

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Wiltshire Walk Homeowner's Association, Jonathan Dix, Dale Gardner, Roman Brant, Craig Wright and Mark Kardos	:	
	:	
v.	:	No. 1726 C.D. 2009
	:	
Board of Supervisors of Newtown Township, Bucks County, Pennsylvania,	:	Argued: March 15, 2010
	:	
Appellant	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER**

FILED: May 5, 2010

The Board of Supervisors (Board) of Newtown Township, Bucks County, Pennsylvania (Township) appeals from the order of the Court of Common Pleas of Bucks County (trial court) granting the Motion for Peremptory Judgment (Motion) of Wiltshire Walk Homeowner’s Association, Jonathan Dix, Dale Gardner, Roman Brant, Craig Wright and Mark Kardos (collectively, the Association). The Board argues that the trial court’s order is moot because the Board has formally vacated Upper Silver Lake Road (the Road) during the pendency of this appeal. As to the merits of the appeal, the Board argues that the trial court erred in granting the

Association a writ of mandamus ordering the Board to repair and maintain a portion of the Road, which the Board had effectively closed, but not formally vacated.

The Road is a public road that runs between Lower Dolington Road and Newtown-Yardley Road in the Township. Although it is not explicitly stated in the pleadings, it appears that the Road is one of two routes of access to the Wiltshire Walk Development (Development). As a condition of the approval of the Development, part of the Road was to be closed, except for emergency access.¹ (Complaint ¶ 8, R.R. at 5a; Answer ¶ 8, R.R. at 14a; Board’s Br. at 5.) The conditional approval “further obligated [the Association] to be responsible for maintenance of a portion of the [Road] that was proposed to be closed.” (Complaint ¶ 8, R.R. at 5a; Answer ¶ 8, R.R. at 14a.) In its brief, the Board states that the reason the approval of the Development was conditioned on the closure of the Road was due to the traffic impact that the Development would cause. (Board’s Br. at 5.) The Road is also adjacent to another development, the Villas of Newtown (the Villas). As part of the approval of the Villas, the Villas’ developer (Villas Developer) “agreed to make certain improvements” to the Road as directed by the Board, but did not agree to repair the Road up to the standards required of a Township road.² (Answer ¶ 18, R.R. at 15a.) In 2001 or 2002 (the pleadings

¹ We note that although the Board makes a number of references to the fact that closure of the Road was a condition of the approval of the Development, the Board does not argue that the Association is a successor to the Development’s developer and is, therefore, bound by this condition, or that the Association lacks a right to relief on the basis of this condition.

² The Association avers that the Villas Developer agreed to resurface the Road. (Complaint ¶ 18, R.R. at 6a.)

differ), the Board caused signs to be erected which stated that access was only to be allowed for emergency or authorized vehicles. Later, the Board put up chains and bollards blocking a portion of the Road. Finally, the Board erected earthen barriers preventing access to a portion of the Road measuring approximately 120 feet. In addition, the Board put up a sign designating the Road as “no thru street.” (Complaint ¶ 13, R.R. at 5a.) Before 2009, the Board did not formally vacate the Road; however, the Board did not maintain the Road at the standard that it maintained other Township roads. The Association averred in its Complaint that the Road degraded to the point “that it effectively became mud and grass and was inaccessible under any circumstances.” (Complaint ¶ 14, R.R. at 6a.) The Board admitted that the Road degraded, but did not stipulate the degree of the degradation.

In April 2008, the Board voted to begin securing the easements necessary to preserve the Road as an emergency access way so that the Road could be vacated as a public road. On May 14, 2009, the Association filed its Complaint with the trial court. After the Board filed its Answer and New Matter and the Association filed its Reply to New Matter, the Association, on July 15, 2009, filed its Motion. The parties presented briefs to the trial court on the Motion. On August 6, 2009, the trial court issued an order directing that:

1. [The Board] shall immediately commence the repair and maintenance of [the closed portion of the Road];
2. [The Board] shall, within thirty (30) days from this date, repair and maintenance having been completed, open said roadway to all public travel, removing any signage that would purport to limit access, and removing any obstructions to full access of said roadway;
3. The Board . . . [is] hereby directed to keep said roadway in good repair and reasonably clear of all impediments to easy and

convenient travel to ensure that [the Road], in its entirety, is kept in good maintenance and repair, so as to permit full, public travel along the length thereof.

(Order at 1.) In its opinion, the trial court explained that the Board had a duty to maintain the Road pursuant to Section 2308(a) of the Second Class Township Code³ (Code). (Trial Ct. Op. at 11-12.) The Board appealed to this Court.

