

and Declaration of Taking, pursuant to O.C.G.A. §§ 32-3-4 through 32-3-19.

2. The Petition in Rem: identifies the condemnation is for the construction and maintenance of a public roadway in the City; describes the property to be taken and the interest to be taken; and names Richard R. Beavers the Fulton County Tax Commissioner, and Fulton County Probate Court as person with potential interest in the property.

3. The Declaration of Taking: identifies and attaches the City resolution authorizing the taking, which explains the taking as necessary for a public road project; includes metes and bounds descriptions and identifies the three interests in property to be taken, which are a fee simple right-of-way taking, a permanent easement for the construction and maintenance of slopes, and a permanent easement for construction and demolition; states the sum of money estimated to be just consideration for the land taken; and certifies the necessity of proceeding under O.C.G.A. § 32-3-1 *et seq.*

4. On February 22, 2018, the City deposited funds in the amount of \$358,800.00 in the Court Registry as the estimated just compensation for the land taken.

5. On March 15, 2018, the City moved to amend the Petition and Declaration of Taking to add Randy Beavers Insurance Agency, Inc. as a tenant with potential interest in the property and attach a copy of the plat showing the lands to be taken.

6. The City provided Condemnee Beavers with a copy of the plat showing the lands to be taken and a copy of the appraisal done on the property prior to the City filing the Petition in Rem and Declaration of Taking. (Testimony of Kerry Missel, Hearing Transcript 58:1–8.)

7. The City provided Condemnee Beavers a questionnaire regarding the property at issue in an attempt to gather information relevant to any potential taking. (*Id.* 58:14–23; Plaintiff's Exhibit No. 4, Property Owners' Questionnaire.)

8. The Property Owners' Questionnaire requested information regarding any tenants

occupying the property. (*Id.* 59:24–60:2.)

9. Condemnee Beavers did not identify the Randy Beavers Insurance Agency, Inc. as a tenant in response to this inquiry. (*Id.* 60:3–7.)

10. The required right-of-way line for the public road project touched the building improvements on the parcel at issue. (*Id.* 40:6–8.)

11. The Georgia Department of Transportation mandated demolition of the building as the result of it encroaching the right-of-way. (*Id.* 40: 8–12, 19–21.)

12. The permanent demolition easement is required for the road construction and maintenance project for public purposes. (*Id.* 60:12–18.)

13. The condemned property is being taken for the widening of the street and sidewalk along Sandy Springs Circle. (*Id.* 57:21–26.)

14. The use of the condemned property was for public use only. No other use is contemplated. (*Id.*)

15. No testimony presented at the hearing suggested or identified any non-public use of the condemned property.

16. Ken Cantrell appraised the takings in November 2017 and February 2018 on behalf of City of Sandy Springs. (Testimony of Ken Cantrell, Hearing Transcript 70:20–23.)

17. Cantrell appraised the takings in November 2017 for \$358,800.00. This appraisal evaluated the takings as a fee simple right-of-way taking, a permanent easement for construction and maintenance of slopes, a temporary easement for construction and demolition, and consequential damages. (*Id.* 71:23–72:9; Defendant's Exhibit No. 6, November 2017 Appraisal.)

18. Cantrell appraised the takings in February 2018 for \$354,300.00. (*Id.* 74:22–75:6.)

19. The February 2018 valuation changed because the appraisal considered a

permanent construction and demolition easement, not the temporary easement considered in the November 2017 appraisal. (*Id.* 76:1–6, 77:17–79:7, 87:22–88:2; Plaintiff's Exhibit No. 6, Compensation Summary.)

20. The \$354,300.00 valuation appraised the value of the City's actual taking dated February 22, 2018. (*Id.*)

21. The \$358,800.00 valuation from November 2017 is the highest value appraised for any proposed taking by the City. (*Id.* 87:9–13.)

22. The Condemnees did not produce any testimony of fraud or lack of a public purpose in the taking or use by the City-Condemnor.

