

**SUPERIOR COURT
OF THE
STATE OF DELAWARE**

CHARLES E. BUTLER
JUDGE

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**Re: *State of Delaware, upon The Relation of the Secretary of the
Department of Transportation v. Hess Retail Stores, LLC, et al.*
C.A. No. N15C-07-208 CEB
Plaintiff's Motion for Entry of Order Allowing It To Enter Into
Possession and Occupy Property To Be Taken In
Condemnation. GRANTED.
Defendant's Emergency Motion to Strike. DENIED.**

Dear Counsel:

Before the Court is the State of Delaware's motion for entry of an Order, pursuant to 10 *Del.C.* § 6110, permitting the State to occupy property to be taken in condemnation. In response, Hess Retail Stores LLC ("Defendant"), the owner and occupier of the property, filed an "Emergency Motion" asking the Court to strike the State's motion and grant leave to conduct discovery. The Court heard argument on the conflicting motions on August 19, 2015.

The State of Delaware Department of Transportation (“DeIDOT”) seeks a temporary construction easement (“TCE”) over 0.0084 acres of land on Defendant’s property, occupied by a gas station and retail market, for the purpose of construction and/or reconstruction on Kirkwood Highway.¹ The State filed its complaint in condemnation, and the “just compensation” for the easement will be determined through the condemnation proceeding. In the meantime, however, the State – as it often does in road construction – feels some urgency in commencing the project. The State’s need to keep moving is recognized in Superior Court Rule of Civil Procedure 71.1 that provides:

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

¹ State Project No. T201200701, HEP NCC, SR2, Wollaston Road to Milltown Road.

² Superior Court Rule of Civil Procedure 71.1 (emphasis added).

In a condemnation proceeding, Rule 71.1 places the burden on 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.”³

The State has complied with the requirements of Rule 71.1 and 10 *Del.C.* § 6110, and has set forth a *prima facie* case of necessity for a public use. Therefore, the only issue before the Court is whether the Defendant has shown good cause why the order of possession should not be entered. At the hearing, Defendant did not argue that there existed good cause why the order of possession should not be entered. Instead, Defendant argued that it should be granted leave to conduct discovery in order to determine if a “good cause” argument exists by examining whether the taking is necessary and whether the State negotiated in good faith. The remainder of Defendant’s arguments focus on the detriment to the Defendant’s business, a consideration that would be relevant if just compensation was an issue presently before the Court.

Our State Supreme Court has ruled that “[w]hen the General Assembly delegates the right of eminent domain to a governmental agency for a public purpose, as it has to DelDOT, it may also delegate to such agency the power of determining what property and how much property is necessary for the purpose. The only limit to that power is that it may not be exercised thoughtlessly or

³ *Id.*

arbitrarily.”⁴ In order to accord proper deference to DelDOT, we must review DelDOT’s “necessity determination for fraud, bad faith, or gross abuse of discretion.”⁵ Even though Defendant conceded that it has no reason to suspect fraud, bad faith, or gross abuse of discretion on the part of DelDOT, they argue that they should be granted leave to take discovery in the hopes of uncovering evidence of fraud, bad faith, or gross abuse of discretion on the part of DelDOT.

The position taken by the defense is completely at odds with the statute and the Court’s rule. The tenor of these laws makes it clear that DelDOT may exercise the State’s powers without delay unless there is some clear showing of irregularity, and the strong presumption is that there was none.⁶ These laws do not allow the property owner to halt the project while it rummages through DelDOT seeking a basis for a naked claim which it cannot even assert in good faith.

We understand completely the Defendant’s concern that DelDOT’s compensation is insufficient, or unjust. But the underlying condemnation proceeding is the forum through which those issues will be fleshed out. DelDOT’s temporary easement allows the project to move forward and leaves the

⁴ *Cannon v. State*, 807 A.2d 556, 560 (Del. 2002) (internal citations and quotation omitted).

⁵ *Id.* (internal citation and quotation omitted).

⁶ Superior Court Rule of Civil Procedure 71.1 (“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”); *Cannon*, 807 A.2d at 560 (“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.”).

compensation issue for another day, exactly as the statutory structure – as we read it – intends.⁷

For the reasons set forth above, Plaintiff's motion is **GRANTED** and Defendant's motion is **DENIED**.

IT IS SO ORDERED.

/s/ Charles E. Butler
Judge Charles E. Butler

⁷ See 10 *Del.C.* § 6110(b).