*, 2007 WL 3105895, at *1 (denying the defendant's request for a full evidentiary hearing). The Superior Court was therefore well within its discretion and the confines of Rule 71.1 when it declined to conduct a full evidentiary hearing.

CONCLUSION

For the foregoing reasons, DelDOT respectfully requests that this Court affirm the Orders of the Superior Court entered on May 15, 2012 and May 17, 2012.

Respectfully submitted,

By: /s/ Gregory B. Williams
Gregory B. Williams (I.D. No. 4195)
Austen C. Endersby (I.D. No. 5161)
Mian R. Wang (I.D. No. 5685)
FOX ROTHSCHILD LLP
Citizens Bank Center
919 N. Market Street, Suite 1300
Wilmington, DE 19801
(302) 622-4211

Attorneys for Appellee
State of Delaware Department of
Transportation

Dated: August 21, 2012

UNREPORTED CASES

A

Not Reported in A.2d, 2007 WL 1784187 (Del.Super.)
(Cite as: 2007 WL 1784187 (Del.Super.))

H

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Delaware,
Kent County.
STATE of Delaware, upon the Relationship of the Secretary of the Department of Transportation,
Plaintiff,
v.
Mehul N. AMIN and Trupti N. Desal, Artisans' Bank, 8,311.34 square feet (0.19 acres of land), more or less as Permanent Taking, and Denial of Vehicular Access to U.S. Route 13 Southbound and Lockmeath Way, Situate in Nort Murderkill Hundred, Kent County, State of Delaware and Unknown Owners, Defendants.

C.A. No. 06C-10-014 WLW.
Submitted: Jan. 19, 2007.
Decided: April 26, 2007.

Upon the State's Rule to Show Cause for Order of Possession. Dismissed Without Prejudice.
Mark F. Dunkle, Esquire of Parkowski Guerke & Swayze, Dover, Delaware; attorneys for the Plaintiff.

Richard L. Abbott, Esquire of Abbott Law Firm, Hockessin, Delaware; attorneys for the Defendants.

ORDER

WITHAM, R.J.

*1 The Delaware Department of Transportation ("DelDOT") brought an action to acquire land under the power of eminent domain. Generally, the interests to be acquired by the Plaintiff are fee simple title as to 8,311.34 square feet (0.19 acres of land), more or less, and the imposition of a denial of vehicular access along the property line fronting U.S. Route 13 Southbound and Lochmeath Way. Defendants oppose the taking and attempt to show good cause why the Order of Possession should not be entered.

Procedural History and Parties' Contentions

The State of Delaware, by the Secretary of the Department of Transportation, ("the State") filed a Complaint seeking an Order of Possession under the power of eminent domain. The Land Owner Defendants filed an "Opposition to Request for Order of Possession." FN1 Defendant Amin, individually, then filed a "Response in Opposition to Request for Order of Possession and Motion to Dismiss." FN2 Defendants' second Motion supplemented the Defendants' Original Motion and also added the Motion to Dismiss. The Parties filed further submissions in accordance with the Court's letter Order dated December 12, 2006. The Court held a hearing on the issue of good cause concerning the Order of Possession, under Superior Court Civil Rule 71.1, on January 19, 2007. FN3

FN1. Defendants in this action are Mehul N. Amin, Trupti N. Desai, Artisans' Bank, 8,311.34 Square Feet (0.19 acres of land), more or less as permanent taking, and Denial of Vehicular Access to U.S. Route 13 Southbound and Lockmeath Way, Situate in North Murderkill Hundred, Kent County, State of Delaware and Unknown Owners. Defendants Amin and Desai filed the "Opposition to Request for Order of Possession."

FN2. Only Defendant Amin filed this Motion due to an alleged service of process issue concerning Defendant Desai that existed when the Motion was filed. Defendant Desai has been served by a special process server in this action. The Court will treat the Motions and submissions as if submitted by both Defendants.

Further, the Court will treat the Defend-

ants' Responses and Motion to Dismiss as objections or defenses to the taking made by way of answer, pursuant to 10 *Del. C.* § 6107. Title 10 *Del. C* . § 6107 states in pertinent part: "Any objection or defense to the taking of the property ... by any defendant, shall be made by answer ... All objections and defenses not so presented shall be deemed waived ..."

FN3. Defendants argued for and wish to have a full blown evidentiary hearing concerning certain objections or defenses raised. The Court held a hearing on good cause pursuant to Rule 71.1 and will determine whether to enter the Order of Possession forthwith based on the previously held hearing and submissions of Parties. A full blown evidentiary hearing is not needed.

The State argues that the taking of Defendants' property is necessary for a public purpose and the affidavits submitted by the State evidence the necessity and public purpose of the taking. Consequently, the State contends that the taking is proper and the Order of Possession should be granted.

Defendants raise several objections or defenses to the taking of their property.[FN4] First, Defendants claim that the proposed taking is for a private purpose and DelDOT is exercising various forms of bad faith, fraud and abuse of discretion in proposing the taking in issue. Next, Defendants argue that there is no public necessity to justify the magnitude of the proposed taking. Finally, Defendants contend that the State failed to comply with the Real Property Acquisition Act ("RPAA")[FN5] due to inadequate settlement negotiations.[FN6]

FN4. Defendants have submitted two affidavits in support of their opposition to the Order of Possession. The affidavits are from Defendant Amin and Defense Counsel Richard L. Abbott. The Court has taken arguments raised in the affidavits into account in this decision.

FN5. Specifically, 29 *Del. C.* § 9505.

FN6. Defendants also make an argument concerning lack of advance notice of the Order of Possession hearing. Defendants had notice of the State's intent to present an Order of Possession at least 10 days prior to the Court's January 19, 2006 hearing on good cause, which laid out all of the issues now presently before the Court. The argument is therefore moot.

Discussion

The General Assembly granted the Delaware Department of Transportation ("DelDOT") the authority to condemn private land for public use, providing that DelDOT may "acquire by condemnation or otherwise any land, easement, franchise, material or property, which, in the judgment of the Department, shall be necessary therefor ..."[FN7] Superior Court Civil Rule 71.1 governs condemnation proceedings.[FN8] Rule 71. 1 provides in pertinent part:

FN7. *Cannon v. State of Delaware,* 807 A.2d 556, 560 (Del.Supr.2002) citing 17 *Del. C.* § 132(c)(4).

FN8. Title 10 *Del. C.* § 6103 makes Rule 71.1 applicable. Title 10 *Del. C.* § 6103 states "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."

"In a condemnation proceeding instituted by a public agency ... an order of possession of the property to be taken shall be entered forthwith, pursuant to 10 *Del. C.* § 6110(a), upon 10 days' written notice of intent to present such order, to

be given to the property owner or his attorney of record, supported by an affidavit of necessity executed by the chief administrative officer of the condemning agency, unless the property owner by affidavits, depositions, and/or verified answer shall show good cause why such order of possession should not be entered forthwith. Any hearing on the issue of good cause shall be held without delay and on such affidavits, depositions, and/or verified answer. Disposition of the issue of good cause shall be made by the Court without delay ...

*2 In all such condemnation proceedings the burden shall be upon the property owner to overcome the presumption of regularity and the prima facie case of necessity for a public use presented by the institution of such proceeding ..."

Defendants contend that DelDOT's proposed taking is for an improper private purpose. Defendants concede that the installation of the traffic signal at the U.S. 13 and Lochmeath Way intersection serves a public purpose, but Defendants argue that other components of the project have been undertaken for the purposes of benefitting private real estate developers.[FN9] Specifically, Defendants claim that the developers' engineers drew up the project without giving any attention to the impact on private property owners and their access, which pre-existed and pre-dated the Camden Station shopping center development.

FN9. Defendants argue that former Secretary of Transportation, Nathan Hayward, "cut a backroom deal ... in order to advance [the] pecuniary interests [of politically influential developers]." For example, the denial of access to Defendant Amin's liquor store will likely lead to the store's closing, which would allow the developers to establish their own liquor store in the Camden shopping center.

DelDOT may condemn property under eminent domain for the statutory purposes required by 17 *Del. C.* § 132.[FN10] Agencies of the State may condemn private property provided that the primary purpose of the condemnation is to benefit the public.[FN11] DelDOT has been charged by the General Assembly with doing whatever is necessary to ensure that the citizens of this State have suitable highways upon which to travel.[FN12] The Court's inquiry must focus primarily on whether the *statutorily defined interests are the chief beneficiaries of the project.*[FN13] The Court may also consider evidence indicating whether the condemning authority was motivated by concerns not within its statutory mandate.[FN14]

FN10. DelDOT is charged with maintaining all state highways under its jurisdiction. 17 *Del. C.* § 132(b)(2).

FN11. *Wilmington Parking Auth. v. Land With Improvements,* 521 A.2d 227, 231 (Del.1986).

FN12. *Cannon,* 807 A.2d at 562.

FN13. *Wilmington Parking Auth.,* 521 A.2d at 233.

FN14. *Id.*

DelDOT is charged with maintaining suitable highways for state travelers. Drew A. Boyce, professional engineer for DelDOT, submitted an affidavit analyzing the background of and impact to Defendants' property with relation to the proposed taking. Mr. Boyce's affidavit explains the following: A signal study was conducted by DelDOT concerning the intersection at U.S. 13 and Lochmeath Way and it was determined that a traffic signal was needed at the intersection. The study showed that 27 crashes occurred at the subject intersection during a 4.5 year time period, including 1 fatal accident. The subsequent design of the service road and intersection improvements was based on the addition of the traffic signal. The State then analyzed (and reconfigured) the existing lane configuration so that the signal could operate at an acceptable level. It is apparent to the Court that travelers on

the State's public highway are the chief beneficiaries of the proposed condemnation project in this case.

Defendants argue that DelDOT was motived by concerns not within their statutory mandate, because the State's primary [underlying] motivation was to benefit private developers. The Court is satisfied that the improvements required, which facilitate the need to condemn the subject property, are motivated by DelDOT's determination that a traffic signal was needed at the intersection of U.S. 13 and Lochmeath Way. Mr. Boyce's affidavit evidences the State's motivation. The affidavit explains the following: The State hired Karins and Associates, an engineering firm, to perform the analysis discussed above, and the firm determined that the approach leg on eastbound Lochmeath Way would need a separate right turn lane, through lane, left turn lane and a single westbound lane, which would necessitate the need to establish a new right-of-way. Based on the geometry of the intersection, it was determined that the roadway widening would be done on the north side of the intersection. A median island needed to be added in the leg of the intersection to control vehicle movement perpendicular to the queued traffic. As a result of these considerations, the new-right-of way was therefore proposed.

