

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

THE STATE OF DELAWARE, UPON)
THE RELATION OF THE SECRETARY)
OF THE DEPARTMENT OF)
TRANSPORTATION,)

Plaintiff,)

v.)

MELPAR, LLC, 1,7761995 SQUARE)
FEET (0.0408 ACRES) OF LAND,)
711.9788 SQUARE FEE (0.0163 ACRES))
OF LAND, 3,598.7712 SQUARE FEET)
(0.0826 ACRES) PART OF TAX MAP)
AND PARCEL NUMBER)
234-23.00-269.14 SITUATE IN INDIAN)
RIVER HUNDRED, and DASH-IN)
FOOD STORES, INC.)

Defendants.)

C.A. No.: S21C-03-017 FJJ

Submitted: December 2, 2021

Decided: December 9, 2021

OPINION AND ORDER

ON DEFENDANTS’ MOTION FOR AN EVIDENTIARILY HEARING - DENIED

ON PLAINTIFF’S MOTION FOR POSSESSION - GRANTED

ON DEFENDANTS’ MOTION TO DISMISS – DENIED

ON PLAINTIFF’S MOTION TO VACATE DEPOSITION - DENIED

ON PLAINTIFF’S MOTION FOR PROTECTIVE ORDER - GRANTED

ON DEFENDANTS’ MOTION TO AMEND ANSWER - GRANTED

Brady Eaby, Esquire, Deputy Attorney General for the State of Delaware.

Richard A. Forsten, Esquire, Attorney for Defendant Dash In Food Services, Inc.

Richard L. Abbott, Esquire, Attorney for Defendant Melpar, LLC.

Jones, J.

INTRODUCTION

The Delaware Department of Transportation (“DelDOT”) instituted condemnation proceedings against Melpar, LLC (“Melpar”) and Dash In Food Stores, Inc (“Dash In” or collectively “Defendants”). DelDOT now moves for an entry of an order granting it possession of the property (“Motion for Possession”). Defendants oppose the Motion for Possession and move to dismiss the condemnation action (“Motion to Dismiss”) claiming that DelDOT failed to negotiate in good faith, as required under Delaware’s Real Property Acquisition Act (“RPAA”).¹

FACTUAL AND PROCEDURAL BACKGROUND

The property at issue is commercial land located at the southeast corner of the intersection of State Route 24, Johns Williams Highway and Long Neck Road, Sussex County.² On March 22, 2021, DelDOT filed its Condemnation Complaint (“Complaint” or “Motion for Possession”) for a partial acquisition. The property to be taken is: (1) One Fee Simple Interest of 1,776 sq. ft. (0.0408 acres); (2) One Temporary Construction Easement of 711 sq. ft. (0.0163 acres); (3) One Temporary Construction Easement of 3,598 sq. ft. (0.0826 acres) of land; and (4) two light poles

¹ 29 *Del.C.* §9501 et seq.

² Melpar’s Motion to Dismiss and Opposition to Motion for Possession (“Melpar’s Mot.”), ¶1. The street address for the Subject Property is 24851 John J. Williams Highway, Millsboro, DE 19966. Compl. ¶9.

(the “Subject Property”).³ The fee simple acquisition consists of an 8-foot-wide strip of land running mostly parallel to SR 23 along the Subject Property frontage.

Melpar owns the real property at issue.⁴ Dash In is a tenant operating a gas station and convenience store at the Subject Property.⁵

In November 2010, DelDOT completed the SR 24, SR 30 to Love Creek Bridge Traffic Study (“Study”).⁶ The Study discussed six intersections identified through DelDOT’s Highway Safety Improvement Program (“HSIP”) that required safety improvements.⁷ The intersection of SR 24 at SR 5/ SR 23, where the Subject Property is located, received the lowest safety rating. Specifically, 13 crashes occurred at the entrance to the Subject Property at SR 23 between December 2006 to November 2009.⁸

“To improve the safety and operation of the [] intersection, as it relates to the Subject Property, DelDOT plans to: extend the left turn lane from westbound SR 23 heading towards the southbound SR 24 intersection; install bicycle lanes on westbound SR 23; channelize the entrance to the Subject Property from westbound SR 23; and install a two-way left-turn lane on southbound SR 24 at the Subject Property’s SR 24 entrance.”⁹

³ DelDOT’s Response to Melpar’s Mot. (“Resp.”), ¶1; *see also* Compl. Ex. A. for a more fully described in the metes and bounds legal description.

