

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Ruth Keene Anderson, :
Marjorie A. Hartley and :
Jocelyn Betty Keene, :
Appellants :
v. :
Karen Hunt and Ronald L. Hunt, : No. 1390 C.D. 2009
husband and wife : Submitted: January 15, 2010

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY

FILED: May 26, 2010

Ruth Keene Anderson, Marjorie A. Hartley and Jocelyn Betty Keene (Appellants) appeal from the order of the Court of Common Pleas of the 17th Judicial District (Snyder County Branch) (trial court) which confirmed the Board of View's (Board) decision regarding the location of a private road under the Private Road Act (Act).¹

Appellants own a landlocked parcel located in Center Township, Snyder County, which is located to the south and east of farmland owned by Karen and Ronald L. Hunt (Landowners).

¹ Act of June 13, 1836, P.L. 551, *as amended*, 36 P.S. §§ 1781-2891.

On June 26, 2008, Appellants petitioned with the trial court pursuant to Section 11 of the Act, 36 P.S. § 2731,² and requested a board of view to lay out a private road to Appellants' landlocked parcel. Appellants proposed a private road that would extend north across the Landowners' farm for a distance of approximately 430 feet and bisect the Landowners' corn field. On July 29, 2008, the trial court appointed the Board which consisted of: (1) a layman; (2) a professionally licensed surveyor; and (3) an attorney.

In lieu of answering the Petition, Landowners wrote a letter and suggested an "alternative route" that would not bisect their cornfield, but would instead run along the perimeter of their property. According to Landowners, they had a longstanding lease with a tenant farmer who rented the field yearly to grow corn. By situating the road around the perimeter of the property less farmland would be consumed.

A view was held on November 21, 2008, at which both parties and Appellants' attorney were present. The Board walked both proposed routes. Immediately following the view, a hearing was held in the jury room of the Snyder

² Section 11 of the Act, 36 P.S. § 2731, provides in pertinent part:

The several courts of quarter sessions shall, in open court as aforesaid, upon the petition of one or more persons, associations, partnerships, stock companies, or corporations, for a road from their respective lands or leaseholds to a highway or place of necessary public resort, or to any private way leading to a highway, . . . direct a view to be had of the place where such road is requested, and a report thereof to be made, in the same manner as is directed by the said act of thirteenth June, one thousand eight hundred and thirty-six.

County Courthouse. At the hearing, witnesses testified, and various documents were introduced as exhibits, including a subdivision plan, several deeds, a road docket page, and a “Survey” of the affected lands, including courses and distances and contour lines. There was no transcript of the view or hearing.³

On March 13, 2009, the Board issued its report and concluded that a private road was necessary pursuant to Section 12 of the Act, 36 P.S. § 2732,⁴ because Appellants’ property was landlocked. As to location of the road, the Board determined that although Appellants’ proposed route was shorter, the Landowners’ alternate route “would [1] allow for better control of surface water and water runoff with the least impact to the land of the owners downgrade and [2] not sever the existing tillable field of the [Landowners] into two.” Board of View Decision, March 13, 2009, at 4.

Appellants filed exceptions and alleged that the Board abused its discretion and erred as a matter of law in selecting the Landowners’ proposed route as the location of the road.

³ Appellants’ counsel explained the reason there was no transcript, “It was a snowy day. We were walking around with boots and snow on the ground. And the testimony was limited.” Oral Argument on Petitioners’ Exceptions to Board of View Report, at 10; Reproduced Record (R.R.) at 72a.

⁴ Section 12 of the Act, 36 P.S. § 2732, provides:

If it shall appear by the report of viewers to the court directing the view, that such road is necessary, the said court shall direct what breadth the road so reported shall be opened, and the proceedings in such cases shall be entered on record, as before directed, and thenceforth such road shall be deemed and taken to be a lawful private road.

After the trial court heard oral argument on Appellants' exceptions on June 17, 2009, the trial court dismissed Appellants' exceptions and confirmed the Board's report. Relying on this Court's decision in In re Private Road in East Rockhill Township, 645 A.2d 313 (Pa. Cmwlth.), allocator denied, 539 Pa. 698, 653 A.2d 1235 (1994), the trial court held that it was apparent from the Board's report that the Board considered all of the factors that it was required to consider under the Act. The trial court noted that it could neither look beyond the record nor consider questions of fact. The trial court concluded that it was required, under this Court's precedent, to affirm the Board's report. This appeal followed.⁵

**Whether the Board Abused its Discretion
in Choosing the Route for the Public Road**

The Survey

On appeal⁶, Appellants contend that the Board's findings are not supported by the record and are contrary to the only land survey presented to the Board during the hearing. They argue that the Board "capriciously disregarded" the Survey. Therefore, there was no competent evidence upon which to base its decision.