***3** After establishing the need for the new right-of-way, the State determined that the taking needed to include the denial of access to Defendants' property. Access was denied based on DelDOT standards. In addition, access was denied for safety reasons (discussed below). Mr. Boyce's sworn affidavit articulates the process DelDOT utilized in determining the need for the condemnation. DelDOT's process was thoughtful and thorough. It is apparent to the Court that the State's underlying motivation for the taking was for the benefit of the public and derived from the need to install a traffic signal at the intersection of U.S. 13 and Lochmeath Way.

Defendants next argue that the magnitude of the proposed taking is not necessary for a legitimate public purpose. Defendants specifically claim that the widening of Lochmeath Way, the installation of concrete channelization islands and medians, the interconnection with the private internal shopping center street of WalMart Drive and denial of access to Defendants' property is not necessary for the public purpose of installing a traffic signal at the Lochmeath Way and U.S. 13 intersection.

Title 17 *Del. C.* § 132(c)(4)makes clear that DelDOT is empowered to make the determination of necessity in the first instance.[FN15] DelDOT has been charged by the General Assembly with doing whatever is necessary to ensure that the citizens of this State have suitable highways upon which to travel.[FN16] Once DelDOT determines a particular property is necessary to the fulfillment of its duty to maintain the State's highways, the courts must accord broad deference to that decision.[FN17] This Court reviews DelDOT's necessity determination for fraud, bad faith or abuse of discretion.[FN18]

FN15. *Cannon,* 807 A.2d at 560.

FN16. *Id.* at 562.

FN17. *Id.* at 560.

FN18. *Id.* at 561.

The chief administrative officer of DelDOT, Carolann Wicks, submitted an affidavit stating that the taking in issue was necessary for a public purpose. Thus, there is a presumption of regularity and a prima facie case of necessity for public use that Defendants must overcome. Defendants generally argue that other less intrusive options were available that the State could have chosen to effectively install the traffic signal, but the State choose the present option in order to benefit private developers. However, Mr. Boyce submitted an affidavit explaining the necessity for the taking in detail. Mr. Boyce's affidavit articulates the analytical framework relied on by the State in determining the need for the right of way and why a denial of access

to the parcel should be established. Those reasons include the current site constraints, limited roadway frontage and safety issues. Specifically, Mr. Boyce states that it is impossible for a delivery truck to safely access the site in question and it would be impossible to provide the required parking and room for vehicles to travel within the site.[FN19]

> FN19. There was also a concern stated about non-delivery vehicles' ability to safely enter the liquor store due to the proposed road changes.

Defendants allege that the magnitude of the proposed taking is improper and a result of bad faith on the part of DelDOT. Specifically, Defendants argue that the magnitude of the taking is a result of former Secretary of Transportation Nathan Hayward's "desire to help out his developer buddies." To allege bad faith a party must charge facts rather than conclusions and such facts must suggest actual malevolence by the official towards the complaining part y.[FN20] Defendants make conclusory allegations concerning DelDOT's alleged effort to take Defendants' property for the bad faith purpose of benefitting private developers. However, the facts do not sufficiently support the allegations. Further, the affidavits of Mr. Boyce and Ms. Wicks directly contradict Defendants' allegations. Mr. Boyce's affidavit evidences that DelDOT's proposal was thoughtful and nonarbitrary concerning the necessity of the taking. Defendants have not shown that DelDOT's necessity determination was a product of bad faith, fraud or abuse of discretion.[FN21] Consequently, Defendants have not overcome the presumption of regularity and the prima facie case of necessity for public use.

> FN20. *United States of America v. 49.79 Acres of Land, et. al.,* 582 F.Supp. 368, 374 (D.Del.1983).

> FN21. Merely reciting personal, motivative actions on the part of various State officials does not require or demand further investigation without a factual showing by the Defendants. Blanket allegations that developers have hijacked DelDOT by money-grabbing private developers feeding at the public trough does not further the Defendants' case. See Mr. Abbott's affidavit.

***4** Finally, Defendants object to the Order of Possession on the grounds that DelDOT failed to comply with the policies of the Real Property Acquisition Act ("RPAA") as set forth in 29 *Del. C.* § 9505. The RPAA is applicable to the acquisition of real property by state and local land acquisition programs or projects in which federal, state, or local funds are used.[FN22] Section 9505 of the RPAA prescribes policies that an agency shall follow in acquiring real property.[FN23] The RPAA guidelines are directory rather than mandatory.[FN24] Therefore, noncompliance may in certain circumstances be excused.[FN25]

> FN22. *City of Dover v. Cartanza,* 541 A.2d 580, 581 (Del.Super.1988).

> FN23. *Id.*

> FN24. *Id.* at 583.

> FN25. *Id.*

Noncompliance is not a jurisdictional defect requiring automatic dismissal whenever it is raised.[FN26] The initial burden of establishing noncompliance rests on the defendant.[FN27] If noncompliance exists, then the agency must demonstrate a valid excuse for its failure to follow the RPAA's policies.[FN28] Excuses include the agency's good faith efforts to comply with the policies or a showing that compliance would have been futile.[FN29]

> FN26. *Id.* ("[Noncompliance] is instead a defense or objection to the taking ...").

> FN27. *State of Delaware v. Dorzbzck,* 1991 WL 89887, *2 (Del.Super.1991).

> FN28. *Cartanza,* 541 A.2d at 583.

FN29. *Id.*

Defendants specifically argue that the State did not comply with the RPAA §§ 9505(1), 9505(7) and 9505(15) in the present action[FN30]. Title 29 *Del. C.* § 9505(1) states "every reasonable effort shall be made to acquire expeditiously real property by negotiation." The State submitted an affidavit from V. Wayne Rizzo, Assistant Director, Planning for Real Estate Services for DelDOT, explaining the negotiations that took place.

FN30. Based on the Court's decision concerning 29 *Del. C.* § 9505(1), Defendants' claims concerning §§ 9505(7) and 9505(15) will not be addressed.

The negotiations proceeded as follows: Defendants were made aware of an appraisal being assigned concerning the subject property in March 2004. The appraisals were internally approved in July 2004, but offers were not extended at that time. After the Developer purchased two residential properties adjoining the Defendants' property, the State waited until after new plans were developed to proceed with the offers. In March 2005, contact was made with the Defendants to make a total acquisition offer due to the denial of access. Defendants' Counsel attempted to negotiate an alternative access as opposed to a complete denial of access to Defendants' property. A final appraisal was completed in April 2006, after the final (new) plans were completed, and DelDOT was authorized to negotiate in June, 2006. A written offer was made on June 29, 2006, and the Appraisal was supplied to the Defendants.

Defense Counsel explained to DelDOT that his client wanted to exhaust all settlement options with respect to the property swap, alternative access or liquor store parking lot reconfiguration settlement concept before expending thousands of dollars to obtain an appraisal in order to make a counter offer. The State put Defendants' property into condemnation on August 31, 2006, because the Defendants never proffered a counter offer to DelDOT's June 29, 2006 offer, which made "further negotiations futile."[FN31]

FN31. The Parties were still continuing to communicate about the other settlement options (discussed above), including possible replacement sites, at that time.

The Court finds that the State did not comply with the RPAA § 9505(1). Further, the State failed to proffer a valid excuse for its failure to comply with the act. The State is required to make every reasonable effort to acquire real property by negotiation under the RPAA. DelDOT made a written offer for Defendants' property on June 29, 2006. On August 31, 2006, DelDOT moved to condemn the property because Defendants had not made a counter offer at that time. Defendants were still in ongoing negotiations with the State between June 29 and August 31, 2006 concerning alternate access options and possible replacement sites. Defendants' actions evidenced their belief that the value of the property was higher than what the State had offered.[FN32]

FN32. This point also cuts across the State's futility argument discussed below.

***5** Defendants specifically explained to the State that it would be hard to respond to the June 29th offer until the underlying negotiations [concerning non-price related issues] were concluded. Further, Defendants articulated that they would have "some numbers" (monetary value) that would allow them to negotiate with the State if it was determined that a relocation was possible. If a relocation was not possible, Defendants explained to the State that they would need to get an appraisal. The State argues that Defendants only discussed the request to obtain access over the Developer's property, but did not otherwise respond to the offer (as to price). However, there is no evidence that DelDOT ever requested that the Defendant make a counter offer, nor did DelDOT explain that the alternative negotiation requests (for access, etc.) were off the table.[FN33] Defense Counsel was not even

made aware that a condemnation action had been filed until November 2006.[FN34]

FN33. Defense Counsel states that no discussions with respect to the monetary amounts were requested by DelDOT.

FN34. Defense Counsel was under the impression that settlement negotiations were still ongoing when he became aware of the condemnation proceeding.

The State made an offer and continued to negotiate with Defendants concerning non-price related issues. The State placed the property into condemnation without requesting a counter offer from the Defendants and without explaining that the alternative options were off the table (which would have triggered the Defendants to get an appraisal). Therefore, the State did not make every reasonable effort to acquire the Defendants' property by negotiation.[FN35] DelDOT's excuse that further negotiations would have been futile is unpersuasive. Defendants were willing to negotiate concerning alternate access, etc., and the State did not even ask the Defendant to make a counter offer before filing the condemnation action. Consequently, the State could not have reasonably known whether further negotiations with Defendants concerning the purchase price would have been futile.

FN35. See *State of Delaware v. Brandywine Sec., Inc.,* 1994 WL 792725 (Del.Super.). The State cited this case in oral argument, because the Court held that 29 *Del. C.* § 9505(1) had been met. However, in that case "communications occurred between [the Parties] regarding purchase price," and counter offers were made by the property owners (even though the Court found the counter offers unreasonable).

In conclusion, the Court finds that the proposed taking is necessary for a public purpose. However, the State failed to comply with the Real Properties Acquisition Act. Given the purposes of the RPAA, the appropriate remedy to ensure compliance with its guidelines is dismissal without prejudice.[FN36] Should good faith efforts to comply with the RPAA not result in an agreement between the parties, the State may commence another condemnation action.[FN37]

FN36. *Cartanza,* 541 A.2d at 584.

FN37. *Id.*

Based on the foregoing, the condemnation action is *dismissed without prejudice.* IT IS SO ORDERED.

Del.Super.,2007.
State v. Amin
Not Reported in A.2d, 2007 WL 1784187 (Del.Super.)

END OF DOCUMENT

B

Not Reported in A.2d, 2007 WL 3105895 (Del.Super.)
(Cite as: 2007 WL 3105895 (Del.Super.))

H
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Delaware,
Kent County.
STATE of Delaware, upon the Relationship of the Secretary of the Department of Transportation, Plaintiff,
v.
Mehul N. AMIN and Trupti N. Desal, Artisans' Bank, 8,311.34 square feet (0.19 acres of land), more or less as Permanent Taking, and Denial of Vehicular Access to U.S. Route 13 Southbound and Lockmeath Way, Situate in Nort Murderkill Hundred, Kent County, State of Delaware and Unknown Owners, Defendants.

