

DEPARTMENT OF TRANSPORTATION
DIVISION OF TRANSPORTATION SOLUTIONS

Statutory Authority: 17 Delaware Code, Sections 137 and 145; 29 Delaware Code, Section 8404
(17 Del.C. §§137 & 145; 29 Del.C. §8404)

FINAL

REGULATORY IMPLEMENTING ORDER

2407 Alternative Dispute Resolution Process for Acquisition of Certain Real Property Interests

1. Summary of the Evidence and Information Submitted

The Delaware Department of Transportation sought public comment regarding an alternative dispute resolution procedure to assist in reaching or finally determine the amount of compensation to be paid for the acquisition of real property, when the Department has filed a condemnation action for that acquisition, in the manner otherwise prescribed by 10 Del.C. Chapter 61.

In some instances, the parties involved may find it useful to engage in either a binding or non-binding review of their respective property valuations, using a panel of qualified appraisers for the purpose. The protocols for this alternative dispute resolution mechanism were outlined in the draft regulations, which were published at 18 DE Reg. 545 (01/01/2015).

The Department took written comments on the proposed Regulation for this Alternative Dispute Resolution Protocol for Acquisition of Certain Real Property Interests from January 1, 2015 through January 31, 2015.

The only comments received came from Richard Abbott, Esquire.

His comments are reproduced herein, with the Department's responses for each comment appearing immediately thereafter.

[Abbott] 1.0 - Why limit ADR to certain projects, rather than making it available across the board on all takings? Since it must be agreed to by both sides, DelDOT automatically has the ability to internally require Chief Engineer approval as a prerequisite to agreeing to any ADR.

Response: The limitations on use of this option came from the Department's discussions with the Federal Highway Administration (FHWA).

[Abbott] 2.2 - I would also allow ADR after a party has agreed to a voluntary Right of Entry, not just an Order of Possession, so that no Court filing is necessary just to go to ADR. In fact, DelDOT may be better able to procure a ROE from an owner if it also agrees to ADR at that time. Both sides benefit from possibly avoiding the cost of litigation if the ADR process resolve the Just Compensation issue.

Response: The agreement takes place prior to the Order of Possession, but should not impact a Right of Entry request.

[Abbott] 3.1 - I would leave the ADR option open longer than 45 days after entry of the Order of Possession. If DelDOT or the property owner believe ADR is being requested too late in the process, then all that party has to do is say no to ADR (since it must be mutually agreed to).

Response: The Department agrees to leave the option open for up to 90 days. One risk is that the appraisals and/or other information becomes stale. The intent is to reduce costs to both parties.

[Abbott] 3.3 - Terms DAG and Assistant Director need to be clarified. The terms "DelDOT legal counsel" and "the DelDOT Assistant Director of Planning" would be more clear to a layperson.

Response: Agreed. The wording will change to Deputy Attorney General and DelDOT Chief of Right of Way.

[Abbott] 3.5 - I think it is a bad idea to allow either party to cancel ADR at any time. Once the trigger is pulled, there should be no bailing out.

Response: For the time being, the Department prefers to keep to the original draft language on this issue, until it sees how the process works out in actual cases.

[Abbott] 3.6 through 3.13 - I think a non-binding ADR should be permitted to be conducted by a single appraiser if both parties agree. In Kent and Sussex Counties it would be difficult to get 3 commercial appraisers from the County the property is situated in, as there simply are not that many such appraisers who could or would agree to serve (in my view).

Response: For the time being, the Department prefers to keep to the original draft language on this issue, until it sees how the process works out in actual cases.

[Abbott] 3.7 - The two appraisers selected by the parties should pick the third panel member, who should also be an appraiser. The section as written creates a potential "wild card" situation, where a voluntary trade organization names the likely deciding member of the review panel, who may be a commercial realtor rather than an appraiser.

Response: For the time being, the Department prefers to keep to the original draft language on this issue, until it sees how the process works out in actual cases.

[Abbott] 3.11 - This private meeting with no presentation by the parties is not a good approach in my view; property

owners should be able to present their position verbally and in person to the panel members, whether the ADR is binding or non-binding. Owners want to have an opportunity to be heard by the decision maker(s). A secret process would not likely lead to confidence in the outcome if either side is not happy with the value conclusion.

Response: The intent of the Regulation was to shorten the process. There has been discussion about allowing both sides to present a short summary, and an owners' statement could be permitted. However, the consultation among the appraisers should be private, in order to encourage full debate and discussion. The Regulation will be amended to permit an opening statement by both sides and a statement by the owner. There would be no discovery, testimony, or cross-examinations.

[Abbott] I applaud DelDOT for exploring ADR for Just Compensation purposes. And the fact that DelDOT would pay for the cost of review panel members makes it very fair to property owners.

Response: Thank you for your comment.

[Abbott] I am concerned about how the process would work in practice, as I would expect that DelDOT will pick an appraiser for the panel it thinks is favorable to it and the owner would pick one perceived to be favorable to him or her. This means the Chief of the review panel would likely cast the deciding vote toward the lower DelDOT pick's number or the higher property owner pick's number. The process is fraught with unknowns and risk, which would make it difficult to recommend on a binding basis.

Response: For the time being, the Department prefers to observe how the process works out in actual cases. It remains committed to assuring that property owners' rights continue to be respected by the State in its property acquisition activities.

2. Findings of Fact

The Secretary finds that it is appropriate to amend the existing regulations as proposed, with the exceptions of the non-substantive changes shown in the attached Exhibit A.

3. Decision to Amend the Regulations

For the foregoing reasons, the Secretary concludes that it is appropriate to adopt the **Alternative Dispute Resolution Process for Acquisition of Certain Real Property Interests**.