On December 2, 2009, after the Board had filed its brief with this Court, the Board adopted Ordinance 2009-0-2 (the Ordinance). The Ordinance vacated the portion of the Road at issue in this case. The Association challenged the Ordinance on the grounds that it serves no legitimate governmental purpose, was passed only to escape the obligation imposed by the trial court's order in this case, and that the vacation of the Road is not consistent with the Road's purpose as a collector road. The Board filed an application (Application) with this Court requesting that the trial court's order be vacated and the appeal dismissed as moot because the Road had been vacated. By order dated February 2, 2010, this Court ordered that the Application be argued with the merits of the appeal.

Before we reach the Board's argument that the trial court's order should be vacated as moot, we will first address the merits of the appeal.⁴ Before this Court,⁵

³ Act of May 1, 1933, P.L. 103, as amended, added by Section 1 of the Act of November 9, 1995, P.L. 350, 53 P.S. § 67308(a). Section 2308(a) provides that “[p]ublic roads in townships shall, as soon as practicable, be effectually opened. All public roads shall at all seasons be kept in repair and reasonably clear of all impediments to easy and convenient traveling at the expense of the township.” Id.

⁴ Because we ultimately determine that we must remand this matter to the trial court to determine whether the trial court's order is moot in light of the Ordinance and the outcome of the

the Board argues that the trial court erred as a matter of law or abused its discretion by: (1) ordering the Board to repair the Road within 30 days when the Board cannot do so due to competitive bidding requirements; (2) failing to recognize the authority of the Board to temporarily close the Road due to conditions rendering the Road unfit or unsafe for travel; (3) disregarding the fact that the Board had begun taking action to formally vacate the Road; and (4) granting peremptory judgment on the pleadings without a factual record upon which to base its determinations. The Association, for its part, asks this Court to find that the Board's appeal is frivolous and to award fees and costs to the Association.

The Board argues that the trial court erred as a matter of law in imposing a 30-day time limit within which the Board must repair the Road because this time limitation does not give the Board enough time to comply with the competitive bidding requirements of the Code or to practicably complete the repairs. The Association argues that the Board waived this issue by not raising it before the trial court.

challenge thereto, we will, in the interests of judicial economy, address the merits of the trial court's order to ensure that it was correct when issued.

⁵ Peremptory judgment in a mandamus action is the equivalent of summary judgment in other cases. General Motors Corp. v. State Board of Motor Vehicle Manufacturers, Dealers and Salespersons, 511 A.2d 249, 255 (Pa. Cmwlth. 1986). "Summary judgment may be granted only when the facts demonstrate clearly that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Gontarchick v. City of Pottsville, 962 A.2d 703, 705 n.3 (Pa. Cmwlth. 2008), appeal granted, ___ Pa. ___, 987 A.2d 638 (2009). This Court's "standard of review is whether the trial court committed an error of law or abused its discretion." Id.

Generally, “[i]ssues not raised in the lower court are waived and cannot be raised for the first time on appeal.” Pa. R.A.P. 302(a). The Board raised the issue of whether the 30-day timeframe is legally or practically feasible in its Statement of Matters Complained of on Appeal. An issue is generally waived if it is raised for the first time in a statement of matters complained of on appeal. Clayton v. City of Philadelphia, 910 A.2d 93, 98 n.10 (Pa. Cmwlth. 2006). However, the Supreme Court has held that, where a party has not had an opportunity to “fully and fairly” address an issue before a trial court, strict compliance with Rule 302 is not required. Cagnoli v. Bonnell, 531 Pa. 199, 202, 204, 611 A.2d 1194, 1195-96 (1992). From the record before this Court, it is not clear that the Board had a full and fair opportunity to argue the practicable and legal feasibility of a 30-day timeframe within which it would have to repair the Road if the Association were successful.