C.A. No. 06C-10-014 WLW.
Submitted: May 10, 2007.
Decided: Aug. 8, 2007.

Upon Defendants' Motion for Partial Reargument. Denied.
Upon Plaintiff's Motion for Partial Reargument. Denied.
Mark F. Dunkle, Esquire of Parkowski Guerke & Swayze, Dover, Delaware; attorneys for the Plaintiff.

Richard L. Abbott, Esquire of Abbott Law Firm, Hockessin, Delaware; attorneys for the Defendants.

ORDER

WITHAM, R.J.

***1** The Delaware Department of Transportation ("DelDOT" or "the State") brought an action to acquire land under the power of eminent domain. Generally, the interests to be acquired by the Plaintiff are fee simple title as to 8,311.34 square feet (0.19 acres of land), more or less, and the imposition of a denial of vehicular access along the property line fronting U.S. Route 13 Southbound and Lockmeath Way. The Land Owner Defendants opposed the taking and attempted to show good cause why the Order of Possession should not be entered. [FN1]

FN1. Defendants in this action are Mehul N. Amin, Trupti N. Desai, Artisans' Bank, 8,311.34 Square Feet (0.19 acres of land), more or less as permanent taking, and Denial of Vehicular Access to U.S. Route 13 Southbound and Lockmeath Way, Situate in North Murderkill Hundred, Kent County, State of Delaware and Unknown Owners.

By Court Order [FN2] dated April 26, 2007, the Court found that the taking proposed by the State was necessary for a public purpose. The Court also found that the State failed to comply with the Real Properties Acquisition Act ("RPAA"). Therefore, the Court dismissed the State's Complaint without prejudice to ensure compliance with the RPAA's guidelines.[FN3]

FN2. *State v. Amin, et. al,* 2007 WL 1784187 (Del.Super).

FN3. The Court further explained that if good faith efforts to comply with the RPAA failed to result in an agreement between the parties, the State was entitled to commence another condemnation action.

Both the State and the Defendant Land Owners filed Motions for Partial Reargument concerning the Court's April 26, 2007 Order.[FN4] The Court will address both Motions for Partial Reargument concurrently.

FN4. Both Parties also filed Motions in response to the opposing Party's Motion for Partial Reargument.

Standard of Review

The standard for a Rule 59(e) motion for reargument is well defined under Delaware law.[FN5] A motion for reargument will be denied unless the Court has overlooked a controlling precedent or legal principles, or the Court has misapprehended the law or facts such as would have changed the outcome of the underlying decision.[FN6] A motion for reargument is not intended to rehash arguments already decided

by the court.[FN7]

FN5. *Kennedy v. Invacare Corp.*, 2006 WL 488590 (Del.Super.) at *1.

FN6. *Id.*

FN7. *State v. Trump,* 2004 Del.Super. LEXIS 285, at *2.

Discussion

I. Defendants Motion for Partial Reargument

Defendants filed a Motion for Partial Reargument of the Court's April 26, 2007 Order regarding Defendants' objections to the taking of the subject property based upon lack of a valid public purpose. Specifically, Defendants argue that it was necessary for the Court to conduct an evidentiary hearing in order to make factual findings regarding the issue of whether DelDOT had a valid public purpose for the proposed taking. The State contends that Defendants' Motion for Partial Reargument should be denied because the Defendant is merely rehashing the same arguments ruled on by the Court in its April 26th Order.

The Court held a hearing on the issue of good cause concerning the Order of Possession, under Superior Court Civil Rule 71.1 [FN8], on January 19, 2007. Upon consideration of the Parties' arguments and the Parties' written submissions, the Court ruled that the taking proposed by the State was necessary for a public purpose. Defendants previously argued for the Court to hold a full blown evidentiary hearing concerning certain objections and/or defenses to the taking that the Defendants raised. The Court considered Defendants' request and determined that "a full blown evidentiary hearing [was] not needed." [FN9]

FN8. Rule 71. 1 provides in pertinent part:

> "In a condemnation proceeding instituted by a public agency ... an order of possession of the property to be taken shall be entered forthwith, pursuant to 10 *Del. C.* § 6110(a), upon 10 days' written notice of intent to present such order, to be given to the property owner or his attorney of record, supported by an affidavit of necessity executed by the chief administrative officer of the condemning agency, unless the property owner by affidavits, depositions, and/or verified answer shall show good cause why such order of possession should not be entered forthwith. Any hearing on the issue of good cause shall be held without delay and on such affidavits, depositions, and/or verified answer. Disposition of the issue of good cause shall be made by the Court without delay ...
>
> In all such condemnation proceedings the burden shall be upon the property owner to overcome the presumption of regularity and the prima facie case of necessity for a public use presented by the institution of such proceeding ..."

FN9. *State v. Amin, et. al,* 2007 WL 1784187, FN 3 (Del.Super). FN 3 of the Court's April 26, 2007 Order provides: "Defendants argued for and wish to have a full blown evidentiary hearing concerning certain objections or defenses raised. The Court held a hearing on good cause pursuant to Rule 71.1 and will determine whether to enter the Order of Possession forthwith based on the previously held hearing and submissions of Parties. A full blown evidentiary hearing is not needed."

Superior Court Civil Rule 71.1 governs condemnation proceedings.[FN10] The Rule provides that "any hearing on the issue of good cause *shall be held without delay and on such affidavits, depositions, and/or verified answer.* Disposition of the issue of good cause shall be made by the Court without delay." [FN11] The Rule does not require that the Court hold a full blown evidentiary hearing, which would necessitate the examination of numerous witnesses. The Rule requires that the Court hold the good cause hearing *on such affidavits, depositions, and/or verified answer* (that the property owner can proffer to show good cause). In the case *sub judice,* the Court held a Rule 71.1 hearing on the issue of good cause and disposed of the issue without delay. The Court properly denied Defendants' request for a full blown evidentiary hearing, because a full blown evidentiary hearing was (and is) not needed in this case and would only tend to delay disposition of the issue.

FN10. Title 10 *Del. C.* § 6103 makes Rule 71.1 applicable. Title 10 *Del. C.* § 6103 states "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."

FN11. Superior Court Civil Rule 71.1.

*2 Defendants alternatively argue that, absent an evidentiary hearing, dispositive motions like the one in question must be treated similar to motions for summary judgment.[FN12] Condemnation Proceedings are governed by Rule 71.1, which does not provide for a full blown evidentiary hearing nor does the rule make mention of the standard that Defendants now argue is applicable. Assuming, without deciding, that the proposed standard is applicable in the present condemnation action, the Court reiterates its previous ruling that the proposed taking is necessary for a public purpose when viewing the facts (laid out in the Court's April 26th Order) in a light most favorable to the Land Owner Defendants.

FN12. When considering Motions for Summary Judgment, the Court views the facts in a light most favorable to the nonmoving party. In this condemnation proceeding, the State filed a Complaint seeking an Order of Possession under the power of eminent domain and Defendants objected to the taking by way of answer (pursuant to statute). Therefore, there is technically no "nonmoving party," so Defendants are apparently arguing that the Court should view the facts in a light most favorable to the answering Defendants in a condemnation proceeding.

Defendants raise a third argument regarding the subject of discovery. The Court's April 26, 2007 Order, which is subject to the present Motion for Reargument, did not address any discovery issues. Any oral ruling concerning discovery that the Court would have made, necessarily, occurred at or before the Court's January 19, 2007 hearing on good cause.[FN13] A Motion for Reargument on the issue was required to be filed within 5 days of the ruling.

FN13. The Court notes that Defendants did not point to any specific Court ruling in their present Motion.

Superior Court Civil Rule 59(e) states that a "motion for reargument shall be served and filed within 5 days after the filing of the Court's opinion or decision." [FN14] "The Rule is crystal clear." [FN15] "Under Superior Court Civil Rule 6(b) [FN16], the Superior Court has divested itself of the power to enlarge the time for a motion for reargument." [FN17] Defendants' present Motion for Partial Reargument was not filed until May 3, 2007, over three months after the hearing on good cause was held. Defendants' attempt to reargue the discovery issue is therefore time barred pursuant to Rule 59(e).

FN14. *Hendricks v. Tull,* 2005 WL 1654005 (Del.Super.) at *1.

FN15. *White v. Riego,* 2005 WL 516850 (Del.Super.) at *1.

FN16. *Superior Court Civil Rule 6(b)* states in relevant part: the Court may not extend time for taking any action under Rules ... 59(e), except to the extent and under the conditions stated in them.

FN17. *Hessler, Inc., v. Farrell,* 260 A.2d 701, 702 FN* (Del.Supr .1969).

Based on the foregoing, Defendants Motion for Partial Reargument is *denied.*

II. DelDOT's Motion for Partial Reargument

The State filed a Motion for Partial Reargument of the Court's April 26, 2007 Order regarding the Court's determination that the State failed to comply with the Real Properties Acquisition Act. The State argues that certain facts, not specifically mentioned in the Court's Order, evidences that the State complied with the RPAA, 29 *Del. C.* § 9505, and/or the State had a reasonable basis for not complying with the act. Defendants contend that the State is attempting to rehash arguments previously made and rejected by the Court in the Court's April 26th Order, which clearly established the Court's full consideration of all of the facts regarding the negotiation posture in the months preceding DelDOT's filing for condemnation.

In making its April 26, 2007 ruling, the Court

fully considered the events, facts and correspondences between the Parties that occurred prior to the State placing the subject property into condemnation. The Court concluded that the State did not make every reasonable effort to acquire the Defendants' property by negotiation, as required by the RPAA, because the State placed the property into condemnation without requesting a counteroffer from Defendants and without explaining that negotiations concerning alternative options were off the table. The specific communications (emails) in the record that the State now emphasizes merely show that the State asked Defendants for updates concerning the June 29, 2006 offer. The communications were not express requests for a counteroffer. Defendants timely responded to the State's request for updates. The responses were adequate, even though Defendants did not respond to the offer in monetary terms. Defendants did not respond in monetary terms because they were in the process of negotiating alternative access to the liquor store. However, Defendants did "update" the State regarding the June 29, 2006 offer, pursuant to the State's request.[FN18]

> FN18. Defendants also articulated that they did not want to address a monetary figure at that time because they thought the proposed taking was not necessary for a public purpose. The State argues that Defendants' position provided the State with a valid excuse for not complying with the RPAA, since further negotiations would have been futile. However, the State neither expressly asked for a counteroffer, nor explained to Defendants that the ongoing negotiations regarding alternative options had ceased, prior to placing the property into condemnation. Defendants were negotiating with the State at the time the property was put into condemnation concerning alternative options, which tends to show that Defendants were willing to negotiate. Defendants' position did not make further negotiations futile. Therefore, the State did not have a valid excuse for noncompliance.

