2014 IL App (5th) 130347-U

NO. 5-13-0347

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE DEPARTMENT OF TRANSPORTATION, State of Illinois, Plaintiff-Appellee, v. PETROLEUM FUEL AND TERMINAL COMPANY, a Missouri Corporation, Defendant-Appellant (Banque Paribas & Banque Indosuez, Union Electric Company, d/b/a Ameren, and Unknown Owners, Defendants).	)	Appeal from the Circuit Court of St. Clair County. No. 13-ED-1 Honorable Ellen A. Dauber, Judge, presiding.

JUSTICE GOLDENHERSH delivered the judgment of the court.
Justices Chapman and Wexstten concurred in the judgment.

ORDER

¶ 1 *Held*: The Illinois Department of Transportation made a good-faith attempt to purchase property prior to filing for condemnation under the Eminent Domain Act.

¶ 2 Plaintiff, the Department of Transportation, State of Illinois (IDOT), filed a condemnation action against defendant, Petroleum Fuel and Terminal Company, under the Eminent Domain Act (Act) (735 ILCS 30/1-1-1 to 99-5-5 (West 2012)). After a hearing on IDOT's motion for immediate vesting, the court granted quick taking with

compensation in the amount of $63,000. On interlocutory appeal, defendant raises the issue of whether IDOT engaged in good-faith negotiation before filing for condemnation under the Act. We affirm.

¶ 3 FACTS

¶ 4 IDOT desired 0.7208 acres of land owned by defendant for a construction project expanding Illinois Route 3 in East St. Louis. An IDOT form labeled "Negotiator's Report" indicated that an offer was made, both verbally and in writing, in the amount of $33,000. The report was marked as "Negotiations not successful: Unable to agree on compensation for parcel."

¶ 5 The negotiator's report contained a log of contact. According to the report, on August 29, 2012, a representative from IDOT called the offices of defendant, made a verbal offer in the amount of $33,000 for the property, and was asked to mail the offer to the president of defendant. The negotiator placed an entry for the following day:

> "Spoke with [president of defendant] they are not interested in selling any property at that price[.] I suggest they prepare a counter offer. He thought Eminent Domain was the route to go I asked if there was an Attorney I could deal with he gave me [defendant's attorney] phone # I called and left message. Explained 60 Day notice."

The log indicated that the negotiator had telephoned and sent e-mail messages to the named attorney for the defendant several times over the next few weeks, with no

response. On October 12, 2012, the negotiator called the president of defendant stating that defendant's attorney had not responded. The negotiator's report, dated October 17, 2012, referred the matter for condemnation.

¶ 6 On January 30, 2013, IDOT filed a complaint for condemnation. Defendant filed a traverse and motion to dismiss, alleging in part that IDOT had failed to engage in good-faith negotiations. On May 28, 2013, IDOT filed a motion for immediate vesting of title. 735 ILCS 30/20-5-5, 20-5-10 (West 2012). In the motion, IDOT asserted that an appraisal report would be presented at the time of a hearing on the motion.

¶ 7 On June 13, 2013, the court held a quick-take hearing. At the hearing, IDOT submitted a form labeled "Appraisal Report" that placed the value of the property at $63,000. The appraisal report was dated May 24, 2013.

¶ 8 At the hearing, Cheryl Keplar, a civil engineer for IDOT, described how the property was needed for a road extension in conjunction with a new bridge being built over the Mississippi River. On cross-examination, Keplar was asked why the value of the property was higher than the offer:

> "Q. [Attorney for defendant:] Do you have any explanation why during the negotiation phase $33,000 was offered, but the current appraisal was showing the property upwards of $60,000?
>
> A. Yes. Initially an appraisal is completed for the negotiation purposes, and then later on, if it comes to condemnation, we have an updated appraisal

done based on the date of filing of the complaint. So the $33,000 was based on an appraisal that was done early on in the project, and then the second one was done primarily for an update for condemnation proceedings."

Keplar testified that she did not conduct the appraisals and did not know the process the appraiser used for estimating values.