4. Text and Citation

The text of 2 **DE Admin. Code** 2407 shall be in the form attached as Exhibit "A".

5. Effective Date of Order

The effective date of this Order shall be ten (10) days from the date this Order is published in the Delaware *Register of Regulations*.

IT IS SO ORDERED THIS 2nd DAY OF FEBRUARY, 2015.

Jennifer L. Cohan, Secretary
Department of Transportation

2407 Alternative Dispute Resolution Process for Acquisition of Certain Real Property

1.0 Purpose

The Department may initiate an Alternative Dispute Resolution (ADR) process, at the discretion of the Chief Engineer, on a per project basis to provide a property owner the opportunity to initiate and/or agree to a binding or non-binding review to determine the Just Compensation for the acquisition. This review will be held in an attempt to amicably settle the case without going to a formal court hearing. The results of this review will be either binding or non-binding on either party as they may agree in writing. If non-binding, either party can request the case proceed thereafter to a formal hearing. The results of the non-binding review will be considered privileged information and any part of the review, including value conclusions shall not be admissible in any future valuation hearings by either party.

2.0 Requirements

- 2.1 Both parties must agree to the ADR and the process listed below. Any changes to the process must be approved by both parties and a DAG assigned to the case.
- 2.2 The ADR review can only take place after an Order for Possession has occurred. However, an agreement to proceed to an ADR is allowed at anytime prior to the Order for Possession.
- 2.3 Expenses related to the conducting of the ADR review shall be borne by DelDOT, except for any cost incurred by the defendant, their attorney or witnesses in preparing or presenting their case.

- 2.4 No discovery other than the transfer of appraisals, engineering reports or other documentation typically available during negotiations is allowed.
- 2.5 All information related to the case shall be held as confidential in the non-binding ADR.

3.0 Steps

- 3.1 Upon the entering of an Order for Possession by the Courts, either party (DeIDOT or the owner, or their respective representatives) may request an ADR review. This request must be in writing and may be submitted any time after the initiation of negotiations, but no later than within **[4590]** days of the Order for Possession.
- 3.2 A response to the ADR request must be sent to the requesting party within 15 days of receipt of the request. Non-response by the party receiving the request within the 15 day period shall be construed as a refusal to the request for an ADR review.
- 3.3 All ADR requests or responses to a request made to DeIDOT, or activities/determinations performed by DeIDOT as part of the review process must have approval of the ~~[Assistant Director DeIDOT Chief of Right of Way]~~ with concurrence from a **[DAG Deputy Attorney General]**. In cases with Just Compensation in excess of \$500,000, approval of the Secretary is also required.
- 3.4 If no request is made or response received within the time frames identified, no ADR shall be allowed. If any activity or determination of either party is not performed within the identified time frames during the ADR process, without a written request and agreement for additional time to meet the obligation, the ADR process will be considered canceled by the obliged party.
- 3.5 Both parties shall have the right to cancel the ADR at any time. However if the ADR review is canceled by the property owner less than 30 days prior to the hearing, they shall be responsible for any costs incurred by DeIDOT related to the conducting of the ADR review.
- 3.6 Within 30 days of agreement between the parties to meet, each party shall submit the name of one Delaware Licensed Real Estate Appraiser that is qualified to appraise the property being acquired, who shall act as a review panel member.
- 3.7 The parties shall mutually select a third, independent, qualified member for the ADR review panel. If no agreement for a third member is reached, the parties shall request the Board of Realtors for the County the property is located in to appoint a Delaware Licensed Real Estate Broker, or Delaware Licensed Real Estate Appraiser, whose expertise includes the type of property being acquired, to act as the Chief ADR officer. This person shall be compensated for their time at the review as well as any travel in accordance with DeIDOT's reimbursement for Fee Appraisers.
- 3.8 The Chief ADR Officer will act as the lead for the review panel and will be responsible to prepare the final report.
- 3.9 The date and place of the review shall be arranged between the two parties and the members of the ADR review panel.
- 3.10 All documentation to be supplied by the parties shall be presented to the ADR officers and the opposing party no less than 15 days prior to the review.
- 3.11 The members of the ADR review panel shall meet in private to discuss the merits of each party's appraisal and documentation. **[Prior to this discussion, both sides may make a short opening statement, and the owner may make an owner's statement.]** There will not be any testimony or input required from either party for the review unless requested by the ADR review panel. Copies of any testimony or input required of the parties shall be made available to the opposing party.
- 3.12 The ADR review panel shall then reach a value conclusion based upon the information provided. A majority vote of the members must agree to approve the final value determination.
- 3.13 The Chief ADR officer, with assistance from the other members, shall present a report detailing the determination of value as well as the justification for the determination. The amount of detail required is to be determined by the ADR panel members; however, the report must clearly justify the panel's findings and reference any materials, testimony or input used to arrive at the determination.
- 3.14 The final report shall be transmitted in writing to the parties within 30 days of the review meeting.
- 3.15 If the ADR is a non-binding review, each party shall have 20 days to accept or reject the ADR determination. If both parties accept, the parties shall proceed to settlement. If either party rejects the determination, the case shall continue the normal eminent domain process.
- 3.16 The parties shall notify the other party as well as the ADR of their determination in writing.
- 3.17 Upon final receipt of the ADR report, the ADR review panel shall be dismissed and any compensation will be made to the members.

3.18 The ADR report is considered a protected document and may not be distributed to any party without consent by both parties and the members of the ADR prior to completion of all portions of the real estate transaction or any ancillary activities relating to the real estate transaction.

18 DE Reg. 734 (03/01/15) (Final)