***3** The property was placed into condemnation without the State informing Defendants that the alternative options were off the table (which would have triggered the Defendants to get an appraisal) and the State never expressly demanded a counteroffer. When the Condemnation action was commenced, the Defendants were under the impression that negotiations concerning alternative options were still ongoing. After reviewing the negotiations that occurred prior to placing the property into condemnation, the Court properly determined that the State did not make every reasonable effort to acquire the Defendants' property by negotiation (in this case), as required by the RPAA. The communications that the State emphasizes in its present Motion for Partial Reargument were previously before the Court and do not change the outcome of the Court's underlying opinion.

Based on the foregoing, DelDOT's Motion for Partial Reargument is *denied.*

IT IS SO ORDERED.

Del.Super.,2007.
State v. Amin
Not Reported in A.2d, 2007 WL 3105895 (Del.Super.)

END OF DOCUMENT

C

Not Reported in A.2d, 1991 WL 89887 (Del.Super.)
(Cite as: 1991 WL 89887 (Del.Super.))

C

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Delaware, Kent County.
The STATE of Delaware, Upon the Relation of the SECRETARY OF the DEPARTMENT OF ADMINISTRATIVE SERVICES, Plaintiffs,
v.
Doris R. DORZBACK, Donna D. Stone, Joseph's, Inc., a Delaware corporation, 31,319 Sq. Ft. of Land Situate In the City of Dover, Kent County, State of Delaware, and Unknown Owners, Defendants.

No. 90C-SE-7.
Submitted: April 3, 1991.
Decided: May 28, 1991.

Upon Plaintiff's Motion for Order of Possession, Motion Dismissed Without Prejudice.
Aubrey B. Lank and Richard L. Abbott, of Theisen, Lank, Mulford & Goldberg, P.A., Wilmington, for plaintiff State of Delaware.

George F. Gardner, III, of Parkowski, Noble & Guerke, P.A., Dover, for defendants Dorzback, Stone and Joseph's, Inc.

MEMORANDUM OPINION

STEELE, Judge.

FACTS

*1 Defendants Donna Stone ("Stone") and her mother, Doris R. Dorzback ("Dorzback"), own two parcels of land located next to the Richardson-Robbins building in Dover, Delaware. The Richardson-Robbins building is presently occupied by the Department of Natural Resources (DNREC). A third parcel, located between the two owned by Stone and Dorzback, is owned by Joseph's, Incorporated. Karl D. Dorzback is the president of Joseph's, Inc. and Doris Dorzback's husband.

Since at least February 1989, the State of Delaware has considered expanding the Richardson-Robbins building and/or to expand the available parking facilities. In February 1989, a meeting occurred with Stone, Laura G. Simmons ("Simmons"), the Real Property and Space Administrator for the Division of Facilities Management, Department of Administrative Services (DAS), and David S. Hugg, the Director of Management and Operations for the Department of Natural Resources and Environmental Control, Office of the Secretary. Stone, a realtor, previously arranged for the lease of several different parking areas by the State. The State officials understood Stone was representing her parents. During the meeting, they discussed two possibilities concerning the properties- 1) whether a parking lot on one of the parcels might be available for the State to rent, and 2) whether the owners might be interested in selling the properties. Stone informed the officials of the plans she and her parents previously had for the property and that they would now consider selling it. She estimated the asking price between $400,000 and $500,000. Following the meeting, DNREC and DAS requested funding for an appraisal of the properties. Later, a request for funds was incorporated into the fiscal year 1990 budget request.

Simmons directed several appraisals be performed on the properties in November or December, 1990. Philip J. McGinnis ("McGinnis"), one of the appraisers, previously appraised the properties for the defendants. When the State asked him to conduct an appraisal on the property, he called Stone and requested permission. At no time was an offer made to the owners allowing them to accompany the appraisers during the appraisals.

Funding to purchase the property was approved and on July 13, 1990, George E. Hale, Secretary of the DAS, sent a letter to the owners offering to purchase the properties for $141,000. Simmons tele-

phoned Stone to determine her position when there was no response to the offer. Stone told Simmons that the owners considered the offer to be extremely low, her father did not want to dignify the State's offer with a response and they were presently negotiating with a third party to sell the property for $350,000. Stone told Simmons the asking price was $350,000 if the State was interested. There was no further communication between the parties prior to the September 17, 1990 complaint. The plaintiff deposited $141,000, the amount they estimate is just compensation, and filed a notice of intention to take possession of the property sought to be condemned. The defendants filed an answer challenging the proposed taking for two reasons. First, the State failed to comply with the provisions of the Real Property Acquisitions Act, 29 *Del.C.* Ch. 95 (RPAA). Second, the State failed to demonstrate a need or necessity for the property within a reasonable time.

Compliance with the Real Property Acquisitions Act

***2** Both parties concede the Real Property Acquisition Act (RPAA), 29 *Del.C.* § 9501 *et seq.*, applies. Section 9505 of the RPAA prescribes guidelines agencies should follow. This Court, in *City of Dover v. Cartanza,* Del.Super., 541 A.2d 580 (1988) determined the guidelines within the RPAA to be directory rather than mandatory. Therefore, non-compliance may in certain circumstances be excused. The initial burden of establishing non-compliance rests on the defendant. If that burden is met, the Agency must demonstrate a valid excuse for its failure to follow the RPAA's policies. *Id.*

The purpose of the RPAA is to encourage and expedite the acquisition of real property by encouraging agreements with owners, to assure consistent treatment of property owners, to promote public confidence in land acquisition practices, and to avoid litigation and thereby relieve congestion in the courts. *Id.*

The defendants allege the State has not complied with three guidelines established in 29 *Del.C.* § 9505. They argue the State has not made every reasonable effort to acquire the property expeditiously by negotiation as required by § 9505(1).

The Court determines the following negotiations did occur:

(1) the initial meeting in February 1989, (however, this meeting shall not be considered because it was prior to the appraisal, *see* § 9505(2));

(2) the letter offering to purchase the property;

(3) the follow-up call by Simmons to Stone.

The statute requires an agency to take "every reasonable step," and it then sets forth some steps which the legislature felt were reasonable. The Court does not believe the State took every reasonable step to expedifiously acquire the property by negotiation for the reasons stated below:

The State had at least two appraisals done on the property as required by § 9505(2) which reads:

§ 9505. Real property acquisition policies.

(2) Real property shall be appraised before the initiation of negotiations, and the owner or his designated representative shall be given an opportunity to accompany the appraiser during his inspection of the property.

The State concedes it gave the owners no opportunity to accompany the appraisers. The State, in its attempt to demonstrate a valid excuse, alleges the defendants suffered no harm because the land is vacant with only one valueless building on it and the appraiser did not need to, nor did he, enter upon the property. Therefore, their failure should be excused.

The property owners did not receive a written statement of, and summary of the basis for, the amount established as just compensation as required by § 9505(3) which reads:

Before the initiation of negotiations for real

property, an amount shall be established which it is reasonable believed is just compensation therefor, and such amount shall be offered for the property. In no event shall such amount be less than the approved appraisal of the fair market value of real property.... *The owner of the real property to be acquired shall be provided with a written statement of, and summary of the basis for, the amount established as just compensation.* (emphasis added)

***3** The State attempts to excuse its failure to comply with § 9505(3) by indicating "the defendants have admitted in their opening brief to the receipt of such a written summary." They also argue the written offer to purchase offered copies of the appraisal reports to the owners, but the owners never asked for them.

Defendants have admitted to the receipt of a written summary, however, the summary was not received until after the commencement of discovery. It appears from the language of the statute that the report is to be provided to the property owner prior to the initiation of negotiations. The State failed to do so. The owners were not able to review and consider the information contained within the report when evaluating the State's offer.

The legislature clearly intended state agencies should follow certain steps prior to initiating a condemnation proceeding. However, a property owner may easily frustrate an agency's efforts to comply with the RPAA by refusing to negotiate. *Cartanza,* 541 A.2d 583 (1988). Therefore, an agency's failure to comply may be reasonably excused. This does not mean the RPAA guidelines may be disregarded without a good faith effort to comply. *Bartley v. Davis,* Del.Supr., 519 A.2d 662 (1986).

The State completely ignored its obligation to permit the owners to accompany its appraiser on the property. In addition, the State failed to provide the owners with the required appraisal summary. A written offer and a telephone call are not "every reasonable effort." Had the State complied with these requirements, it is entirely possible the defendants might have better understood the State's intentions and the basis for its decision. By meeting those requirements, the State might have had more information resulting in a different decision. At the very least, a misunderstanding may have been avoided. The State failed to present any reasonable excuse for its failure to comply with the requirements of § 9505. *See Rockaway v. Donofrio,* 452 A.2d 694 (N.J.Super., A.D.1982).

The Question of Necessity

Under Superior Court Civil Rule 71.1, the defendant must show good cause why such an order should not be entered. The property owner is required to overcome the presumption of regularity and the *prima facie* case of necessity for a public use presented by the department. *Id., State v. 0.62033 Acres of Land in Christiana Hundred,* Del.Super., 110 A.2d 1 (1954), *aff'd,* 112 A.2d 857 (1955). The determination of necessity shall stand short of a clear showing of fraud, bad faith or gross abuse of discretion. *Id.* Any questions of valuation are not appropriate at this stage of the action.

Judicial review of necessity is restricted to protecting the defendant against fraud, bad faith or gross abuse of discretion. *State v. 0.62033 Acres,* 110 A.2d 1. When a reasonable possibility of need for a proper public purpose exists, there is no room for further judicial inquiry into the question of necessity for the taking. *Id.* at 6. In addition, the property must be put to a public use within a reasonable time after the taking. The doctrine of reasonable time prohibits the condemnor from speculating as to possible needs at some remote future time. *Id.*

***4** The defendants have not made a showing of fraud, bad faith or gross abuse of discretion. The State has demonstrated that a reasonable possibility of need exists for the property in question now and in the immediate future. Therefore, there is no cause for this Court to inquire further into the necessity of this taking.

Conclusion

While the requirements of the RPAA are dir-

ectory rather than mandatory, the agency may not arbitrarily disregard those requirements. The agency must be able to demonstrate a good faith effort to meet the requirements. Any other analysis would defeat the legislative intent of the RPAA. The Court is not persuaded the State made a good faith effort to meet the requirements of the RPAA and, therefore, does not believe their non-compliance should be excused. The appropriate remedy to insure compliance with the guidelines of the RPAA is dismissal.