⁵ The Landowners did not file a brief with the Court.

⁶ This Court's review of a trial court's decision regarding a board of view's opening of a private road is limited to ascertaining the validity of the trial court's jurisdiction, the regularity of the proceedings, questions of law, and whether there has been a manifest abuse of discretion. In re Laying Out and Opening a Private Rd. in Sullivan Twp., 964 A.2d 495, 499 n.7 (Pa. Cmwlth. 2009).

It is well settled that a board of view has broad authority to determine the location of a private road. Sullivan Twp., 964 A.2d at 504; Mandracchia v. Stoney Creek Real Estate Corp., 576 A.2d 1181 (Pa. Cmwlth. 1990).

The location of the road is wholly within the province of the viewers. **Viewers go upon the premises of a proposed road and observe all the physical aspects of the land** and are far better able to select a location than any judges sitting in the courthouse. The statute gives the viewers power to locate the road. (Emphasis added).

Holtzman v. Etzweiler, 760 A.2d 1195, 1197 (Pa. Cmwlth. 2000) citing In re Private Road in Nescopeck Township, 422 A.2d 199, 202 (Pa. Super. 1980).

Under Section 2 of the Act, the board of view must view the ground and consider four factors before determining the site for a private road: (1) the shortest distance; (2) the best ground for the road; (3) which route would do the least injury to private property, and (4) as far as practicable, the desire of the petitioners:

The persons appointed as aforesaid, shall view such ground, and if they shall agree that there is occasion for a road, they shall proceed to lay out the same, having respect to the shortest distance, and the best ground for the road, and in such manner as shall do the least injury to private property, and also be, as far as practicable, agreeable to the desire of the petitioners.

36 P.S. § 1785 (Emphasis added).

There is no requirement that the Board must rely on a survey of the property. The viewers are restrained to no particular type of evidence. In fact, our

courts have held that the view itself may be evidence to support the Board of View's findings.

In Private Road of Brubaker v. Ruhl, 352 A.2d 566 (Pa. Cmwlth. 1976), this Court explained that the viewers are not restrained to any particular evidence outside of the view:

Ordinarily, in cases of this character, the most valuable evidence can be obtained while the view is being made. At that time, the petitioners can best show what purpose the proposed road is to serve, and, likewise, those opposed can best point out their objections. The sense of sight frequently gathers evidence of more weight than the sense of hearing. 'The viewers are restrained to no particular species of evidence, and may resort to any source of information which they may think proper; even the evidence of their senses.'

Brubaker, 352 A.2d at 568. (Emphasis in original).

Appellants contend that the Board abused its discretion because it “ignored the Survey” and several of the Board’s determinations were “contradicted” by the Survey.

The Least Injury to the Property

First, Appellants argue that the Survey proved that their proposed road was “shorter” and consumed less of Landowners’ cornfield. They assert that the Board’s conclusion that a road around the perimeter of the property caused the “least injury to the property” was not supported by competent evidence.

This Court does not agree that the Survey was the *only* competent evidence upon which the Board could rely. The Board walked the property and

saw for itself the “edges” of the property and the “tillable” field. The Board selected the “edges” of the property for the private road instead of a route across quality crop land. Accordingly, there was evidence to support the Board’s determination, regardless of what the Survey showed with respect to the lengths of the opposing routes.⁷ Brubaker.

The Best Ground for the Road

Next, Appellants assert that the Survey contradicted the Board’s finding that the road proposed by Landowners was the “best ground” because the topographic information contradicted the “steepness” and “runoff and drainage” issues raised by the Board. Specifically, Appellants assert that the Survey proved: (1) Landowners’ proposed route included a maximum grade of 19.3% for 120 feet, whereas the maximum grade of Appellants’ proposed route was 19.2% for only 75 feet; (2) the drainage would be harder to control with the road proposed by the Landowners because the drainage area of 5.6 acres is greater than the 3.9-acre drainage area impacted by Appellants’ proposed route; (3) the route proposed by Appellants was shorter than the route proposed by Landowners by 160 feet; (4) the average slope of Appellants’ proposed route was 12.3% whereas the average slope of Landowners’ proposed route was 17.4%.