CONCLUSIONS OF LAW

Condemnees seek to set aside City of Sandy Springs Declaration of Taking. O.C.G.A. § 32-3-11 authorizes the superior court to set aside, vacate, or annul a declaration of taking under certain restricted circumstances, including fraud or bad faith and/or improper use, abuse, or misuse of the powers under O.C.G.A. § 32-3-11 *et seq.* O.C.G.A. § 32-3-11(b). However, "[t]he power of the court . . . shall not be construed as extending to a determination of questions of necessity, but there shall be a prima-facie presumption that the property or interest condemned is taken for an is necessary to the public use provided[.]" *Id.* § 32-3-11(a); *Emery v. Chattooga County*, 325 Ga. App. 587, 588 (2014). The condemnee "has the burden of proof to show that the taking should be set aside under O.C.G.A. § 32-3-11." *Emery*, 325 Ga. App. At 588. While the Condemnees failed to produce evidence, their arguments fall into two categories: (1) the City failed to strictly conform to the statutory requirements in the Declaration of Taking and (2) the City acted in bad faith and/or abused its powers in condemning a permanent, as opposed to temporary, construction and demolition easement. Neither are availing: (1) the omissions to the original Petition and Declaration of Taking did not prejudice Condemnees, and the City's motion

to amend cured any defect; and (2) Condemnees failed to carry their burden to show bad faith or abuse of the City's power. Accordingly, the Court denies Condemnees' Petition to Set Aside Taking.

O.C.G.A. § 32-3-1 *et seq.* set forth specific information a condemnor must include in a condemnation petition and a declaration of taking. The petition must include:

- (1) The facts showing the right to condemn;
- (2) The property or interests to be taken or damaged;
- (3) The names and residences of the persons whose property or interests are to be taken or otherwise affected, so far as known;
- (4) Descriptions of the persons or classes of unknown persons whose right therein are to be executed or otherwise affected;
- (5) Such other facts as are necessary for a full understanding of the cause;
- (6) A prayer for the judgment of the court in accordance with Code Section 32-3-12 or 32-3-19; and
- (7) The date of the approval of the original location of the highway. (if applicable)

O.C.G.A. § 32-3-5(a). A declaration of taking must include:

- (1) A statement of the authority under which, and the public use for which, such lands are taken;
- (2) A description of the lands taken sufficient for the identification thereof;
- (3) A statement of the real estate or interest in the lands taken for public use;
- (4) A plat showing the lands taken;
- (5) A statement of the sum of money estimated by the condemning authority to be just compensation for the land taken, including consequential damages to land not taken, accompanied by a sworn copy as an exhibit of the appraiser's statement justifying the sum; and
- (6) A certified copy of an order by the commissioner if the property or interest is being condemned for the department or by the county or municipality if the property or interest is being condemned for a county or municipality, finding that the circumstances are such that it is necessary to proceed in the particular case under this article, and specifically authorizing condemnation under this article.

O.C.G.A. § 32-3-6(b). “[T]o insure due process to the property owner,” the condemnor must strictly conform to these requirements. *Dorsey v. Dep’t of Transportation*, 248 Ga. 34, 37 (1981). However, a trial court has the authority to allow a condemnor to amend the petition and declaration of taking if defective. O.C.G.A. § 32-3-17.1; *Dorsey*, 248 Ga. at 37.

The City's original petition and declaration of taking did not include the Randy Beavers Insurance Agency, Inc. as a tenant with a potential interest in the condemned property. The City was required only to set forth the names of those persons with an interest in the property "so far as known." O.C.G.A. § 32-3-5(a)(3). As shown by the testimony of Kerry Missel at the hearing on this matter, based on the questionnaire completed by Condemnees-Beavers, the City had no reason to believe any tenant occupied the property; therefore, the failure to include the tenant was the result of the representations of the Condemnee. The addition of a tenant-Condemnee benefits the Condemnees and the Condemnees benefit from the amended Petition.

Second, the declaration of taking did not include a plat of the property. The City recognized this deficiency and amended the declaration by attaching a copy of the plat as required. This amendment corrects this technical deficiency. The Court here notes that the failure to include the plat in the initial petition did not work any prejudice against Beavers. The petition and declaration of taking included metes and bounds descriptions of the interests to be taken, allowing Beavers sufficient notice and ability to identify the property to be condemned. The plat did not change the property identified. Further, the City had provided Beavers a copy of the plat prior to filing this condemnation proceeding. These facts mitigate any concerns of notice or due process. *See Dorsey*, 248 Ga. at 36.