The State's motion for an order of possession is dismissed without prejudice.

IT IS SO ORDERED.

Del.Super.,1991.
State ex rel. Secretary of Dept. of Administrative Services v. Dorzback
Not Reported in A.2d, 1991 WL 89887 (Del.Super.)

END OF DOCUMENT

D

Not Reported in A.2d, 1990 WL 199502 (Del.Super.)
(Cite as: 1990 WL 199502 (Del.Super.))

Superior Court of Delaware, Kent County.
The STATE of Delaware, upon relation of the SECRETARY OF THE DEPARTMENT OF TRANSPORTATION, Plaintiff,
v.
JEFFERIC ENTERPRISES, INC. a Delaware corporation; 144.8950 Acres of Land, more or less, as a Permanent Taking situated in East Dover Hundred and Little Creek Hundred, Kent County, State of Delaware, Unknown Owners, Defendant.

No. 90C-AU-20.
Submitted: Oct. 11, 1990.
Decided: Nov. 19, 1990.

Upon Plaintiff's Request for an Order of Possession Granted.
Aubrey B. Lank of Theisen, Lank, Mulford and Goldberg, P.A., Wilmington, for plaintiff.

William E. Manning of Duane, Morris & Heckscher, Wilmington, for defendant.

MEMORANDUM OPINION

STEELE, Judge.

*1 The plaintiff, the Delaware Department of Transportation ("Department"), has filed a motion requesting an order of possession concerning certain lands which they allege are necessary for the construction of the Route 1-U.S. Route 13 relief route. The defendant, Jefferic Enterprises, Inc., ("Jefferic"), is contesting the request based upon its belief that a contract for the sale of the land in question already exists and, therefore, plaintiff is precluded from obtaining the property through the condemnation process. The parties agreed to proceed by affidavit in lieu of an evidentiary hearing.

The Relevant Facts

The Department has established a right-of-way plan concerning the construction of the Route 1-U.S. Route 13 relief route. The defendant's property is known on that plan as parcels 149-A, 149-B, 149-C, and 149-D.

The Department approached Jefferic concerning the purchase of the land in question. The Department had the property appraised in late 1989 and the results were submitted on December 18, 1989. Based upon the appraisal, the Department delivered a written offer to Jefferic on January 26, 1990, to purchase the property for $1,080,000. Attached to the offer was a standard form contract used by the Department to acquire land. The offer was prepared by James Carr, a right-of-way consultant under contract to the Department. Mr. Carr stated in his affidavits he met with Dennis McGlynn, James McGinnis and Jerry Dunning on January 26, 1990. At the meeting, he delivered the written offer. In addition, he reviewed the Department's plans and the proposed contract "item by item." He also informed them that if the offer was accepted, the purchase contract had to be approved by the Department.

Jefferic's representatives took the information and paperwork which Carr provided. Over the next two months, Jefferic reviewed the proposed contract. They made several changes deleting paragraphs eight and nine and adding paragraph 13, which specified May 31, 1990, as the settlement date. However, paragraph three remained in the contract. It states "final settlement for the purchase of the herein described property shall be held within ninety days from the date this contract is approved by the Department." By terms of the contract, approval required the signature of the Secretary of the Department of Transportation or the Director of the Division of Highways. Carr picked up the amended contract from Jefferic on March 26, 1990.

James McGinnis called Carr three times on April 9, April 18, and May 2, 1990. The purpose of each call was to determine whether the Department had approved the contract. On May 3, 1990, Carr was advised by his supervisors the Department would not approve the contract. When Carr learned that the Department would not approve the contract, he notified Jefferic in a letter dated May 10, 1990. On July 18, 1990, the Department submitted a new offer to Jefferic for $630,000. Jefferic rejected the $630,000 offer.

The Department claims it refused to approve the initial contract because of changes to federal regulations which became effective on January 1, 1990. These regulations impacted the appraisal of the property by requiring a different technique be used to determine whether property consists of wetlands. The new method, when applied to defendant's property, resulted in a larger portion of the property being classified as wetlands. The higher concentration of wetlands produced by the new formula reduced the value of the property or required purchase and/or conversion of other acreage to wetlands with additional cost to the Department. The new federal regulations were not published or disseminated to affected state agencies until sometime after March 26, 1990. Since the December 18, 1989 appraisal classified the wetlands using the formula in the old regulations, the Department obtained a revised appraisal. The Department's July 18, 1990 offer of $630,000 to Jefferic was based upon the second appraisal calculated according to the formula in the new regulations. Nothing in the record suggests any alternative available to the Department. It does not appear the Department created the situation causing the revised offer. While it is unfortunate the new federal guidelines, as applied to Jefferic's property, resulted in a lower appraised value, it is something over which the Department had no control. The Department is required to work within the existing framework of federal and state regulations.

The Legal Standard

***2** The motion before the Court is for an order of possession. Under Superior Court Civil Rule 71.1, the defendant must show good cause why such an order should not be entered. The property owner is required to overcome the presumption of regularity and the *prima facie* case of necessity for a public use presented by the Department. Superior Court Civil Rule 71.1; *State v. 0.62033 Acres of land in Christiana Hundred,* Del.Super., 110 A.2d 1 (1954), *aff'd,* 112 A.2d 857 (1955). If the property owner challenged the necessity of the taking, the administrative determination of necessity would stand unless the defendant made a clear showing of fraud, bad faith or gross abuse of discretion. *Id.* Jefferic has not challenged necessity. Therefore, the sole question for this Court to decide is whether Jefferic has shown good cause why no order of possession should be granted.

Discussion

Jefferic asks this Court to deny the motion for an order of possession on the grounds that the Department has contractually bound themselves to purchase the property. It is Jefferic's argument that Carr, as an agent of the Department, made an authorized offer on January 26, 1990, to purchase the property. It argues there were no conditions or additional steps expressed in either the agreement or in the representations made to Jefferic. In its view, a binding obligation arose even though the Department did not formally execute the contract. Jefferic believes a valid offer had been made and accepted, immediately creating a contract. Based upon that alleged contract, the Department had no right to reject or cancel the agreement.

An examination of the record reveals the form contract provided to Jefferic clearly indicated in paragraph 3 that settlement was contingent upon the Department's approval. In addition, Carr, in reviewing the items of the contract with Jefferic's representatives, explained approval was needed. Jefferic's awareness of the need for approval was also demonstrated by James McGinnis's telephone calls to Carr between March 26, 1990, and May 2, 1990,

in which he was trying to determine whether approval had been granted. Based upon these facts, I find that approval of the contract by the Department must, by agreement of both the Department and Jefferic be consummated by the signature of the Secretary or Director pursuant to paragraph 3.

Jefferic's attempt to establish a contract based upon the acceptance of an offer fails because Jefferic attempted to modify the Department's original offer and returned an altered proposed contract to the Department. In order for an acceptance to be effective, it must be identical to the offer and unconditional. *Friel v. Jones,* 42 Del.Ch. 148, 206 A.2d 232, *aff'd,* 42 Del.Ch. 371, 212 A.2d 609 (1964). The contract Jefferic returned to the defendant constituted a counteroffer and not an acceptance. The Department remained free to accept or reject this counteroffer within a reasonable time. The Department chose to reject the March 26, 1990 counteroffer and present a new counteroffer on July 18, 1990, which Jefferic chose to reject. The result is that no contract has ever existed nor does one now exist between the parties.

Conclusion

***3** It is the law in Delaware that the defendant has the burden to show good cause why this order should not be entered. Jefferic's argument proposing good cause is dependent upon the existence of a contract between the parties for the sale of the land in question. It is the finding of this Court that no contract exists. Good cause does not exist to deny the motion. Therefore, the motion for an order of possession shall be granted.

IT IS SO ORDERED.

Del.Super.,1990.
State ex rel. Secretary of Dept. of Transp. v. Jefferic Enterprises, Inc.
Not Reported in A.2d, 1990 WL 199502 (Del.Super.)

END OF DOCUMENT

E

Not Reported in A.2d, 2009 WL 929935 (Del.Super.)
(Cite as: 2009 WL 929935 (Del.Super.))

H

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Delaware,
New Castle County.
The STATE of Delaware, Upon the Relation of the Secretary of the Department of Transportation,
Plaintiff,
v.
Ronald C. TEAGUE and Mildred Teague, 0.0498 Acres of land, more or less, as a Permanent Taking and 0.023 Acres of Land, more or less, as a Temporary Construction Easement; situate in New Castle Hundred; New Castle County, Delaware; Wilmington Trust Company, Preferred Financial Federal Credit Union; and Unknown Others, Defendants.

C.A. No. 08C–09–065 JAP.
Submitted: Dec. 22, 2008.
Decided: April 3, 2009.

West KeySummary**Eminent Domain 148 ⚿55**

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k54 Exercise of Delegated Power
148k55 k. In general. Most Cited Cases

Eminent Domain 148 ⚿196

148 Eminent Domain
148III Proceedings to Take Property and Assess Compensation
148k196 k. Evidence as to right to take. Most Cited Cases

Taking of land owner's property by the department of transportation to expand a highway was for a valid public purpose. The property owner was unable to show that the department acted with fraud, bad faith, or gross abuse of discretion. The unrebutted evidence showed that safety reasons required the taking because the department anticipated a greatly increased use of the highway in the near future.

Michael W. Arrington, Esquire, Wilmington, Delaware, Attorney for Plaintiffs.

Richard L. Abbott, Esquire, Hockessin, Delaware, Attorney for Defendants.

MEMORANDUM OPINION

***1** Ronald and Mildred Teague live on almost an acre of land located on the western side of Bear–Christiana Rd. (more commonly known as Route 7) near where it intersects with Delaware Route 273 in Christiana. DelDOT has instituted condemnation proceedings to obtain a small portion of the Teagues' property as part of a project to improve Route 7. Presently before the Court is the State's application for an order of possession and the Teagues' motion to dismiss. For the reasons which follow, DelDOT's application is **GRANTED** and the Teagues' motion is **DENIED.**

Background

In addition to the Teague's home, there is a building on the parcel which Mr. Teague uses to operate his business, Christiana Auto Parts. The State seeks to condemn 2,171 square feet, amounting to less than six percent of the Teague parcel, located on the front of the Teague parcel for use connected with a redesign and renovation of Route 7. Neither of the buildings on the Teague parcel are located on the portion to be condemned. There are, however, four oak trees, asphalt paving and a sign advertising the presence of Christiana Auto Parts on the portion subject to condemnation, and the State's offer includes compensation for those items.