Again, the Board walked both proposed routes. The members of the Board observed firsthand all the physical aspects of the land including the contours and steepness of the hills and neighboring property surrounding each proposed

⁷ In response to “argument” that Appellants’ proposed road consumed less crop land, Mr. Hunt, one of the landowners, explained to the trial court that the route he proposed around the **(Footnote continued on next page...)**

route. One of the viewers was a professional licensed surveyor who obviously, based on his credentials, was able to calculate the comparative grades or steepness of the proposed routes and gauge the impact each proposed route would have on surface water, runoff, and erosion controls.

Moreover, while Appellants introduced the Survey into evidence at the Board hearing they did not offer any testimony to explain the exhibit. The first time Appellants raised these questions was before the trial court. Appellants' counsel admitted during Oral Argument on the Exceptions to the Board of View Report, that there was no evidence or argument presented to the Board of View pertaining to what was allegedly shown on the Survey. Counsel for Appellants indicated that he had "no opportunity" to present this to the Board of View. Upon further questioning by the trial court, Counsel for Appellants admitted that he was aware, prior to the view and the hearing from Landowners' letter that the Landowners proposed an alternative route for the Board's consideration.

Q. By the trial court: Now, in your exceptions, Mr. Clark [Appellants' Counsel], you make great argument about average grades and, you know, grades over a short section, a long section. Was this information presented to the Board?

A. By Appellant's Counsel: No. We had --- we had no opportunity. We had no opportunity.

Q. By the trial court: Why didn't you have the opportunity?

(continued...)

perimeter of his property consumed less crop land because his farm tenant did not farm the perimeters of the property which were covered with briar and other vegetation.

A. By Appellant's Counsel: Because --- because those things would have to be -- those things would have to be calculated on --- on ---- you know, by a surveyor. Until you what the route is, how can – until you know what the route is, how can – how can you prepare for that?

Q. By the trial court: You had no knowledge that the Hunts [Landowners] were going to propose an alternative route?

A. By Appellant's Counsel: They never filed an answer. They never – they never filed an answer.

Q. By the trial court: My question is you had no advance notice that they were going to propose an alternate route?

A. By Appellant's Counsel: Well, they did write a letter suggesting that we go out that – that – that we go out that side.

Transcript of Hearing, June 17, 2009, at 14-15.

The Board conducted the requisite view and considered all the necessary factors in determining the location where the road should be opened and its decisions regarding the least injury to the property and best ground for the road. Its decision was supported by competent evidence and did not constitute an abuse of discretion.⁸

⁸ Appellants also argue that the Board's report is deficient as a matter of law because the Board attached a "crude sketch" of the proposed road instead of attaching their Survey. In re Private Road, Cogan Township, Lycoming County, 684 A.2d 237 (Pa. Cmwlth. 1996). First, this issue was not raised in the Statement of Matters Complained of on Appeal and there is no real argument on the point in the Brief. Therefore, it is waived. Even if the issue was preserved it is without merit. The Act requires the board of view to annex a "plot or draft" of the proposed road, which states "the courses and distances." Here, the drawing attached to the Report showed the courses and distance of the road selected by the Board and met the requirements of the Act.

**Whether the Board Erred When it Considered the
Impact of Road on Current Use of Property**

Appellants argue that the Board improperly considered the effect that bisecting the Hunts' field would have on the current use of the property. Appellants contend that this is an issue of damages that should not be considered until after the route is finalized. In Sullivan Twp., this Court held that “[t]he use to which the land being taken has been put goes to the issue of damages, not the propriety of the route chosen, *so long as the choice is otherwise proper.*” Sullivan Twp., 964 A.2d at 505 (Emphasis added) (quoting In re Laying Out of a Private Road (Appeal of Zeafla), 592 A.2d 343 (Pa. Super. 1991)). This Court does not read the Court’s ruling in Sullivan Twp. to mean that a Board may not consider the impact that the proposed road would have on the current use of the land being taken. Indeed, in laying out a private road the board of view must do so “in such manner as shall do the least injury to private property.” 36 P.S. § 1785. The use to which the impacted land has been put may well be relevant in determining the extent of injury to private property when a board of view evaluates the location of a private road. Sullivan Twp. stands only for the proposition that the use to which the land being taken has been put is not be a basis for defeating the location of a private road that is otherwise proper under the Act. In such cases the use will only be considered in assessing damages for the taking.