¶ 9 The other witness at the hearing was Michelle Berry, a real estate appraiser with over a decade of experience. Berry initially went to the property with the owner in August 2012 for the initial appraisal, then went back in April 2013 for an updated appraisal. Berry testified that the original appraisal was based on the land only:

"Q. [Attorney for IDOT:] Explain to the [c]ourt, if you would, why you did two appraisals and what it was that may have triggered the need for a second appraisal.

A. I did the original appraisal because we were hired by IDOT to appraise their property. Since the taking was minor, we did it as land only, and then there was a complaint filed for condemnation, and so we did an updated appraisal for that–for that request."

Berry then explained that IDOT needed an updated appraisal because her opinion of the valuation had to be of the particular date that the complaint for condemnation was filed.

¶ 10 Berry explained that the updated appraisal reflected a change in comparable sales premised on the entire property owned by defendant. Berry testified:

"Q. [Attorney for defendant:] Could you explain to the [c]ourt, if you would, what it was that gave rise to your opinion changing and actually increasing to $63,000?

A. In the first appraisal, I was doing it as land only, and I used land sales that were smaller than the subject, and when I was updating it for the complaint, as of this date of January 30, 2013, and I looked at it, and [IDOT] wanted me to do it as the whole property with improvements, I decided to use larger comparable sales. So the difference is the comparable sales changed."

¶ 11 Berry described defendant's total property as 15.8 acres between the Eads and Martin Luther King Bridge with an old warehouse building, some above-ground tanks, and a billboard. In conducting the update, Berry looked at the total property, determined the zoning as heavy manufacturing and industrial, and looked for comparable sales of large tracts of commercial real estate. Berry opined that the fair cash market value for the entire property was $1,650,000. Although Berry did not believe that IDOT's acquisition of the desired section would damage the remainder, she placed the proportional value of that section at $63,000.

¶ 12 The court found that IDOT had a reasonable necessity for a quick taking and set just compensation at $63,000. Defendant filed an interlocutory appeal.

¶ 13 ANALYSIS

¶ 14 The Act has been seen as requiring a governmental authority to engage in

negotiations with a landowner before it can invoke the power of eminent domain. *Forest Preserve District of Du Page County v. First National Bank of Franklin Park*, 2011 IL 110759, ¶ 63, 961 N.E.2d 775. Good-faith engagement is viewed as a condition precedent to initiating condemnation proceedings. *Department of Transportation ex rel. People v. 151 Interstate Road Corp.*, 209 Ill. 2d 471, 480, 810 N.E.2d 1, 6 (2004).

¶ 15 Whether a party negotiated in good faith is generally considered a question of fact. *151 Interstate Road Corp.*, 209 Ill. 2d at 488, 810 N.E.2d at 11. As such, a trial court's determination of good faith will not be reversed unless it is against the manifest weight of the evidence. *151 Interstate Road Corp.*, 209 Ill. 2d at 488, 810 N.E.2d at 11. A judgment of the trial court is against the manifest weight of the evidence only in instances where an opposite conclusion is apparent or when the findings are arbitrary, unreasonable, or not based on the evidence. *City of Chicago v. Zappani*, 376 Ill. App. 3d 927, 932, 877 N.E.2d 17, 22 (2007).

¶ 16 Good faith in the context of condemnation proceedings should not be viewed in the same light as fair dealing in a private sale. An authority armed with the power of condemnation may not simply attempt to reach the best possible deal for the benefit of constituent taxpayers. *City of Naperville v. Old Second National Bank of Aurora*, 327 Ill. App. 3d 734, 739, 763 N.E.2d 951, 955 (2002). In negotiations for a private sale, an owner may simply walk away from the process. In negotiations preliminary to condemnation proceedings, an owner faces the ominous cloud of litigation. The portent

of such an ordeal requires a taking authority attempt to reach a bargain that is in line with the actual value of the property. *Old Second National Bank of Aurora*, 327 Ill. App. 3d at 740, 763 N.E.2d at 956. Thus, the contours of good-faith negotiation are colored by the fair market value of the property.