The heart of the controversy seems not to be the value of the land taken from the Teagues, but rather the redesign of Route 7. Currently, Mr. Teague's customers coming from the south make a

left turn on Route 7 directly into Christiana Auto Parts.[FN1] The redesigned Route 7 includes a four foot wide median divider in front of the Teagues property, which will make it impossible for northbound drivers to make a left hand turn directly into Christiana Auto Parts. Instead they will be required to travel 700 feet farther north, make a U-turn at the intersection with Route 273 (which will be controlled by a traffic light) and drive back south to the store entrance. Mr. Teague contends that the large majority of his customers use northbound Route 7 to approach his store and that his business will be ruined if they cannot turn directly into the premises.

FN1. There is an at-grade concrete median strip on Route 7 in front of the Teague's property. There is some question whether northbound drivers can legally turn left across that median. Given this Court's resolution of the pending applications, it is not necessary for the Court to resolve this question.

The overwhelming evidence at the trial demonstrated it was not feasible for DelDOT to provide the Teagues with a dedicated left hand turn for at least two reasons. First, redesigned Route 7 will have two lanes of traffic in both directions, thus forcing northbound drivers attempting to turn left into the Teagues' property to cross two lanes of southbound traffic. According to the plaintiff's witnesses, this creates a danger not only for the Teagues' customers but also for the motorists heading southbound on Route 7. Second, a dedicated turn lane for the Teague property would dangerously shorten the northbound left turn lanes planned for Route 7 where it intersects with Route 273. The northbound left turn lane approaching Route 273 needs to be long enough to accommodate stopped vehicles waiting to make a left turn onto Route 273 and provide sufficient space behind those stopped vehicles for drivers entering the left turn lane to decelerate and stop. It is unrebutted that it would be impossible to construct a turn lane sufficiently long if there were a dedicated turn lane for the Teagues.

The Teagues' Contentions

***2** The Teagues raise several objections to the State's motion for an order of possession. They contend that:

1. The State did not proceed by motion as required by the rules of this Court when it sought an order of possession.

2. The State has not established any public necessity for the Teagues' property in order to construct a road project within a reasonable time.[FN2]

FN2. Response, ¶ 11.

3. The State did not make a good faith offer as required by the Real Property Acquisition Act because it did not take into account the rezoning of the parcel to a commercial zone.

4. The State has used the wrong valuation method in determining the compensation to offer the Teagues and therefore have violated its statutory duty to make a good faith offer.[FN3]

FN3. *Id.*, ¶¶ 9, 10.

5. The State did not describe the public use in the manner required by the RPAA.

6. The State did not afford the owners an opportunity to meet with the appraiser at the site as required by the RPAA.

Analysis

The General Assembly imposed on DelDOT the duty to establish a "permanent system of state highways along the route or routes of travel as will accommodate the greatest needs of the people of this State."[FN4] To this end, DelDOT is empowered to "lay out, open, widen, straighten ... reconstruct and maintain any state highway ."[FN5] DelDOT is authorized to exercise the State's power of eminent domain in order to accomplish this.[FN6]

FN4. 17 *Del. C.* § 132(a).

FN5. 17 *Del. C.* § 132(c)(3).

FN6. *Cannon v. State,* 807 A.2d 556 (Del.2002).

DelDOT's authority to exercise the State's power of eminent domain is not without its limits, however. In 1972 the General Assembly enacted the Real Property Acquisition Act[FN7] in order that the State could secure funding[FN8] under the federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970.[FN9] The RPAA's purpose, as described by the Superior Court is:

FN7. 58 Del. Laws c. 413.

FN8. *Id.* The preamble to the legislation recites that "continued eligibility of the State of Delaware for various types of Federal aid is made contingent upon [passage of legislation such as the RPAA]."

FN9. 42 U.S.C. § 4601, *et seq.* The federal statute which spawned Delaware's RPAA contains guidelines which are worded similarly to the RPAA. However the federal statute does not create any rights in property owners. *United States v. 410.69 Acres of Land,* 608 F.2d 1073, 1074, n. 1 (5th Cir., 1979) (per curiam)("that provision is no more than a statement by Congress of what it perceives to be the preferred method of dealing with landowners when the Government wants to acquire their land"); *Paramount Farms, Inc. v. Morton,* 527 F.2d 1301, 1306 (7th Cir.1975) (statute's "language, legislative history, judicial decisions and policy considerations all compel the conclusion that Congress never intended to permit judicial review of agency action taken or omitted pursuant to guidelines"); *Portland Natural Gas Transmission System v. 4.83 Acres of Land,* 26 F.Supp.2d 332,336 (D.N.H.1998) (statute "does not create any substantive rights and cannot be cited as an impediment to an eminent domain action"); *Tennessee Gas Pipeline Co. v. New England Power, C.T.L., Inc.,* 6 F.Supp.2d 102, 104–5 (D.Mass.1998) (statute "merely sets forth policy guidelines, creating no rights whatsoever in condemnees").

> "to encourage and expedite real property acquisitions by agreements with owners, to assure consistent treatment of property owners, to promote public confidence in land acquisition practices, and to avoid litigation and thereby relieve congestion in the courts ."[FN10]

FN10. *City of Dover v. Cartanza,* 541 A.2d 580, 582 (Del.Super.1988).

The primary means of accomplishing the Act's goals is its emphasis on acquiring real property through negotiation.[FN11]

FN11. 29 *Del. C.* § 9505(1) ("Every reasonable effort shall be made to acquire expeditiously real property by negotiation").

The RPAA sets out fifteen guidelines which, at first blush, might appear to be mandatory requirements imposed upon the governmental agency seeking to acquire real property.[FN12] In a scholarly opinion, however, then President Judge Ridgley concluded that these guidelines are neither mandatory nor jurisdictional and, in appropriate cases, the acquiring agency may still condemn property despite its failure to strictly comply with those guidelines.[FN13] This Court concluded in *City of Dover v. Cartanza*[FN14] that if the acquiring agency has deviated from those guidelines:

FN12. The guidelines are prefaced by the language "[t]he agency shall comply with the following policies." 29 *Del. C.* § 9505.

FN13. *Cartanza,* 541 A.2d at 583.

FN14. 541 A.2d 580.

I conclude that the RPAA guidelines are directory rather than mandatory. Therefore, noncompliance may in certain circumstances be excused. Noncompliance is not a jurisdictional defect requiring automatic dismissal whenever it is raised. It is instead a defense or objection to the taking which shall be deemed waived if not presented.

*3 If noncompliance exists, then the agency must demonstrate a valid excuse for its failure to follow the RPAA's policies. Excuses include the agency's good faith efforts to comply with the policies or a showing that compliance would have been futile.[FN15]

FN15. *Id.* at 583 (citation and footnote omitted).

Cases following *Cartanza* have reiterated the necessity of the non-complying agency showing a good faith mistake or futility in compliance.[FN16]

FN16. *E.g., State v. Amin,* 2007 WL 1784187 (Del.Super. April 26, 2007); *State v. Dorzback,* 1991 WL 89887 (Del.Super. May 28, 1991).

The Court believes there is a further exception which excuses the failure to strictly comply with section 9505. When the departure from the guidelines does not frustrate the purpose of the Act and has no discernable impact on the course of the negotiations, the Court will excuse the agency's failure to strictly comply. The traditional remedy for an agency's failure to adhere to section 9505's guidelines is to dismiss the condemnation suit without prejudice with leave for the agency to begin the acquisition process anew.[FN17] The *Cartanza* court concluded that "Given the purposes of the RPAA, the appropriate remedy to ensure compliance with its guidelines is dismissal without prejudice. Should [future] good faith efforts to comply with the RPAA not result in an agreement between the parties, the City may commence another condemnation action."[FN18] In cases where there has been a material departure from the guidelines which could have adversely affected the negotiation process, this remedy makes sense. That remedy, however, is too extreme in instances where the Court is satisfied that the departure from the guidelines had no impact on the negotiations. In such cases, requiring the agency to start over would be fruitless because, after the meaningless departure from the guidelines is corrected, the same negotiation impasse will invariably result. It is well settled that the law will not require the performance of a useless act,[FN19] and this Court is unwilling to require an acquiring agency to undertake such a useless task in these instances. Consequently, if this Court is satisfied that the departure from the RPAA guidelines had no impact on the negotiations and did not otherwise frustrate the purpose of the RPAA, it will excuse that departure.

FN17. *See Cartanza,* 541 A.2d at 584; *Dorzback,* 1991 WL 89887, at *4.

FN18. 541 A.2d at 544.

FN19. *Manganaro v. Stover Builders, Inc.,* 1981 WL 376970 (Del.Super. July 27, 1981); *Lee Builders, Inc. v. Wells,* 92 A.2d 710, 714 (Del.Ch.1952).

The exception to the RPAA guidelines recognized here is similar to the familiar harmless error rule. The United States Supreme Court has observed that harmless error rules "serve a useful purpose insofar as they block setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result in any way."[FN20] harmless error rule is frequently applied in both civil and criminal litigation and indeed it is imbedded in the rules of the courts of this state.[FN21] This Court can see no justification for carving the harmless error doctrine out of our jurisprudence when it comes to application of the RPAA.

FN20. *Chapman v. California,* 386 U.S.

824, 827 (1967)

FN21. *E.g.,* Superior Court Civil Rule 61; Court of Chancery Rule 61. *See also* D.R.E. 103(a) ("Error may not be predicated upon [an evidentiary] ruling ... unless a substantial right of a party is affected").

Finally, this is not a marked extension, if any extension at all, of the rule announced in *Cartanza.* As mentioned previously, then President Judge Ridgley wrote in that case that "futility" would excuse strict compliance with the RPAA. "Futility" can be fairly characterized as meaning there is no adverse impact on the negotiations. Thus the *Cartanza* court recognized, implicitly at least, that the absence of adverse impact on the negotiations will excuse strict compliance with the RPAA.

*4 The Court now turns to the Teagues' contentions.

1. There is no procedural bar to the State's application

The Teagues contend that DelDOT is not entitled to an order of possession because it did not proceed by motion. They point out that DelDOT has chosen, instead, to proceed by a document entitled "Notice of Intention to Take Possession." FN22 This contention warrants only scant attention.

FN22. The premise underlying defendants' argument—that plaintiff incorrectly proceeded with a "Notice of Intention to Take Possession"—is mistaken. The rules of this Court require "10 days written notice of intent...." Super. Ct. Civ. R. 71.1. Consequently, the title DelDOT affixed to its submission is appropriate.