In this case, however, though the Board relied heavily on the impact that Appellants’ proposed road would have on Landowners’ use of their property to reject Appellants’ proposed route, the Board gave other reasons for its decision. Specifically, the Board found:

The Board has determined that drainage would be harder to control with the road proposed by the [Appellants] and any water would most likely spill over onto the existing road from Scholl Road, and the neighboring Burkholder property, causing erosion. In addition, it was considered that any additional roadway built on the [Appellants'] property which would be steeper than the proposed road, would also contribute to the runoff and ... would be channeled by the proposed roadway.

....

Although the alternative road [proposed by Landowners] is a longer route than [Appellants'] proposed road, at approximately 563 feet, the Board determined that the potential damage caused by water runoff of the alternative road would not be as great as the proposed road. . . . The last 150 feet [of the route proposed by Landowners] would proceed south at a grade of 5% to 11%. This route would allow for better control of surface water and water runoff with the least impact to the land of the owners downgrade and will not sever the existing tillable field of the Landowners into two.

Board of Review Decision, March 13, 2009, at 3-4.

Accordingly, the Board committed no error of law in considering the current use of Landowners' property, as it did not rely exclusively on that use as the basis for its location of the private road.

The Order of the trial court is affirmed.

BERNARD L. McGINLEY, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Ruth Keene Anderson,	:	
Marjorie A. Hartley and	:	
Jocelyn Betty Keene,	:	
Appellants	:	
	:	
v.	:	
	:	
Karen Hunt and Ronald L. Hunt,	:	No. 1390 C.D. 2009
husband and wife	:	

ORDER

AND NOW, this 26th day of May, 2010, the Order of the Court of Common Pleas of the 17th Judicial District (Snyder County Branch) in the above-captioned case is hereby affirmed.

BERNARD L. MCGINLEY, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Ruth Keene Anderson, Marjorie A.	:	
Hartley and Jocelyn Betty Keene,	:	
Appellants	:	
	:	
v.	:	No. 1390 C.D. 2009
	:	Submitted: January 15, 2010
Karen Hunt and Ronald L. Hunt,	:	
husband and wife	:	

**BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE JIM FLAHERTY, Senior Judge**

OPINION NOT REPORTED

**DISSENTING OPINION
BY JUDGE BROBSON**

FILED: May 26, 2010

I respectfully dissent. One of Appellants’ assignments of error in this appeal directly challenges the grounds that the Board of View (Board) used to support its chosen route for the private road—*i.e.*, a comparison of the impact each proposed route would have on surface water, runoff, and erosion controls. Appellants contend that these findings by the Board are not supported by the record and, in fact, are contrary to the only land survey presented to the Board during the hearing. If Appellants are correct in their position, then the Board abused its discretion. *See Lily Penn Food Stores, Inc. v. Pennsylvania Milk Mktg. Bd.*, 472 A.2d 715, 719 (Pa. Cmwlth. 1984) (“To constitute an abuse of discretion, the board must have based its conclusion upon wholly arbitrary grounds, in capricious disregard of competent evidence.”).

The limited record of the Board's proceedings, however, is an impediment to meaningful appellate review of this challenge. This Court has held that a board of view needs to hold a hearing only if necessary and that a view alone is sufficient to support a board's report. *In re Private Road of Brubaker in Buffalo Township, Union County v. Ruhl*, 352 A.2d 566 (Pa. Cmwlth. 1976); *see In re Brinker*, 683 A.2d 966 (Pa. Cmwlth. 1996). In this case the Board held an evidentiary hearing, but there is no transcript of that hearing. During the hearing, the Board heard testimony. It is possible that this testimony included evidence to support the Board's findings. It is also possible, as the Majority Opinion posits, that during the view a member of the Board took measurements and/or made calculations of the impact each route would have on storm water management and erosion controls, which, if made part of the record in the hearing, would support the Board's findings. Without a full record of the proceedings before the Board, however, we can only speculate. The absence of a full record of the proceedings before the Board prevents us from fully evaluating Appellants' claim on appeal.

We cannot, however, simply remand this matter to the Board. "In reviewing the report of a board of viewers, a trial court may confirm it or reject it and direct a review." *Benner v. Silvis*, 950 A.2d 990, 994 (Pa. Super. 2008). The trial court thus had only two options—(1) confirm or (2) reject and direct a new review of Appellants' petition. The trial court confirmed the Board's report. For the reasons set forth above, I would reverse the trial court's order and remand the matter to the trial court to order a new review of Appellants' petition.

P. KEVIN BROBSON, Judge