⁴ Compl. ¶9.

⁵ *Id.* ¶7.

⁶ *Id.* ¶10.

⁷ *Id.*

⁸ *See* Resp. ¶1; Resp., Ex. B at 5.

⁹ Compl. ¶10.

The existing entrance at SR 23 (Long Neck Road) (“SR 23 Entrance”) will be channelized thereby preventing left in/left out turns (“SR 23 Lefts”).¹⁰ DelDOT contends that the removal of the SR 23 Lefts is a logical safety improvement to alleviate a documented crash problem at the current SR 23 Entrance.¹¹ The SR 23 Entrance is currently too close to the signal to allow vehicles turning left through queued traffic. Right in/right out turns will remain. Bike lanes will be added along northbound SR 23, and the left turn lane from northbound SR 23 onto westbound SR 24 will be restriped (collectively the “Improvements”).¹² The entrance to the Subject Property at SR 24 should remain unaffected by the Improvements.

In January 2019, DelDOT reached out to an appraiser and instructed the appraiser in their scope of work agreement to: “[d]etermine market value of the proposed partial acquisition(s) and determine if there are any damages to the remainder, caused by the project if any. If damages to the remainder are seen by the appraiser, contact the Department to determine if a before and after method appraisal is appropriate.”¹³

In June 2019, DelDOT obtained an appraisal prepared by W.R. McCain & Associates (“McCain Appraisal”).¹⁴ The McCain Appraisal valued the Subject Property to be acquired by DelDOT for a sum of \$76,900.¹⁵ The McCain Appraisal

¹⁰ Resp. ¶1.

¹¹ *Id.*

¹² *Id.*

¹³ Resp., Ex. D.

¹⁴ Resp., Ex. C.

¹⁵ *Id.*

determined there were no damages to the remainder parcel and performed a strip appraisal (“Strip Appraisal”).

In September 2019, DeIDOT sent a written offer to Melpar based off the McCain Appraisal.¹⁶ The parties negotiated through writing and by phone.¹⁷

In August 2020, Melpar dissatisfied with the McCain Appraisal, had their own appraisal performed (“Tidewater Appraisal”).¹⁸ The Tidewater Appraisal utilized the “before” and “after” appraisal method (“B&A Appraisal”) and determined the value of the Subject Property was \$848,100.¹⁹

In October 2020, DeIDOT completed an internal review of the Tidewater Appraisal and rejected the appraisal.²⁰ The parties continued to negotiate until January 2021, when DeIDOT informed Melpar that the parties were at an impasse and that DeIDOT would proceed with acquiring the Subject Property through condemnation.²¹

In March 2021, after filing the Motion for Possession, DeIDOT deposited \$76,900 with the Court.²² DeIDOT maintains this deposit represents just compensation for the Acquired Property as based upon the highest fair market value.²³

¹⁶ Resp., Ex. E (Affidavit attesting to the summary of negotiations and negotiations record).

¹⁷ *Id.*

¹⁸ *Id.*; Melpar’s Mot., Ex. A.

¹⁹ Melpar’s Mot. ¶12.

²⁰ Resp., Ex. E (Affidavit attesting to the summary of negotiations and negotiations record).

²¹ *Id.*

²² *See* Certificate of Deposit; Transaction ID 66487905 (filed April 6, 2021).

²³ Compl. ¶16.