At the outset the Court notes that the title DelDOT has chosen to affix to its submittal is appropriate. The rules of this Court in condemnation proceedings require "10 days written notice of intent [to take possession]." FN23 The title selected by DelDOT is consistent with this. Moreover, the Court's rules are to be "construed and administered to secure the just, speedy and inexpensive determination of every proceeding." FN24 This matter has been litigated in precisely the same manner as it would have been if the State had titled its submittal a "motion" and the Teagues do not argue that they have been prejudiced in any way by the purported misnomer. In the absence of any prejudice to the Teagues, the title to DelDOT's submittal is of no moment to the Court. Accordingly, the Teagues' argument is rejected.

FN23. Super. Ct. Civ. R. 71.1.

FN24. Super. Ct. Civ. R. 1.

2. The State has established a public purpose for the project

The Teagues argue that the proposed taking is not for a valid public purpose. There is a rebuttable presumption that the proposed taking is for a valid public purpose, which in order to overcome, the Teagues must make a clear showing of fraud, bad faith or gross abuse of discretion. FN25 This can be a daunting task for a party challenging the proposed construction of a public highway. FN26 Indeed, the record is devoid of any such evidence and for this reason alone defendants' argument fails.

FN25. *State v. 0.62033 Acres of Land in Christiana Hundred,* 110 A.2d 1 (Del.Super.1954), *aff'd,* 112 A.2d 857 (Del.1995).

FN26. *See Woodwerx, Inc. v. Delaware Department of Transportation,* 2007 WL 927943, at*2 (Del.Supr. Mar. 29, 2007) (service road "served a valid public purpose as a matter of law").

It is worth noting, however the evidence shows that, contrary to fraud, bad faith or abuse of discretion, there is a clear public purpose as to the project in general and the manner in which it impacts the Teagues in particular. The unrebutted evidence shows that the State anticipates a greatly increased

use of Route 7 in the near future. Currently about 26,000 vehicles use the pertinent stretch of Route 7 each day, and the State estimates that daily use by 2025 will rise to roughly 43,000 vehicles. The Court finds, therefore, that the proposed widening of Route 7 has a legitimate public purpose. As noted previously, the primary bone of contention with the Teagues is that northbound vehicles will no longer be able to make a left turn directly into their auto parts store. As discussed above, the unrebutted evidence is that safety considerations require extension of the Route 7 left turn lane onto Route 273 and that the extension of this lane will preclude direct turn access onto the Teague property. That evidence also shows that even if it were feasible to shorten the left turn lane onto Route 273, it would be unsafe to permit left turns at the Teague property across the new two lane southbound Route 7.

*5 In short, there is no evidence of fraud, bad faith or abuse of discretion and therefore this Court accepts the State's determination that this project serves a public purpose.

3. The State made a good faith effort to negotiate with the Teagues

The record demonstrates that the State made a good faith effort to negotiate. Mr. Teague testified that at a 2003 public meeting he was aware that a median barrier would be constructed on Route 7. In both 2003 and 2004 DelDOT told Mr. Teague that it could not, and would not, include a northbound left turn into his property. Hence, Mr. Teague knew even before negotiations began that the left hand turn he sought was not a negotiable item.

DelDOT made reasonable efforts to negotiate with the Teagues. William Roe delivered in person the appraisal report along with DelDOT's offer to Mr. Teague on April 29, 2008. Thereafter [FN27], Mr. Roe had contact with the Teagues or their prior counsel on the following dates as part of DelDOT's effort to negotiate the compensation with the Teagues:

FN27. The Court considers only efforts to negotiate after the offer was delivered to the Teagues.

• 4/29/08—Offer made in person to property owners. Teague response—insisted on left in/left out or business will close.

• 5/8/08—follow up visit with Mr. Teague to go over results of research in response to questions/ comments during initial meeting:

• 31 Auto Parts houses in NCC with 19 having a left in/left out. 6 of 19 no impact with no right in/ no right out.

• Project Management—left in/left out unsafe. The left in/left out does not exist now. Anyone turning into the Auto Parts business, over the median, is breaking the law. The median has been placed there to direct traffic, keeping it on the asphalt only.

• U-turn at Route 7 and SR 273 option now and will remain as an option when project constructed.

• 5/22/08—follow up visit with Mr. Teague. Mr. Teague not satisfied with valuation. Mr. Teague indicated he would hire an appraiser to review the DelDOT appraisal. He also will hire an attorney to review the documents. He asked for a set of plans. Delivered plans on this same date.

• 6/4/08—follow up visit with Mr. Teague. He has not hired an appraiser, did hire an attorney.

• 6/18/08—follow up visit with Mr. Teague. He has not hired an appraiser. He did visit the comparable sales in the appraisal report—not satisfied with the comparable sales in the appraisal but did not offer any refuting information other than he is not satisfied with comparable sales in the appraisal.

• 6/18/08—follow up visit with Mr. Teague. Mr. Teague not in.

• 6/24/08—follow up visit with Mr. Teague. Nothing new.

• 6/26/08—Mr. Teague's attorney (William Bailey) called requesting project plans/drawings.

• 7/2/08—follow up visit with Mr. Bailey to drop off project plans/drawings.

Thomas Nickel of DelDOT also contacted the Teagues on July 10, 2008 in an effort to resolve the impasse.[FN28]

FN28. DX–7, DX–6.

In contrast to DelDOT's efforts, the Teagues never submitted a counteroffer to DelDOT nor did they ever provide a rationale to DelDOT why their property was worth more than DelDOT's offer. Indeed never obtained their own appraisal of their property. Under these circumstances, the Court is satisfied that DelDOT has more than fulfilled its obligation to negotiate in good faith with the Teagues.

***6** This Court's opinion in *State v. Amin*[FN29] resembles in some respects the case-at-bar and therefore warrants discussion. In that case the owner of property to be partially taken by DelDOT complained about limitations on access to his property caused by a highway redesign. The State and the owner negotiated for several weeks about alternative designs which would increase the owner's access. These negotiations lured the owner into not retaining his own appraiser to value the land to be taken. At some point the State abruptly instituted condemnation proceedings without telling the owner that design modifications were off the table. This Court concluded that under those circumstances the owner was misled during the negotiation process and, therefore, the State failed to negotiate in good faith as required by the RPAA.

FN29. 1995 WL 717407 (Del.Super.Nov.22, 1995).

Amin is distinct in critical respects. The Court finds here that the Teagues were never misled into believing that left turn access into their property was "on the table" for discussion. The Court credits the testimony of Ms. Hastings that Mr. Teague was told as early as 2003, and consistently thereafter, that it was not feasible to provide him with left turn access.[FN30] Further, unlike *Amin,* there is no evidence that DelDOT ever negotiated about left turn access with the Teagues' property; indeed, the undisputed evidence shows that from the outset DelDOT was convinced that such left turn access was not feasible. Finally, Mr. Teague's testimony shows that the reason they failed to hire their own appraiser had nothing to do with being misled by DelDOT, but rather was attributable to the fact "I didn't have the zoning straightened out ."[FN31] The Court concludes, therefore, that *Amin* does not require it to find that DelDOT failed to negotiate in good faith.

FN30. A handwritten note in DelDOT's negotiation record indicates that on July 10, 2008 a negotiator advised Mr. Teague "I would talk to Shante about left in & will call back." DX 6. On July 14, according to another note, the negotiator "[a]dvised left in/out cannot happen, will not be constructed as part of our project." *Id.* This, standing alone, might suggest that Mr. Teague was not told until the last moment that design modifications were off the table. In taking into consideration all of the evidence, however, the Court concludes that the Teagues were aware that a left turn into the property was never a negotiable item.

FN31. Rough tr. at 65.

4. DelDOT made a good faith offer.

The Teagues assert that DelDOT failed to make a good faith offer as required by the RPAA because it utilized the wrong valuation technique. They contend that DelDOT should have used the "before and after" appraisal method, but instead employed an inappropriate method known as the strip valuation method. The undisputed evidence convinces this

Court, however, that under the circumstances of this case DelDOT has made a good faith offer to the Teagues.

It is undisputed that DelDOT's appraiser used the strip valuation method when appraising the Teagues' property. Under this method, the appraiser estimates the value of the entire property (less improvements) and calculates the value of the portion to be taken on the basis of the ratio of the size of the portion to be taken compared to the size of the entire parcel. For example, assume a one acre parcel is valued at $50,000 and the State desires to take 10% of that parcel for a highway project. Applying the strip method of appraisal, the value of the portion to be taken is 10% of $50,000, or $5,000.

The Teagues strenuously argue that DelDOT was required by law to apply a different valuation method known as the "before and after" method. This method requires determining the value of the entire parcel before the taking and the value of the remaining parcel after the taking. The difference between the two is the compensation to which the landowner is entitled. It first received judicial approval in the Delaware courts in 1952 when then Judge Herrmann employed it in *State v. Morris,* [FN32] and ever since then "[j]udicial adherence to the "Difference Between the Fair Market Value of the Property Before and After the Taking" has been steadfast in our law." [FN33]

FN32. 93 A.2d 523 (Del.Super.1952).

FN33. *State v. Hawkins,* 1995 WL 717407, at *2 (Del.Super.Nov.22, 1995); *see, e.g., Acierno v. State,* 643 A.2d 1328 (Del.1994); *State ex rel Secretary of the Department of Transportation v. ECR Properties, Inc.,* 2004 WL 693001 (Del.Super.Mar.25, 2004).

*7 In evaluating the Teagues' argument it is critical to keep in mind the measuring stick to be used. The RPAA provides that "[b]efore the initiation of negotiations for real property, an amount shall be established which it is reasonably believed is just compensation therefore, and such amount shall be offered for the property." [FN34] Therefore the issue here is not the final valuation of the Teagues' property, but rather whether DelDOT has made a good faith offer.[FN35]

FN34. 29 *Del. C.* § 9505(3).

FN35. *Dorzback,* 1991 WL 89887, at *3 (Del.Super. May 28, 1991) ("Any questions of valuation are not appropriate at this stage [order of possession] of the action").

The evidence shows that DelDOT made a good faith offer. DelDOT offered testimony that it chose to employ the strip method here because the before and after method would have yielded a negligible diminution in the value of the remainder of the parcel which is to be retained by the Teagues. In other words, according to DelDOT's evidence, utilization of the "before and after" method in this instance would have resulted in an offer near zero to the Teagues. The defendants offered no evidence to rebut this testimony and thus the Court accepts it as true. Given that DelDOT has opted to use the valuation method more generous to the Teagues, this Court finds that it has satisfied its obligation to make a good faith offer despite its decision to eschew the "before and after" method here.

5. DelDOT provided sufficient notice of its intent to exercise its power of eminent domain.

The RPAA requires that any agency proposing to exercise its power of eminent domain provide a public description of that use in at least one of three methods prescribed by that statute. Defendants contend that DelDOT has failed to comply with this requirement, but the uncontradicted evidence shows that DelDOT satisfied it by conducting public hearings well in advance of the condemnation.

