IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

THE STATE OF DELAWARE, upon relation of the Secretary of the Department of Transportation,	)	
Plaintiff,	)	
v.	)	CA No. 97C-03-042-JEB
CATAWBA ASSOCIATES - CHRISTIANA 71.055 Square Meters or 0.0176 Acre of land,; and Unknown Owners,	)	
Defendants.	)	

Submitted: December 19, 2003
Decided: February 23, 2005

OPINION

Plaintiff's Motion to In Limine.
Granted.

Defendant's Motion in Limine.
Denied.

Appearances:

Mark F. Dunkle, Esquire, Parkowski Guerke & Swayze, P.A., Wilmington, Delaware.
Attorney for Plaintiff.

William D. Bailey, Jr., Esquire, The Bayard Firm, Wilmington, Delaware.
Attorney for Defendant

JOHN E. BABIARZ, JR., JUDGE.

The State of Delaware and Catawba Associates are embroiled in a property valuation dispute arising out of a condemnation action. The State filed a motion *in limine* to preclude the report and testimony of Defendant Catawba's appraisal expert. Catawba filed a cross-motion *in limine* requesting that the Court find its expert report and testimony to be admissible. For the reasons explained below, the State's motion to exclude the expert testimony is granted, and Defendant's motion to admit the same testimony is denied.

FACTS

In March 1997, the State acquired a small portion of a larger parcel of land owned by defendant at the intersection of Route 7 and Churchman's Road in New Castle County for the purpose of improving traffic flow on nearby Route 1. The property taken measured approximately 0.0176 of an acre; i.e., 765 square feet in size and was used to construct a drainage swale. For this parcel Catawba seeks compensation in excess of two million dollars.

Catawba Associates, Christiana, a Virginia-based general partnership, is the owner of the property and derives income from it by way of a lease to Grayling Corporation, which operates a Chili's Restaurant on the site. The income received by Catawba derives from a variable rent lease based on Chili's monthly gross sales.

Before the taking, Chili's was fully visible to north and south bound traffic on

nearby Route 1. After the taking the visibility of the restaurant to north bound traffic was partially obstructed by a highway overpass which was part of the project for which the drainage swale was needed. Access to Chili's and visibility to south bound traffic was unaffected by the taking.

Catawba seeks compensation for the taking pursuant to DEL. CODE ANN. tit. 10, § 6108. In preparation for trial, an expert retained by Catawba, Philip McGinnis, submitted a report based on a leased fee valuation approach. McGinnis concluded that the value of the land was reduced because of lower rental value occasioned by Chili's lower sales after the taking. McGinnis attributed the purported lost sales to the loss of visibility to the property. The appraisal report states that the valuation of loss was calculated "through the [three years of] construction and completion of the intersection improvements."[1]

DISCUSSION

Because Catawba's claim for diminished value is based principally, if not entirely, on the diminished visibility of Chili's to traffic northbound on Route 1, an initial question arises as to whether this type of injury is compensable under the law of eminent domain. If the loss of visibility, had occurred without the taking of property, Catawba would have recourse only to an action for inverse condemnation, where it

[1]McGinnis Report at 78 (Ex. G. to Pl.'s Br. in Opposition to Def.'s motion *in limine*).

would have the burden of proving that a taking had occurred, that is that the diminished visibility had caused a drastic impairment of value.[2]

Catawba has brought no such action and points out that it asserts its claim under DEL. CODE ANN. tit 10, Ch. 61, which governs the compensation to be awarded when the State condemns private property for public use. Catawba stakes its claim on longstanding Delaware law that where the State takes only a portion of a parcel of land, the damages are measured by the value of the whole parcel immediately before the taking and unaffected by the taking and the value of the remaining portion immediately after the taking and as affected by it.[3]

This measure of damages is rooted in the early case of *Whiteman's Ex'x v. The W&S. RRC*.[4] There the highest court in Delaware in a partial taking case allowed damages for "all the consequences" of the taking.[5] This principle entered the modern era in a 1952 decision by Judge, later Chief Justice Herrmann who in *State v. Morris*,[6] instructed the trier of fact in a partial taking case that it should:

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[2] *See Brandywine Transmission Services, Inc. v. State,* 1990 WL 72591 (Del. 1990).

[3] *State v. Rittenhouse,* 634 A2d. 338, 342-343 (Del. 1993).

[4] 2 Harr 514. Del. Ct of Err and App 1839

[5] *Id.* at 324.

[6] 93 A2d. 523 (Del. Super. Ct. 1952).

> take into consideration the benefits and advantages... resulting *from the highway improvement* and... should set off whatever loss detriment or disadvantage the owners have sustained or will sustain by reason of the taking and *the highway improvement*.[7]

Under Delaware law therefore, even though only 765 square feet of land was taken by the State with minimal direct loss to Catawba, it is entitled to damages for "whatever loss, detriment or disadvantage" it has sustained as a result of the entire highway improvement. A loss of visibility to a retail commercial property is manifestly a detriment to the property, and it is thus a factor which can be considered in determining damages.