The Association asserts that it was clear that the 30-day timeframe was at issue in the Motion such that the Board should have been expected to argue against it. The Motion states that “Plaintiffs move the Court for peremptory judgment in the form of the Order appended hereto.” (Motion ¶ 1, R.R. at 25a.) However, a review of the original record does not reveal any proposed order appended to the Motion.⁶ In resolving the question of whether the Board waived the issue of the

⁶ We note that a proposed order is included in the copy of the Motion in the reproduced record; however, this proposed order does not appear with the Motion in the original record. Additionally, the trial court’s opinion states that “[t]here was nothing in Defendant’s Brief in Opposition to Plaintiff’s Motion . . . , and this Court did not hear any reason, to suggest that thirty days is an impossible amount of time within which to reopen the Road.” (Trial Ct. Op. at 6-7.) It is not clear from this statement, however, that the Board was aware that the trial court was contemplating a 30-day timeframe prior to the trial court’s order.

legality of the 30-day timeframe, this Court is cognizant that a court may not, through a writ of mandamus, compel a defendant to commit an illegal act or violate a statute. Jamieson v. Pennsylvania Board of Probation and Parole, 495 A.2d 623, 625-26 (Pa. Cmwlth. 1985). In addition, the action compelled by a writ of mandamus must be within the defendant's legitimate power. Quail v. Commonwealth, 315 A.2d 660, 662 (Pa. Cmwlth. 1974). Therefore, given the lack of clear evidence in the record to support the Association's argument that the Board waived this issue, we will not find waiver.

Because we do not find waiver, we will address whether the 30-day time limit ordered by the trial court within which the Board must repair the Road, gives the Board time to comply with the competitive bidding requirements of the Code or to practicably complete the repairs. Section 3102(a) of the Code⁷ states that:

All contracts or purchases in excess of the required advertising amount of ten thousand dollars (\$10,000), except those specifically excluded, shall not be made except with and from the lowest responsible bidder after due notice in one newspaper of general circulation in the township. The notice for bids shall be published ***at least two times at intervals of not less than three days*** in daily newspapers or once a week for two successive weeks in weekly newspapers. The first advertisement shall be published ***not more than forty-five days***, and the second advertisement ***not less than ten days***, before the date set for the opening of bids. Notice of proposed contracts or purchases shall also be posted where the board of supervisors normally meets or in a conspicuous place within the township. Any published notice for bids shall contain full plans and specifications, or refer to the places where copies thereof can be obtained, state the amount of the performance bond determined under subsection (g) and give the date, time and place of a meeting at which

⁷ Added by Section 1 of the Act of November 9, 1995, P.L. 350, as amended, 53 P.S. § 68102(a).

an individual or committee appointed by the board of supervisors or the board of supervisors will open and read the bids.

53 P.S. § 68102(a) (emphasis added). The Board argues that, pursuant to this provision, the advertisement process for bids could not take less than 45 days. We disagree. While Section 3102(a) states that the first advertisement for bids may not be published *more* than 45 days before the opening of bids, the first advertisement may be published as few as three days before the second advertisement, and the second advertisement may be published within as few as ten days from the date of the opening of bids. Thus, under Section 3102(a), it appears that the bidding process may take place in as few as 14 days.

However, it also appears likely that, as the Board argues, it could not practicably prepare specifications for bids, analyze bids, prepare a contract, and have the Road repaired within 30 days. Unfortunately, no facts regarding these issues were developed before the trial court because the trial court granted the Association's Motion before a factual record could be developed. Similarly, there are no facts in the record regarding the Association's argument that the Board's employees could complete the repairs or that the Villas Developer would have to make the repairs or shoulder the cost for them. "It is a fundamental principle that mandamus will not issue, as a rule, where it is apparent that the writ will be futile or ineffectual by reason of the inability of the respondent to comply therewith." Commonwealth ex. rel. McLaughlin v. Erie County, 375 Pa. 344, 350, 100 A.2d 601, 604 (1953). We, therefore, must vacate the trial court's order insofar as it orders the Board to complete repairs and reopen the Road within 30 days, and remand this case to the trial court to determine whether the 30-day timeframe is

practicable and, if not, within what period of time the repairs could reasonably be completed.

Next, we address the Board's argument that the trial court erred by disregarding the Board's authority under Section 2308(b) of the Code, 53 P.S. § 67308(b), to "temporarily close any public township road when it determines that conditions have rendered the road unfit or unsafe for travel, and where immediate repair or maintenance is impractical." (Board's Br. at 21 (citing Frisch v. Penn Township, Perry County, 662 A.2d 1166 (Pa. Cmwlth. 1995).)⁸ We disagree. Section 2308(b) states that:

The board of supervisors may *temporarily* close any township road when it determines that conditions have rendered that road unfit or unsafe for travel and immediate repair or maintenance, because of the time of year or other conditions, is impracticable. The road or portion of road closed shall be properly marked at its extremities, and a means of passage for the customary users of the road shall, when possible, be provided.