On April 14, 2021, Defendants' filed the Answer and Objections to Taking, Melpar filed the Motion to Dismiss, and Melpar filed a Motion to Schedule Evidentiary Hearing. On April 29, 2021, DelDOT filed Plaintiff's Response to the Motion to Dismiss (the "Response"). On April 30, DelDOT filed Plaintiff's Response to the Motion to Schedule Evidentiary Hearing. On May 3, 2021, Dash In filed a Response to the Motion to Dismiss, joining Melpar's Motion to Dismiss. Pursuant to the Court's request, the State filed a Response to Dash In's Motion on November 5, 2021. Melpar filed a motion for leave to file an Amended Answer and Objections to Taking on October 28, 2021 and the State's response was filed on November 15, 2021. On November 5, 2021 the State filed a motion to vacate the deposition of its expert that had been noticed by Melpar and a motion for a protective order. A response was filed by the State on November 17, 2021 The Court held oral argument on all pending motions on December 2, 2021.

PARTIES' CONTENTIONS ON MOTION TO DISMISS

A. Melpar

Melpar argues that DelDOT violated multiple requirements of the Delaware RPAA by not obtaining a legally required B&A Appraisal. Melpar argues that DelDOT's failure to obtain a B&A Appraisal makes DelDOT's negotiations, just compensation calculation, and deposit invalid. Additionally, Melpar alleges DelDOT did not comply with requirements for establishing a recognized public use purpose six months prior to the initiation of condemnation proceedings. In its

Amended Answer and Objections, Melpar alleges that the age of the State's appraisal makes the State's reliance upon it violative of the RPAA.

B. DeIDOT's Response to Melpar.

DeIDOT maintains that the dispute with Melpar boils down to a disagreement over appraisal methodology. DeIDOT asserts that a B&A Appraisal must only be performed if there are damages to the remainder parcel, and since there are none here, the Strip Appraisal was appropriate. As such, DeIDOT contends that there have been no violations of the RPAA and that DeIDOT is entitled to Possession and the Court should dismiss Melpar's Motion. DeIDOT disputes that the age of its appraisal and its reliance on it violates RPAA.

C. Dash In.

Dash In has joined Melpar's Motion and repeats a number of the arguments raised by Melpar. In addition, Dash In argues that there were no communications between the State and Dash In. Dash In maintains that the new traffic patterns will impact its business, impact delivery trucks access to the property, and will result in a loss of 3 parking spaces which may cause zoning issues with Sussex County requiring a new site plan, and the potential installation of additional landscaping or stormwater management infrastructure.

D. State's Response to Dash In.

DeIDOT argues that Dash In's objections and defenses to the Order of Possession are waived because Dash In has not opposed the Order of Possession by

Affidavit, deposition or verified Answer nor has Dash In objected or raised any objections to taking in accordance with the requirements of 10 *Del.C.* §6107(a). Second, the State maintains that it had no obligation to comply with the RPAA because there is no requirement under the RPAA for the State to negotiate with lessees. Finally, Dash In’s claim for damages is non-compensable where ample and reasonable access continues to exist after the taking.

STANDARD OF REVIEW

In condemnation proceedings, there are two issues: 1) whether the taking is permissible, and 2) whether the taking is being justly compensated.²⁴ The Court must resolve first whether the taking is permissible before proceeding to a trial on just compensation.²⁵

As part of the condemnation proceedings, the taking agency may move for entry of an order of possession of property.²⁶ Superior Court's Civil Rule 71.1 governs this procedure.²⁷ Such order “shall be entered forthwith, pursuant to 10 Del. C. §6110(a),” unless the property owner can demonstrate “good cause” why the possession order should not be entered forthwith.²⁸ The property owner has the burden of overcoming the presumption of regularity and the prima facie case of necessity for a public use.²⁹

²⁴ *Lawson v. State ex rel. Sec'y of the Dep't of Transp.*, 72 A.3d 84, 90 n. 31 (Del. 2013).

²⁵ *Id.*; see also DEL. CODE ANN. tit. 10, §6107 (2014) (“After the disposition of all such objections and defenses [to the taking] the cause shall proceed to the trial of the issue of just compensation.”).