¶ 17 Normally, an offer congruent with an appraisal is sufficient to establish good faith on the part of a taking authority. *First National Bank of Franklin Park*, 2011 IL 110759, ¶ 63, 961 N.E.2d 775. A taking authority has no obligation to negotiate unilaterally or against itself. *Old Second National Bank of Aurora*, 327 Ill. App. 3d at 741, 763 N.E.2d at 957. Nonetheless, the question of whether a taking authority must continue to engage an owner who has made no counteroffer is not answered by a rigid definition, but must be evaluated under the totality of circumstances. *Zappani*, 376 Ill. App. 3d at 934, 877 N.E.2d at 23.

¶ 18 The Illinois Supreme Court most recently addressed what constitutes good-faith negotiation in *Forest Preserve District of Du Page County v. First National Bank of Franklin Park*, 2011 IL 110759, 961 N.E.2d 775. In *Franklin Park*, a country forest preserve district (District) sought condemnation of approximately 204 acres which included a golf course. Based on a preliminary engineering report obtained by the District, a verbal appraisal estimated the value at $10.3 million. *First National Bank of Franklin Park*, 2011 IL 110759, ¶ 64, 961 N.E.2d 775. After its board of commissioners authorized negotiation, the District offered $9.27 million, giving the owners 10 days to

respond before proceeding to condemnation. The chief negotiator for the District testified that the practice of the District was to make an initial offer 10% below the appraisal value and that he had the authority to go to 10% above the appraised value without any further approval by the board. A few weeks after making the initial offer, the original appraiser verbally updated the value to $11.2 million, but a separate appraiser retained by the District placed the value at $8.99 million. The owners rejected the District's $9.27 million offer and did not respond with any counteroffers. The District sought condemnation.

¶ 19 The supreme court held that the District had negotiated in good faith as a matter of law. In affirming summary judgment entered by the trial court, *Franklin Park* noted that an offer based on the advice of an experienced appraiser generally constitutes good-faith negotiation. *First National Bank of Franklin Park*, 2011 IL 110759, ¶ 63, 961 N.E.2d 775; *151 Interstate Road Corp.*, 209 Ill. 2d at 489-90, 810 N.E.2d at 12; *Trustees of Schools of Township No. 37 v. First National Bank of Blue Island*, 49 Ill. 2d 408, 413-14, 274 N.E.2d 56, 59 (1971). *Franklin Park* distinguished instances where a taking authority had engaged in "egregious behavior." *First National Bank of Franklin Park*, 2011 IL 110759, ¶ 66, 961 N.E.2d 775 (citing *Zappani*, 376 Ill. App. 3d at 931, 877 N.E.2d at 21 ("where the city offered between 45% and 60% of the appraised value"); *Old Second National Bank of Aurora*, 327 Ill. App. 3d at 736, 763 N.E.2d at 953 ("where the city offered less than half of its own appraised value")). The supreme court

concluded that the offer was not " 'a ridiculously low offer without foundation on a take-it or leave-it basis.' " *First National Bank of Franklin Park*, 2011 IL 110759, ¶ 66, 961 N.E.2d 775 (quoting *First National Bank of Blue Island*, 49 Ill. 2d at 414, 274 N.E.2d at 59).

¶ 20 In many ways, IDOT's claim of good-faith bargaining is stronger than the District's in *Franklin Park*. The variance of close to $900,000 between the preliminary estimate and updated appraisal in *Franklin Park* dwarfs the $30,000 difference between appraisals in the case at hand. In contrast, defendant's case rests not on the sum of the variance, but its ratio. IDOT's updated appraisal of $63,000 nearly doubled the $33,000 estimate of initial appraisal issued just a few months earlier. Nonetheless, IDOT presented testimony from its appraiser that the initial assessment used comparables of land-only sales of small acreage because the taking was minor and that once a complaint was filed an updated appraisal based on a proportional valuation of comparable sales of multiacreage property, including improvements in the form of structures, was conducted in contemplation of litigation. See *Department of Transportation v. East Side Development, L.L.C.*, 384 Ill. App. 3d 295, 299, 892 N.E.2d 136, 140 (2008) (imposing unit rule for use of appraisals as evidence of actual value for just compensation). In *Franklin Park*, the District's offer was seen as *bona fide* even though it was based on a preliminary estimate that would not likely have met the rigors of proof for establishing just compensation in condemnation proceedings. Likewise, the record here does not

suggest any bad faith by IDOT in obtaining the initial appraisal. Given the small scale of the property sought by IDOT, the practice seems prudent.