53 P.S. § 67308(b) (emphasis added). The closure of the Road in this case cannot be characterized as "temporary." The parties agree that the Road has been closed since at least 2002. This Court does not believe an eight-year closure may, in the absence of any explanation or extenuating circumstances, be characterized as temporary. In addition, the Board erected earthen barriers at either end of the closed portion of the Road. Such a step is indicative of a permanent, not a temporary closure.

⁸ The Association argues that the Board waived this issue before the trial court; however, the Board quoted and made arguments regarding Section 2308(b) in its brief to the trial court in opposition to the Association's motion for peremptory judgment.

The reason the Board cites for the Road's closure is that it originally intended to vacate the Road, and that closure of the Road was a condition of the approval of the Development because the Road was not able to provide an adequate level of service during peak traffic times. The Board argues that repair and maintenance of the Road were impractical because such repair and maintenance would cost upwards of \$100,000.00 and the Board intended to vacate the Road. However, this figure is what the Board argues it would currently cost to repair the Road and the Board does not explain why it was impracticable to repair or maintain the Road at the time the Board closed the Road. Additionally, the Board does not explain why, if it was closing the Road under the authority of Section 2308(b), it did not provide "a means of passage for the customary users of" the Road. 53 P.S. § 67308(b). For these reasons, we do not find that the Board closed the Road pursuant to its authority under Section 2308(b). Accordingly, we hold that the trial court did not err by declining to find the Road to be temporarily closed pursuant to Section 2308(b).

We next address the issue of whether the trial court's order constituted an error of law where the Board had begun taking action to formally vacate the Road prior to the filing of the Complaint. The Board argues that the current case is similar to Frisch, in which this Court upheld a trial court order directing a board of supervisors to repair and reopen a road only after a developer of adjoining land resolved a drainage problem that had caused the damage to the road in the first place. The Board also argues that, had the trial court given the Board six months to either repair the Road or vacate the Road, the trial court would have protected both the Association's interest in having the Road repaired if it was not going to be

vacated, and the Board's interest in not expending large sums of money on a road it intended to vacate.

The current case is distinguishable from Frisch.⁹ In that case, a developer sought, through mandamus, an order directing the defendant board of supervisors to repair and reopen a road that had been closed due to runoff from the developer's own development. This Court upheld the denial of mandamus relief because the developer had caused the damage to the road and refused to prevent further similar damage by submitting a storm water management plan for the development. Moreover, even though the road in Frisch was closed, residents were still allowed to drive over it. In this case, however, the Board has permanently blocked the Road, going so far as to put up an earthen barrier blocking access to it. The Board itself admits that it has a duty to maintain Township roads that are open and have not been vacated. (Board's Br. at 16-17.) Moreover, it is understandable that the trial court did not wish to give the Board more time when the Road had been closed since 2002 and the Board did not begin taking steps to formally vacate it until 2008. We, therefore, hold that the trial court did not abuse its discretion with regard to this issue.

We next address the Board's argument that the trial court erred in granting the Motion based on the parties' pleadings and briefs without allowing for a further development of the factual record. As discussed above, there are not sufficient facts in the record to determine whether the Board could practicably have the Road

⁹ We note that Frisch was decided under former Section 1110 of the Code, 53 P.S. § 66110, repealed by Act of Nov. 9, 1995, P.L. 350; however, the language of Section 1110 was almost identical to that of Section 2308(b).

repaired and reopened within 30 days; therefore, the trial court erred in making a determination on this issue without taking evidence. However, with regard to the Board's duty to maintain the Road, the relevant facts were admitted by the Board in its Answer. Section 2308(a) provides that "[p]ublic roads in townships shall, as soon as practicable, be effectually opened. All public roads shall at all seasons be kept in repair and reasonably clear of all impediments to easy and convenient traveling at the expense of the township." 53 P.S. § 67308(a). The Board admitted that the Road remained "designated as a public roadway on all records of Newton Township" and that "[n]o ordinance was ever enacted that . . . closed any portion of" the Road. (Complaint ¶¶ 4, 10, R.R. at 4a-5a; Answer ¶¶ 4, 10, R.R. at 13a-14a.) The Board also admitted that the Road was not being maintained up to the standard of other Township roads and that earthen barriers had been put up preventing access to the Road. (Complaint ¶ 13, R.R. at 5a; Answer ¶¶ 13, 20, R.R. at 14a-15a.) Therefore, the facts necessary for the trial court to determine that the Board had a duty to repair and reopen the Road, pursuant to Section 2308, were admitted in the pleadings.