²⁶ Del. Super. Ct. Civ. R. 71.1.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

Section §6110(a) of Title 10 grants a public authority the right to take possession of the property “at any time after filing the condemnation proceeding,” upon notice of the intent to take possession, and after depositing “in Court ...[in] the sum of money estimated by [the authority] to be just compensation for the property or the part thereof taken.”³⁰

A party whose property is subject to condemnation proceedings may object to the agency's taking of possession.³¹ One such objection is an allegation that the condemner has violated the RPAA.³² The RPAA’s purpose is “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.”³³ The RPAA provides a set of fifteen (15) guidelines for state and local land acquisition programs to follow in real property acquisitions.³⁴ These guidelines are directory rather than mandatory, and noncompliance with them is forgivable upon establishment of a valid excuse.³⁵

³⁰ DEL. CODE ANN. tit. 10, §6110(a) (2014) (requirements for entry into possession).

³¹ *See id.* at §6107 (objections or defenses to the taking of property shall be made by answer).

³² *See, e.g., City of Dover v. Cartanza*, 541 A.2d 580, 583 (Del. Super. 1988).

³³ *Cartanza*, 541 A.2d at 583.

³⁴ DEL. CODE ANN. tit. 29, §§9501 – 9506.

³⁵ *See State ex rel. Sec'y of the Dep't of Transp. v. Teague*, 2009 WL 929935, at *3 (Del. Super. Apr. 3, 2009); *Cartanza*, 541 A.2d at 583 (RPAA's guidelines are directory, not mandatory, and therefore failure to comply with them is a defense or an objection to the taking). *See also Lawson.*, 72 A.3d at 88–89 n. 14 (recognizing Supreme Court's implicit adoption, in *Key Properties Grp., LLC v. City of Milford*, 995 A.2d 147, 153–54 (Del. 2010), of *Cartanza*'s holding).

It is the objecting party's burden to first show a RPAA violation.³⁶ If that burden is met, the condemning party has the burden to provide a valid excuse for its noncompliance.³⁷ Valid excuses include good faith efforts to comply with the RPAA, or a showing that compliance would be futile.³⁸ And a contemnor's noncompliance may be excusable where it has no impact on the negotiations and does not otherwise frustrate the RPAA's purpose.³⁹ Should the condemning party fail to set forth a valid excuse for not complying with the RPAA, the Court must dismiss the condemnation action without prejudice.⁴⁰ If subsequent good faith efforts to comply do not result in agreement, a new condemnation action may be filed.⁴¹

DISCUSSION

Melpar's Claims

Melpar has asserted a number of violations of RPAA. While a number of violations are alleged, the central dispute, which forms the basis of the various violations of RPAA, is whether the State, as a matter of law, was required to use a B&A Appraisal as opposed to the strip method appraisal utilized by the State Appraiser. Defendants contend that a B&A Appraisal is required as a matter of law. The State disagrees.

³⁶ *State ex rel. Sec'y of the Dep't of Admin. Servs. v. Dorzback*, 1991 WL 89887, at *2 (Del. Super. May 28, 1991).

³⁷ *Cartanza*, 541 A.2d at 583.

³⁸ *Id.*

³⁹ *Lawson*, 72 A.3d at 89 (citing *Teague*, 2009 WL 929935, at *3).

⁴⁰ *Cartanza*, 541 A.2d at 583.

⁴¹ *Id.*

Melpar relies on *Acierno* to support its argument that a B&A Appraisal is required. In *Acierno*, the Delaware Supreme Court was not addressing possession. Instead, the Supreme Court was reviewing an appeal of the final award of just compensation after trial.⁴² While the Supreme Court began its analysis by recognizing the general rule that in a partial taking case just compensation is calculated using a B&A Appraisal, the central issue in the case was what benefits and advantages the owner realized due to the taking and construction of the road improvements and whether those advantages were to be set off against the value of the property taken and any severance damages at the final compensation hearing.⁴³ In short, *Acierno* was a just compensation case. *Acierno* does not stand for the proposition that a B&A Appraisal is required in all partial taking cases.