¶ 21 Moreover, compared to *Franklin Park*, the totality of circumstances points more strongly towards IDOT's good faith. Similar to *Franklin Park*, the record indicates that IDOT did not approach negotiation in a take-it-or-leave-it fashion. Unlike *Franklin Park*, however, where the District's offer was 10% less than the preliminary estimate, and close to $2 million less than the updated appraisal, IDOT offered the full amount of the initial appraisal. IDOT's good faith becomes even more apparent when compared to the cases of "egregious behavior" discussed in *Franklin Park*. *Old Second National Bank of Aurora*, 327 Ill. App. 3d at 736, 763 N.E.2d at 953; *Zappani*, 376 Ill. App. 3d at 931, 877 N.E.2d at 21.

¶ 22 In *Old Second National Bank*, the City of Naperville (City) sought property for its downtown river walk. *Old Second National Bank of Aurora*, 327 Ill. App. 3d at 736, 763 N.E.2d at 953. When the City first realized an interest in acquiring the property, it obtained an appraisal of $500,000. The city council authorized $300,000 for its share of the purchase price. Nonetheless, the City's initial offer was $200,000, which the owners rejected. After passing an ordinance authorizing the pursuit of condemnation, the City continued negotiations. Prefacing its further engagement with the threat of condemnation, the City made subsequent offers of $325,000 and $425,000 before finally filing suit. *Old Second National Bank of Aurora*, 327 Ill. App. 3d at 736, 763 N.E.2d at

953.

¶ 23 *Old Second National Bank* held that the City had failed to negotiate in good faith. *Old Second National Bank*'s holding derived from the disparity between the appraised value and the offer made by the City. First, *Old Second National Bank* rejected the City's claim that the low offers were a permissible attempt to protect the interests of taxpayer. *Old Second National Bank of Aurora*, 327 Ill. App. 3d at 740, 763 N.E.2d at 956. *Old Second National Bank* explained that the right of the property owner to fair compensation requires a taking authority to attempt to reach an agreement in accord with the fair market value of the property prior to initiating litigation. *Old Second National Bank* examined previous cases and found that sufficient protections were afforded when offers are tied to an appraised value. *Old Second National Bank of Aurora*, 327 Ill. App. 3d at 741, 763 N.E.2d at 957. The City, however, had not offered an amount commensurate with the appraised value. Furthermore, *Old Second National Bank* noted no reason to conclude that the appraisal of $500,000 had overvalued the property as another party had offered $590,000 for the property. *Old Second National Bank of Aurora*, 327 Ill. App. 3d at 741, 763 N.E.2d at 957.

¶ 24 *Old Second National Bank* also found that the City's conduct was not excused by the lack of a counteroffer by the landowner. Although the City was not obligated to engage in unilateral negotiations after an offer based on the fair market value, the evidence indicated that the offers were well below the value of the property. *Old Second*

National Bank of Aurora, 327 Ill. App. 3d at 741, 763 N.E.2d at 957.

¶ 25 Defendant points to the comment by the trial court judge at the conclusion of the hearing that taxpayers might be pleased that IDOT did not begin negotiations by offering $63,000. Defendant contends that this was contrary to the instruction in *Old Second National Bank* that a taking authority may not bargain the same as in a private sale. The court, however, clearly did not misconstrue IDOT's obligations with those in a private sale. After correctly noting that IDOT was not obligated to start by offering the full amount of its appraisal, the court found that IDOT had actually offered the full value estimated in the initial appraisal but that the changed parameters for the updated appraisal resulted in an increased valuation.

¶ 26 In light of the totality of circumstances, the case at hand stands in stark contrast to *Old Second National Bank.* In *Old Second National Bank*, the City made an offer significantly less than the value of its own appraisal and prefaced continued negotiations with the threat of condemnation. In the case at hand, IDOT offered the full amount of its initial appraisal and defendant declined to engage in further negotiations.