The State argues that McGinnis' report and testimony are not reliable or relevant because post-taking loss of business by a tenant may not be used as evidence in a condemnation case. The State also argues that inconvenience or minimal changes due to governmental projects such as highway construction are not compensable in a condemnation case. Defendant argues that Chili's post-taking sales are relevant to the determination of just compensation because they demonstrate a decline in the value of the property. The proponent of expert testimony bears the burden of establishing the relevance, reliability and admissibility of the proposed evidence.[8]

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[7] *Id.* at 523 (emphasis supplied).

[8] *Minner v. American Mortgage and Guaranty Co.,* 791 A.2d 826, 843 (Del. Super. Ct. 2000).

Under Delaware law, the issue to be determined at trial is the fair market value of the property at the time of the taking.[9] The owner is not entitled to compensation for the value of the business conducted on the land taken.[10] This rule is based on the fact that the business owner is free to open his or her business in another location,[11] and this is so even if the business cannot be successfully relocated.[12] Evidence regarding the business is relevant only to the extent that it illustrates one of the uses to which the land may be put.[13]

While Delaware courts have allowed the admission of evidence of pre-taking gross sales to help establish economic rent, they have not permitted the introduction of loss sales after the taking to calculate the residual value of the property.[14]

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[9] DEL. CODE ANN. tit. 10, § 6108. *See also Wilmington Housing Auth. v. Harris*, 93 A.2d 518, 521 (Del. Super. Ct. 1952).

[10] *State v. Davis Concrete of Delaware, Inc.*, 355 A.2d 883, 887 (Del. 1976).

[11] Improved Parcel of Land, etc. v. State ex rel. State Highway Department 201 A2d. 453 (Del. 1964).

[12] Restaurants, Inc. v. Wilmington 274 A2d. 132 (Del. 1971).

[13] *Wilmington Housing Auth. v. Harris*, 93 A.2d at 521 (citing 4 Nichols, *The Law of Eminent Domain*, § 13.3 (3d ed. 1995)). Although just compensation for the taking of real property and the taking of a business operation is determined by different valuation measures, the purpose of either award is the same, to make the condemnee whole for the taking of the property. A condemnation award for the taking of real property is based on the value of the property without regard to any potential investment of the proceeds by the condemnee. So, too, a condemnation award for the taking of a business franchise should be made without regard to the future income which may be earned by the proceeds. *City of Newark v. Delmarva Power & Light*, 1991 WL 165853 at **2 (Del. Super.).

[14] *Ableman v. State*, 297 A.2d 380, 383 (Del. 1972).

Nevertheless, Defendant argues that when a tenant operates under a variable rent lease based on sales of the business, the fair market value of the property can and should be calculated on the lost sales of the tenant's business over the years after the taking. The McGinnis appraisal report is based on this method.

Under Delaware law, when land occupied for business purposes is taken by eminent domain, the owner is not entitled to compensation for the taking or even destruction of the business, because the business is entirely distinct from the market value of the land upon which it is conducted:

> While it is proper to show how the property is used, it is incompetent to go into the profits of the business carried on the property. No damages can be allowed for injury to business. The reason is that the constitution and the statutes ordinarily worded require only that just compensation shall be made for the property taken.[15]

Catawba argues that the rule announced in *New Castle County Dept. v. Teachers Insurance and Annuity Association*[16] makes its appraisal admissible. In *Teachers Insurance*, the Supreme Court held that the leased fee valuation approach used by Catawba's appraiser was acceptable in a real estate tax assessment appeal, although the Court also stated that it was not specifically approving or disapproving the approach. Catawba goes on to point out that *Teachers Insurance* ruling was imported into the law

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[15] *Wilmington Hsg. Auth. v. Nos. 312-314 East Eighth Street*, 191 A.2d 5, 11 (Del. Super. Ct. 1963).

[16] 669 A2d. 100 (Del. 1995).

of eminent domain by the Superior Court in *State v. Haskins Revocable Trust,*[17] even though that case did not specifically involve the leased fee method of valuation.

These cases, however, deal only with the methodology to be employed in determining fair market value. They do not explicitly or implicitly alter the substantive law regarding what must be compensated for in a taking by eminent domain. As noted previously, that law precludes recovery for lost income. Clearly Chili's cannot recover for its lost business and could not even if it were the fee simple owner. There is no reason why Catawba is not bound by the same rules.

CONCLUSION

The State's motion in limine is ***Granted*** and Catawba's is ***Denied*** to the extent that Catawba's appraiser relies on evidence of a loss of post condemnation gross sales as a basis for valuation.

It Is So ORDERED.

Judge John E. Babiarz, Jr.

JEB,jr/rmp/bjw
Original to Prothonotary

[17] 732 A2d. 246 (Del. Super. Ct.1997).