Melpar also cites the Court to two other cases: *State v. Teague* and *Lawson v. State*.⁴⁴

In *State v. Teague*, the owner objected to possession because DelDOT's road design and median placement would eliminate a northbound driver's ability to make a left turn into the Defendants' store parking lot.⁴⁵ The defendant argued that DelDOT violated the RPAA because its appraisal was invalid for two reasons: (1)

⁴² *Acierno*, 643 A.2d at 1334.

⁴³ *Id.*

⁴⁴ See *Teague*, 2009 WL 929935, at *1; *Lawson*, 72 A.3d at 92.

⁴⁵ *Teague*, 2009 WL 929935, at *1.

the appraiser did not account for the possibility that the parcel would be rezoned; and (2) the appraiser used the wrong valuation method.⁴⁶

With respect to the valuation issue, the Court emphasized that during the first stage of a condemnation proceeding, determining an appraisal's validity requires good faith analysis, not a final valuation analysis.⁴⁷ Further, the Court noted that "DelDOT's testimony indicated that it chose to appraise the property using the 'strip' method because the method for which the plaintiffs argues—the "before and after" method—"would have yielded a negligible diminution in the [remainder parcel's] value."⁴⁸ "Given that DelDOT . . . opted to use the valuation method more generous to the" plaintiffs, the Court found that DelDOT "satisfied its obligation to make a good faith offer," thereby excusing any possible error based on DelDOT's choice of valuation method.⁴⁹

In *Lawson v. State ex. rel. Secretary of the Department of Transportation*, the State's appraisal underlying its initial offer did not account for the fact that the taking significantly reduced the property owner's reasonably demonstrated ability to develop the property consistent with its estimated highest and best use.⁵⁰ The Delaware Supreme Court found that the continued reliance on the flawed appraisal "frustrated the parties' negotiations."⁵¹ Further, the Court reversed the trial judge's

⁴⁶ *Id.* at *2.

⁴⁷ *Id.* at *7.

⁴⁸ *Id.*

⁴⁹ *Lawson*, 72 A.3d at 90 (quoting *Teague*, 2009 WL 929935, at *7).

⁵⁰ *Id.* at 92.

⁵¹ *Id.*

findings that the State had complied with §9505(3), and held instead that the State violated the RPAA with no excuse for noncompliance.⁵²

In *Lawson*, the Court recognizes the holding in *Teague* but distinguishes the facts because DelDOT's appraiser failed to consider the highest and best use of the remainder after the taking.⁵³

This Court does not find that the cases relied upon by the Defendants stand for the proposition that in a partial taking the State is required to utilize a B&A Appraisal. The question of what appraisal approach to utilize under a given set of facts is a question that goes not to the initial question of whether it is RPAA compliant but to the ultimate just compensation question. If the two sides of a condemnation case present different methods of appraisals that are based on a good faith analysis of the situation by each side the resolution of which appraisal is appropriate should be determined during the just compensation phase for the Commissioners. It becomes part of the push and pull of the just compensation decision. This is not a situation where an appraisal lacked the parties input⁵⁴ or the State moved forward without giving the defendants an opportunity to obtain their own appraisal.⁵⁵ This is a case where the parties have an honest good faith dispute about what particular appraisal approach is most appropriate under the facts of this

⁵² *Id.* at 92-93.

⁵³ *Id.* at 92.

⁵⁴ *State ex rel., Sec'y of Dept Admin serv v. Dorzback*, 1991 WL 89887 (Del.Super., 1991).

⁵⁵ *State v. Amin*, 2007 WL 1784187 (Del.Super., 2006).

case.⁵⁶ In this situation, the appropriate manner to resolve the dispute is during the valuation phase by the triers of fact in that proceeding after the parties have had the benefit of full discovery and presentations at the just compensation hearing.⁵⁷ In short, under the facts of this case, Melpar has not sustained its burden of overcoming the presumption of Regularity.