Condemnees take issue with the City's attempts to cure the above issues in the petition and declaration of taking, citing *Dorsey* to argue that the City cannot amend its petition or declaration of taking. This argument is misplaced. The *Dorsey* Court specifically refrained from making that holding, stating: "[W]e do not hold, as urged by the condemnees, that the only relief available is for the court to vacate and annul the entire proceeding and dismiss the condemnation." *Dorsey*, 248 Ga. at 37. As stated above, a trial court may allow amendment to cure any purported defects in the petition and declaration of taking. *Id.* In order to prevent the

City from “reaping a benefit from having filed a faulty declaration” however, as required by *Dorsey*, the Court will allow the Condemnees to choose between the February 22, 2018 date of initial filing and March 15, 2018 date of amendment as the effective date of the taking for purposes of determining the land valuation and any consequential damages. *Id.* This election is the extent of Condemnees remedy when the condemnor amends the petition and declaration of taking.¹

Similarly, Condemnees failed to demonstrate the City acted in bad faith or abused the condemnation process. Condemnees’ argument that the City taking a permanent construction and demolition easement, as opposed to a temporary easement, is bad faith or abusive has no merit.

The taking of a permanent easement, in and of itself, is not sufficient to show bad faith or abuse of process. *Skipper v. Dep’t of Transportation*, 197 Ga. App. 634, 635 (1990). In *Skipper*, the Court of Appeals declined to adopt the argument of the condemnee that the taking of a permanent construction easement, as opposed to a temporary easement, was an improper use of the condemnor’s powers. *Id.* The Court held that, absent the required showing by condemnee under O.C.G.A. § 32-3-11(b), “the exercise of the right of eminent domain rests largely in the discretion of the authority exercising such right, as to the necessity, and what and how much land shall be taken.” *Id.* Further, “[c]ourts must not substitute their judgment for that of the condemning authority – neither as to the quantum of *interest* to be condemned, nor the location of the quantum of *land* to be acquired.” *Id.* Ultimately, the Court of Appeals held that the record evidence supported the necessity of the permanent easement. *Id.*

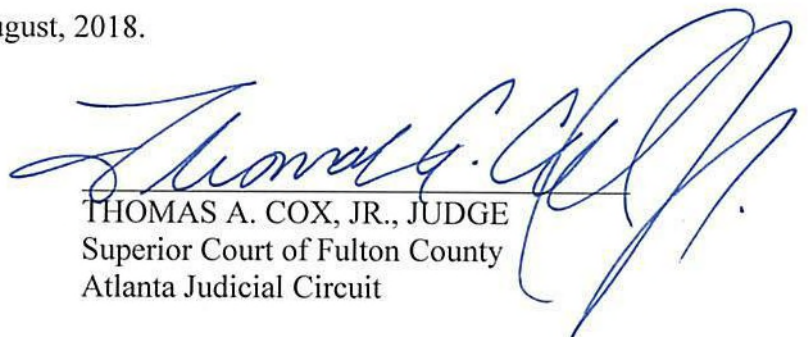
¹ The remainder of Condemnees alleged errors with the City’s petition are unavailing. The petition, by incorporating the City Resolution authorizing the taking, stated the date of approval for the location of the right-of-way and required easements as required by O.C.G.A. § 32-3-5(a)(7). Additionally, O.C.G.A. § 32-3-5(c) applies to the location of a new road or highway; as this taking related to maintenance and improvements to an existing road, the notice provision described are not applicable.

Here, Condemnees provided no record evidence to challenge the necessity of the permanent easement. Condemnees questioned one witness as to the necessity of the permanent easement: City employee Kerry Missel. Missel's testimony established that the permanent construction and demolition easement was required for the public road project. No other testimony contradicted these statements. Accordingly, the Court here will not substitute its judgment for that of the City regarding the necessity of the easement.

Similarly, Condemnees presented no evidence that the monies paid to the Court registry failed to properly reflect the City's estimate of the just and adequate compensation owed for the taking. Condemnees presented no evidence as to valuation other than the testimony of the City's independent appraiser, Ken Cantrell. Cantrell testified that the City has deposited an amount of money *greater* than the amount appraised as just and adequate compensation for the taking that included the permanent construction and demolition easement. There is no record evidence that the City undervalued or improperly valued the taking. If Condemnees wish to contest the City's valuation, the proper avenue for doing so is via their appeal under O.C.G.A. § 32-3-14, not a petition to set aside.

For these reasons, the Court DENIES Richard R. Beavers and Randy Beavers Insurance Agency, Inc.'s Petition to Set Aside Taking under O.C.G.A. § 32-3-11.

SO ORDERED this the 9th day of August, 2018.



THOMAS A. COX, JR., JUDGE
Superior Court of Fulton County
Atlanta Judicial Circuit