We next address the Board's argument that, because the Ordinance vacated the Road, any duty the Board may have had to maintain the Road no longer exists and the trial court's order should, therefore, be vacated as moot. The Association argues that the trial court's order is not moot because it has filed a challenge to the Ordinance and, if that challenge is successful, the Board will still have a duty to maintain the Road. This Court has stated that it generally does not decide moot issues and that an issue may "become moot during the pendency of an appeal due to an intervening change in the facts of the case or due to an intervening change in

the applicable law.” Picone v. Bangor Area School District, 936 A.2d 556, 560 n.4 (Pa. Cmwlth. 2007) (citing In re D.A., 801 A.2d 614, 616 (Pa. Super. 2002)). However, given the pending challenge to the Ordinance, it is not clear whether the issue in this case is truly moot and will remain moot. If the Ordinance is valid, then the Board does not have a duty to maintain and repair the Road and the trial court’s order is moot.¹⁰ With the exception of the 30-day timeframe, however, the trial court’s order was correct when it was decided and, if the Ordinance is not valid, the Board still has a duty to repair and maintain the Road. Therefore, we will not vacate the trial court’s order as moot, but will remand this case to the trial court to consider the impact of the Ordinance and the outcome of the challenge to the Ordinance.¹¹

Finally, we address the Association’s argument that the Board’s appeal is frivolous and that this Court should award fees and costs to the Association. Pursuant to Rule 2744, this Court may award attorney’s fees where we determine “that an appeal is frivolous or taken solely for delay or that the conduct of the participant against whom costs are to be imposed is dilatory, obdurate or vexatious.” Pa. R.A.P. 2744. An appeal is frivolous when it lacks any reasonable

¹⁰ We note that counsel for the Association agreed at oral argument that, if the Ordinance was valid, the Association would not expect the Board to spend the money to repair the Road.

¹¹ Such an outcome is not unprecedented. In Meixell v. Borough Council of Borough of Hellertown, 370 Pa. 420, 88 A.2d 594 (1952), the Supreme Court initially reversed a trial court’s decision that had dismissed a complaint in mandamus. The Supreme Court held that the trial court erred in dismissing the complaint and essentially granted peremptory judgment. Id. at 428, 88 A.2d at 597. However, when the defendant in that case petitioned the Supreme Court arguing that it had a defense to the complaint, the Supreme Court issued a supplemental opinion amending its order, still reversing the trial court, but remanding the matter to the trial court for further proceedings. Id. at 434, 88 A.2d at 600.

basis in law or fact. Greenfield Township Municipal Authority v. D.R. Burket Trust, 959 A.2d 522, 528 (Pa. Cmwlth. 2008). We believe that there is a reasonable basis in the law and the record for the Board's appeal. Notably, we are vacating the trial court's decision, in part, regarding the 30-day timeframe within which the Board is to repair the Road. Therefore, we conclude that the Board's appeal is not frivolous, and we decline to award fees and costs to the Association.

For these reasons we vacate the order of the trial court insofar as it directs that the repair and reopening of the Road must be completed within 30 days. We affirm the trial court's order in all other respects and remand this matter to the trial court to consider whether its order is moot in light of the Ordinance and the outcome of the challenge to the Ordinance. If the trial court determines that its order is not moot, we direct the trial court to take evidence and make factual findings on the issue of the timeframe within which the Board must repair and reopen the Road.

RENÉE COHN JUBELIRER, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Wiltshire Walk Homeowner's Association, Jonathan Dix, Dale Gardner, Roman Brant, Craig Wright and Mark Kardos	:	
	:	
v.	:	No. 1726 C.D. 2009
	:	
Board of Supervisors of Newtown Township, Bucks County, Pennsylvania,	:	
	:	
Appellant	:	

ORDER

NOW, May 5, 2010, the order of the Court of Common Pleas of Bucks County (trial court) in the above-captioned matter is hereby **VACATED**, in part, insofar as it directs the Board of Supervisors of Newton Township, Bucks County, Pennsylvania (Board) to make repairs to and reopen the closed portion of Upper Silver Lake Road within 30 days; the order is **AFFIRMED** in all other respects. The above-captioned matter is hereby **REMANDED** to the trial court to determine whether that court's order is moot in light of Newton Township Ordinance 2009-0-2 and the outcome of the pending challenge to that Ordinance. If the challenge to the Ordinance is successful, the trial court shall take evidence and make factual findings limited to the 30-day timeframe within which the Board may practicably repair and reopen the closed portion of Upper Silver Lake Road.

Jurisdiction relinquished.

RENÉE COHN JUBELIRER, Judge