To the extent Melpar argues that §9505(1) has been violated because of lack of negotiations, I find that Melpar has not met its burden to show that DelDOT has violated §9505(1). The records demonstrate that negotiations in the present case took over 15 months which included emails and phone calls. The fact that DelDOT said “no” to Melpar’s counteroffer of \$848,100.00 does not mean there were no negotiations. On this record, I find no violations of §9505(1) as the negotiations were sufficient.

Section 9505(3) requires a taking agency before the initiation of negotiations for real property [establish] an amount... which it reasonably believed is just compensation. Section 9505(4) provides that the agency must deposit with the Court the sum of money estimated by the agency to be just compensation for the property. Section 9505(7) states that in no event shall the time for negotiations or condemnation be advanced, the deposit of funds in court, for the use of the owner

⁵⁶ Melpar contends that the appraisal is fundamentally flawed because the appraiser described the use of the property as apartments. DelDOT indicates that the reference was a scrivener’s error. Any fair reading of DelDOT’s appraisal can only lead to a conclusion that the appraiser was aware that the use of the property was a convenience store. The appraisal even indicates that the current use of the property is “gas station/convenience store”. The Court accepts DelDOT’s position that the “apartment” reference was a scrivener’s error.

⁵⁷ *State v. Middletown Development, Inc.*, 2015 WL 1086885 (Del.Super. 2015); *State v. Key Properties Group*, 2016 WL 359104 (Del. Super., 2016).

deferred nor any coercive actions be taken to compel an agreement on the price to be paid on the property.” Defendants allege a breach of these sections by the State. The basis for each of these breaches is the defendants’ view that a B&A Appraisal was required. As I find that a B&A Appraisal is not required as a matter of law, I find that the State has not breached any of these sections.

Defendants allege a violation of Section 9505(15). Section 9505(15) requires that an agency establish a recognized public use at least six months in advance of the institution of condemnation proceedings in one of three permitted ways: (1) in 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.⁵⁸ To support compliance with this Section, DelDOT points to the FY2020/2021 Capital Transportation Plan.⁵⁹ DelDOT argues that it complied with §9505(15) because “[t]he adopted FY 2020/2021 Capital Transportation Plan is a certified planning document which recognizes the Improvements as a public use.”⁶⁰ On this record, I find that DelDOT’s planning document is sufficient recognition of public use prior to six months and therefore DelDOT is in compliance with §9505(15).⁶¹

⁵⁸ 29 Del. C. §9505(15).

⁵⁹ Melpar’s Mot. ¶23.

⁶⁰ Resp. ¶23.

⁶¹ DelDOT also argues that it complied with §9505(15) because the plan was presented at a public hearing in October 2016. Section 9505(15) requires that the public hearing be one “held specifically to address the acquisition.” Based on the record presented, the Court cannot determine that the October 2016 hearing was held specifically to address the instant acquisition.

DEFENDANTS' MOTION TO AMEND ANSWER AND OBJECTIONS

On October 28, 2021 Melpar filed a Motion for Leave to File Amended Answer and Objections to the Taking which Dash In has joined. The amendment seeks to add an allegation that the State has violated the requirements of RPAA by relying on an Appraisal that is 2 ½ years old and given the age of the appraisal, it does not constitute a reasonable estimate of the current fair market value of the property. The State opposes the Motion to Amend. The State maintains that there is no brightline rule to determine when an appraisal is outdated. The State also contends that the “shelf life” of the appraisal objection comes too late and as such this defense is waived.⁶² The State alleges that the condemnation process protects Melpar from post filing fluctuations in valuation. Finally, the State alleges that the Amendment would be futile, the Motion is nothing other than a delay tactic; and a delay would cause prejudice to the State in increased construction costs.

Superior Court Civil Rule 15(a) provides that Leave to Amend a Complaint or Answer should be freely granted by the Court when justice is required and the opposing party is not seriously prejudiced by such an amendment.⁶³ The Court finds

⁶² The State maintains that the Answer is not supported by Affidavits as required by Rule 71. This argument is plainly without merit as the Affidavits of Stephen Parsons and Laurence Moynihan have been filed and those Affidavits support the new allegation in paragraph 27 of the Amended Answer.