In 2005 the General Assembly added the following to the RPAA:

> Notwithstanding any other provision of law to the contrary, the acquisition of real property through the exercise of eminent domain by any agency shall be undertaken, and the property used, only for the purposes of a recognized public use as described at least 6 months in advance of the institution of condemnation proceedings:
>
> a. In a certified planning document;
>
> b. At a public hearing held specifically to address the acquisition; or
>
> c. In a published report of the acquiring agency.
>
> This paragraph shall not apply to the obtaining of right-of-ways or easements by an agency for public utilities, such as sewer, water, or electric. FN36

FN36. 29 *Del.C.* § 9505(15).

The uncontradicted evidence shows that DelDOT complied with this requirement by conducting not one, but two, public meetings more than six months before the institution of these proceedings. Mr. Teague acknowledged having attended these meetings, one in 2003 and the other in 2004, at which time proposed modifications to Route 7 were discussed. He agreed that he was aware from these meetings that a portion of his property would be taken as part of the proposed project.

It is true that the events in 2003 and 2004 were called "meetings" by DelDOT instead of "hearings." But the difference in nomenclature has no significance. It is undisputed that information was presented to the public on the nature and scope of the project and acquisitions. It is likewise undisputed that members of the public, including Mr. Teague FN37, were given an opportunity to voice their opinions and present any objections they had. Assuming, without deciding, that DelDOT was also required by the RPAA to provide information about the proposed raised median on Route 7, the Court finds that it did so at these meetings. A slide shown at the 2003 meeting contains the statement "Due to safety concerns, a raised median is required between SR 273 and Christiana Meadows." FN38 Advantages to the raised median were displayed on the same slide. In short, the Court concludes that the 2003 and 2004 meetings conducted by DelDOT satisfied the RPAA.FN39

FN37. Mr. Teague acknowledged that he discussed the raised median and its alleged impact on his business with DelDOT officials at the meetings.

FN38. DX–9. This encompasses the portion of Route 7 on which the Teagues' property is located.

FN39. DelDOT also points to publication of certain planning documents as evidence of its compliance with the RPAA. Because of the Court's conclusion that the public meetings satisfied the Act, it is unnecessary for it to consider this argument.

6. DelDOT and its appraiser have materially complied with the obligation to meet with the owner

***8** The Real Property Acquisition Act provides that "the owner or the owner's designated representative shall be given an opportunity to accompany the appraiser during an inspection of the property...." FN40 The Teagues contend that this did not occur here and therefore the complaint should be dismissed.

FN40. 29 *Del.C* § 9509(2).

It is undisputed that when the appraiser came to visit the property the Teagues were out of state. The appraiser was accompanied on his tour of the property by the Teagues' 39 year old son, who worked at the auto parts store for 20 years. The is no evidence that, prior to the filing of their answer in this matter, the Teagues ever objected to their son accompanying the appraiser or ever requested a second visit from the appraiser, even though they were represented by experienced counsel during some of the

negotiations.[FN41] The Court concludes, therefore, that DelDOT acted in good faith; under the circumstances it reasonably believed that the Teagues' son was authorized to accompany the appraiser on their behalf and that this visit therefore satisfied the requirement of the RPAA.

FN41. The Teagues are now represented by different counsel.

There is a second, independent reason, why the absence of the Teagues during the appraiser's visit should be excused in this case—the record unequivocally demonstrates that the Teagues' absence caused no material adverse impact on the negotiation process and did not frustrate the purposes of the RPAA. Mr. Teague was asked at the evidentiary hearing what additional information the appraiser would have learned if Mr. Teague, rather than his son, had accompanied the appraiser on the tour of the site. He responded that (1) he would have told the appraiser that efforts were afoot to modify the zoning for the property which, if successful, would increase the value of the property and (2) he would have told the appraiser about the adverse impact the raised median strip would have on his business. The Court finds on the basis of this testimony that Mr. Teague's purported inability to convey this to the appraiser had no adverse effect on the negotiations.

The Court does not credit Mr. Teague's testimony that he would have told the appraiser about the moves afoot to change the zoning because, at the time of the appraiser's visit, Mr. Teague was not even aware of the property's zoning. He testified he did not learn of his property's zoning until DelDOT hand delivered a copy of the appraiser's completed report to him, which occurred several weeks after the appraiser's visit.

Moreover, there is no evidence which could lead the Court to conclude that information about later efforts to rezone the property would have affected DelDOT's offer. Even if a zoning change could have somehow been consummated prior to the completion of the appraisal (which it was not), the use of the property was still limited to an auto parts store by a deed restriction. The Teagues acquired the property in question from Mr. Teague's parents in 1984.[FN42] At the time they acquired the property it was subject to a restrictive covenant which limited the property's commercial use to an auto parts store.[FN43] That covenant remains in place today. The zoning change, which was not completed until seven months after the appraisal was done, therefore does not change the highest and best use of the property.

FN42. DX–4.

FN43. PX–1.

*9 Turning to Mr. Teague's testimony that he was deprived of the opportunity to tell the appraiser about the problems the median strip would cause his business, the Court concludes that the loss of this opportunity had no impact on the course of the negotiations. It is undisputed that DelDOT was aware of Mr. Teague's position years before the appraisal. Shante Hastings, a civil engineer employed by DelDOT testified that at the 2003 public hearing Mr. Teague voiced his objection to the median strip.[FN44] Moreover, she testified that the median divider was never a negotiable item because of safety requirements and that Mr. Teague was aware of this. In short, the Court is convinced that the fact that the Teagues were deprived of another opportunity to repeat their previously voiced objections to the median divider had no impact whatsoever on the negotiations.

FN44. The Court finds that Ms. Hastings is a credible witness and credits her testimony in its entirety.

Conclusion

The Court is sympathetic to the Teagues. Although the evidence on the impact off the median divider on their business is incomplete,[FN45] it is certainly understandable why they would be worried about its effect on the livelihood. Nonetheless, the Court is constrained to apply to the law to the

facts as it finds them. Therefore, DelDOT's application for an Order of Possession is **GRANTED** and the Teagues' motion to dismiss is **DENIED.**

> FN45. The Court makes no ruling at this point on whether such evidence is admissible at the trial on compensation.

Del.Super.,2009.
State v. Teague
Not Reported in A.2d, 2009 WL 929935 (Del.Super.)

END OF DOCUMENT

F

Not Reported in A.2d, 2009 WL 1076834 (Del.Super.)
(Cite as: 2009 WL 1076834 (Del.Super.))

H
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

This decision was reviewed by West editorial staff and not assigned editorial enhancements.

Superior Court of Delaware,
New Castle County.
The STATE of Delaware, Upon The Relation of the SECRETARY OF the DEPARTMENT OF TRANSPORTATION, Plaintiff,
v.
Ronald C. TEAGUE and Mildred Teague, 0.0498 Acres of land, more or less, as a Permanent Taking and 0.023 Acres of Land, more or less, as a Temporary Construction Easement; situate in New Castle Hundred; New Castle County, Delaware; Wilmington Trust Company, Preferred Financial Federal Credit Union; and Unknown Others, Defendants.

C.A. No. 08C-09-065 JAP.
Submitted: April 17, 2009.
Decided: April 21, 2009.

Michael W. Arrington, Esquire, Wilmington, Delaware, for Plaintiffs.

Richard L. Abbott, Esquire, Hockessin, Delaware, for Defendants.

On Reargument

JOHN A. PARKINS, JR., J.

***1** This case proves the adage that "no good deed goes unpunished." In this condemnation case DelDOT had to choose between two valuation methods. It chose the one which, according to the unrebutted evidence, yielded the higher offer to the property owners. Now those owners make this choice the focal point of their motion for reargument.

The purpose of a motion for reargument made pursuant to Superior Court Civil Rule 59(e) is to provide the trial court with an opportunity to reconsider a matter and to correct any alleged legal or factual errors prior to an appeal.[FN1] A motion for reargument is not a device for raising new arguments, stringing out the length of time to make an argument, or rehashing the arguments already decided by the court.[FN2] The only issue on a motion for reargument is "whether the court overlooked something that would have changed the outcome of the underlying decision." [FN3]

FN1. *Bowen v. E.I. duPont de Nemours and Co., Inc.*, 879 A.2d 920 (Del.2005).

FN2. *Hennegan v. Cardiology Consultants, P.A.*, 2008 WL 4152678 (Del.Super.Sept.9, 2008)

FN3. *McElroy v. Shell Petroleum, Inc.*, 1992 WL 397468 (Del.Supr. Nov. 24, 1992).

The central issue in the Teagues' motion for reargument is DelDOT's decision to use the strip valuation method rather than the before and after method to determine the amount of its offer to the Teagues. This Court accepted DelDOT's use of the strip method under the circumstances of this case because of the unrebutted evidence that this method resulted in a higher offer to the Teagues than the before-and-after would have yielded.

The Teagues argument is largely a rehash of their previous contentions and therefore does not require this Court to repeat its earlier holding. One of the Teagues' assertions, however, warrants some comment. In their motion for reargument they dispute this Court's conclusion that the unrebutted evidence shows that the strip valuation method is more favorable to them. They contend that "Mr. Teague expressly rebutted this through testimony that his property was seriously harmed-*i.e.* eliminating access." [FN4] They are presumably referring to Mr. Teague's testimony that construction of the median barrier on Route 7 will have an adverse impact on his auto parts business. Their argument fails for either of two reasons. First, the construction of the median barrier, although part of the Route 7 project, is distinct from

the taking of the portion of the Teagues' property. Second, even assuming that construction of the median barrier requires compensation to the Teagues for the loss of business, the Teagues failed to offer any evidence of the amount of that loss which the Court could use to determine the reasonableness of DelDOT's offer.

> FN4. This assertion is factually inaccurate. There was no testimony at all that the modifications to Route 7 will "eliminate" access to the Teagues' to the property. It was agreed by all the witnesses, including Mr. Teague, that there will still be access to the property from southbound Route 7

As noted in the Court's opinion, it is important to keep in mind the current stage of the proceedings. The Court is not now required to determine the final compensation due the Teagues. Rather the issue currently before the Court is whether DelDOT made an offer "which it reasonably believed is just compensation." [FN5] Although precedent in this State seemingly counsels application of the before and after valuation method in partial taking cases, DelDOT's choice of the more generous method (in this instance anyway) satisfies its obligation to make a good faith offer of compensation.

> FN5. 29 *Del.C.* § 9505(3).

***2** For the foregoing reasons, the motion for reargument is **DENIED.**

Del.Super.,2009.
State ex rel. Secretary of Dept. of Transp. v. Teague
Not Reported in A.2d, 2009 WL 1076834 (Del.Super.)

END OF DOCUMENT