¶ 27 In *Zappani*, the owner possessed title to three parcels of property at different addresses on West Monroe Street in the Central West Redevelopment Area of Chicago. *Zappani*, 376 Ill. App. 3d at 931, 877 N.E.2d at 21. Over the course of a year, the City of Chicago (City) sent the owner separate letters according to a similar form with different offer prices for each parcel. Each letter stated the price of an offer for the parcel. Each

letter stated that if the owner did not respond within 10 days the City would conclude that he was not interested in a voluntary sale and would commence condemnation proceedings. Attached to each letter was a summary statement announcing, " 'The City of Chicago's determination of just compensation is based on its inspection of the subject property and its consideration of two appraisals of the property made independently by competent professional appraisers.' " *Zappani*, 376 Ill. App. 3d at 929, 877 N.E.2d at 20. No appraisals were attached to any of the letters.

¶ 28 Each letter was sent to the owner at the same address via certified mail. *Zappani*, 376 Ill. App. 3d at 928, 877 N.E.2d at 19. Aside from signing the return receipts, the owner did not respond. Furthermore, only one of the receipts was returned within 10 days of the certified mailing. Without any further attempt at communication, the City sought condemnation.

¶ 29 Initially, cases for each parcel proceeded separately with the court ordering the parties to exchange appraisals. The owner filed a traverse and motion to dismiss for each case, and the court consolidated the cases. The City answered that it had fulfilled its obligation to make a *bona fide* offer, but denied any obligation to attach appraisal reports. At a later case management conference, the City submitted appraisals that had been updated to the time of filing the condemnation suits. These updated appraisals placed a value on the property that approximated the value of appraisals submitted by the defendant. *Zappani*, 376 Ill. App. 3d at 931, 877 N.E.2d at 21.

¶ 30 *Zappani* found that the City had failed to engage in good-faith negotiation. *Zappani* noted that the City had "simply sent him the standard form letters" with an offer price substantially below the value of appraisals issued a few month later. *Zappani*, 376 Ill. App. 3d at 933, 877 N.E.2d at 23. *Zappani* noted that the City was not obligated to attach the initial appraisals to the form letters but that such conduct seemed unreasonable given that the methodology of determining the offer price was unclear and the defendant had been given only 10 days to respond. *Zappani* commented that the discrepancy between the initial offer price and the values reflected in the subsequent appraisals was "[m]ost troubling." *Zappani*, 376 Ill. App. 3d at 933, 877 N.E.2d at 23. *Zappani* rejected as lacking credence the City's assertion that the values doubled in the span of less than half a year. The totality of the circumstances displayed a lack of good-faith negotiations given the "the extremely low offers, along with the short period of time the offers remained open and the lack of any appraisal reports provided with the offers." *Zappani*, 376 Ill. App. 3d at 934, 877 N.E.2d at 23.

¶ 31 IDOT's use of appraisals is readily distinguished from *Zappani*. IDOT presented testimony from its appraiser describing both the initial and updated appraisals. In *Zappani*, the City never explained the methodology for determining the offer price and, notably, its appraisers remained "unnamed." *Zappani*, 376 Ill. App. 3d at 933, 877 N.E.2d at 23. Furthermore, unlike *Zappani*, IDOT's appraiser explained that the increased valuation in the updated appraisal was not simply due to a passage of time.

Although IDOT's witnesses testified that a more timely appraisal was needed once litigation commenced, the increased valuation was attributed by its appraiser to an understandable change in comparables. In light of the appraiser's testimony, the offer of the full amount of the initial land-only comparable appraisal of a purchase of less than an acre of property constituted strong evidence that IDOT made a *bona fide* attempt to negotiate purchase of the property before filing suit. The fact that a subsequent appraisal made in contemplation of litigation estimated a proportionally greater value does not undermine this good faith.

¶ 32 Moreover, the totality of the circumstances greatly varies from those in *Zappani*. As the trial court noted, IDOT repeatedly contacted defendant in an attempt to negotiate purchase. In contrast to *Zappani* where the landowner was sent one-time form letters setting a strict deadline of 10 days to respond, the negotiator's report reflects that IDOT set no strict demands on defendant and repeatedly invited response. Indeed, as the trial court observed, from the beginning it was defendant's representatives who indicated that they thought eminent domain was the course to pursue.

¶ 33 Accordingly, the order of the circuit court is hereby affirmed.

¶ 34 Affirmed.