⁶³ *Chrysler Corp. v. New Castle County*, 464 A.2d 75 (Del. Super., 1983); *Dunfee v. Blue Rock Van & Storage, Inc.* 266 A.2d 187 (Del. Super., 1970); *Paul v. Chromalytics Corp.*, 343 A.2d 622 (Del. Super., 1975); *Gott v. Newark Motors, Inc.*, 267 A.2d 596 (Del. Super., 1970).

that the State will not suffer prejudice to such an extent as to require this Court not to grant the Amendment.⁶⁴ For this reason, Motion to Amend is Ganted.

Having determined that the Amended Answer should be allowed, the question becomes whether the age of the appraisal is a violation of RPAA and if so, whether that should result in the granting of the Defendants' Motion to Dismiss.

The Court is not at all certain that the appraisal relied upon by the State is so outdated as to not reflect the existing real estate market conditions so as to make the State's reliance on it violative of RPAA. What the Court is certain of is that to dismiss this case on the grounds that a 2 ½ year old appraisal is being relied upon by the state under the facts of this case would be a futile exercise and have no impact on the negotiations.⁶⁵ The central dispute between the parties is the type of appraisal utilized by the State. To dismiss the case and require the State to produce an updated appraisal using the same strip method approach would not break the impasse between the parties and would have no meaningful impact on the negotiations. The wide disparity in value between the parties is based on which appraisal method is used. The gap in value would not be cured by getting a more up to date strip appraisal from the State when the defendants maintain that a B & A appraisal rather than a strip appraisal should be utilized. To dismiss the case because the state's appraisal

⁶⁴ At the December 2, 2021 hearing, the State concluded that it would suffer no prejudice.

⁶⁵ *City of Dover v Cartanza*, 541 A 2d 580, 583 (Del Super. 1988).

is too old would be futile. As such the State's reliance on a 2 ½ year appraisal is not a violation of the RPAA.

Defendants are adequately protected in the condemnation process if the State's appraisal turns out to be outdated. First, interest is awarded on the difference between the deposit and the final award of just compensation. Second, the "effective" date for valuation of the property for the final award of just compensation is the date of possession. Changed circumstances and market fluctuations between the date of the deposit and the final award are realized. Lastly, Melpar is entitled to recover its reasonable litigation expenses, subject to exceptions, including reasonable attorney, appraisal, and expert witness fees where the final award is closer to Melpar's highest valuation evidence provide at trial than to DelDOT's mandatory pre-trial offer of judgment.⁶⁶

DASH IN'S CLAIMS ON THE MOTION TO DISMISS

Dash In advances the same arguments as Melpar with regards to the adequacy of the State's appraisal method. Assuming that Dash In has standing under the RPAA to raise these arguments the question of the proper appraisal method to apply is one for the compensation phase after the development of a full record. Such an analysis

⁶⁶ The State has indicated that once the date of the taking is established it will have its appraisal updated. The Court will require that this be done.

will deal with claims relating to the diminished access, loss of parking spaces, and the impact to the delivery trucks.^{67, 68}

MELPAR’S MOTION TO SCHEDULE AN EVIDENTIARY HEARING

Melpar has moved for this Court to hold an Evidentiary Hearing on its Motion to Dismiss. The State opposes the Motion arguing that a full evidentiary hearing is not necessary under the facts of this case and all that is necessary is a good cause hearing.

Superior Court Civil Rule 71.1 and 10 Del. C. §6107 govern the procedure for a hearing in a condemnation case. Rule 71.1 provides for a good cause hearing. Rule 71.1 provides that an order of possession shall be entered forthwith pursuant to S 610(a), upon 10 days written notice of intent to present such order, supported by an affidavit of necessity, unless the property owner by affidavit, depositions, and/or verified answer shall show good cause why such order of possession should not be entered forthwith. The rule further state, “Any hearing on the issue of good cause shall be held without delay and on such affidavits, depositions, and/or verified answer. Disposition for the issue of good cause shall be made by the Court without delay.” Finally both Rule 71.1 and Section 6110(a) permit the Court in its discretion to proceed ex parte.

⁶⁷ *Speedway LLC v. State*, 2016 WL 6477029 (Del.Super., 2016).

⁶⁸ At this point, it is not clear to the Court how the valuation phase will work in terms of any apportionment that is appropriate between the defendants. The State, in its response to DASH In’s Motion, has suggested a course of action. This issue requires further development by the parties before the Court can rule on this issue.

This Court has refused to request for a “full blown evidentiary hearing” where the evidence presented by the parties prior to the good cause hearing was sufficient for the Court to rule.⁶⁹ Defendants would like a full blown evidentiary hearing to present the testimony of at least their expert to provide testimony to support his view on why the State should have utilized a B & A appraisal.⁷⁰ As explained above it is this Court’s view that the appropriate appraisal method is a question to be decided during the just compensation phase.

On December 2, 2021, this Court held a hearing that satisfied the requirements of the good cause hearing. Prior to that hearing the parties developed an accurate record to adequately explain and support their positions. During the December 2, 2021 hearing the parties further explained their positions and left this Court with no doubt that the Court had an adequate record to address all of the issues surrounding the possession issue. Given the Court’s conclusions a full blown evidentiary hearing is not needed by the Court. Therefore Defendants’ request for an evidentiary hearing beyond the present record is Denied.

MOTION TO VACATE THE DEPOSITION OF THE STATE’S EXPERT

Melpar has noticed the deposition of Benjamin Bauer (“Bauer”). Bauer performed the State’s Appraisal in this case. The State has moved to vacate the

⁶⁹ *State v Amin*, 2017 WL 1784187, at 1 fn3 (Del Super., 2007).

⁷⁰ Defendants also wanted to depose the State’s expert undoubtedly to test his view on the proper appraisal method to be used

deposition of Bauer and for a Protective Order.⁷¹ The primary argument set forth by the State in regard to the Motion to Vacate is that, absent a Court Order, Melpar is not permitted to depose Bauer.

The State is correct that the discovery deposition of an expert, absent agreement by the parties, requires a court order. This particular judge has a very broad view of how discovery should be conducted, and absent a compelling reason, will allow a party to pick the method it would like to use to discover the information it is entitled to discover. The reasons advanced by the State as to why the deposition should not occur do not lead me to vacate the deposition of Bauer. To be clear, since I have ordered possession to the State, Bauer's deposition is permitted in the compensation phase. I will allow the deposition of Bauer as outlined below.

Having ordered the deposition, Bauer's deposition and subpoena duces tecum may proceed only in a manner consistent with the terms of Superior Court Civil Rule 26. In other words, Bauer is entitled to reasonable compensation from the party requesting the deposition. The defendants are not entitled to view any draft reports of Bauer. Nor are Defendants entitled to view any communications between DelDOT's counsel and Bauer except to the extent the communications relate to Bauer's compensation, facts or data provided by the attorney that the expert considered informing the opinions expressed, and assumptions provided by the

⁷¹ Melpar originally wanted the deposition completed during the Taking phase of the case. Given the Court's decision on the Motion for an Evidentiary hearing this issue is moot as to the taking phase. However the issue remains as to the deposition for the compensation phase.

attorney that Bauer relied on informing the opinions expressed. Communications solely between the expert and DelDot employees before counsel's involvement are discoverable. Any draft reports authored before the involvement of counsel are also discoverable.

VI. CONCLUSION

For the reasons stated above, it is hereby ordered this 9th day of December, 2021 that:

- a. The Defendants' Motion to Amend its Answer is GRANTED;
- b. The Defendants' Motion for an Evidentiary Hearing is DENIED;
- c. The Plaintiff's Motion for possession is GRANTED;
- d. The Defendants' Motions to Dismiss are DENIED; and
- e. The Plaintiff's Motion to Vacate Deposition is DENIED and the Motion for Protective Order Is GRANTED to the extent outlined herein.

/s/ Francis J. Jones, Jr.
Francis J. Jones, Jr., Judge

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