IN THE COMMONWEALTH COURT OF PENNSYLVANIA

FPM Development, LLC, Appellant	:	
v.	:	No. 55 C.D. 2011
	:	Argued: September 13, 2011
The Borough of Coopersburg and Municipal Authority of the Borough of Coopersburg	:	

BEFORE: **HONORABLE BONNIE BRIGANCE LEADBETTER,** President Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER **FILED: October 28, 2011**

FPM Development, LLC (FPM) appeals from the December 15, 2010 order of the Court of Common Pleas of Lehigh County dismissing FPM's petition for appointment of a board of viewers for an alleged *de facto* taking by Appellees the Borough of Coopersburg and the Municipal Authority of the Borough of Coopersburg (collectively, "Coopersburg"). We affirm.

In October 1970, Coopersburg entered into an agreement with Upper Saucon Township and Upper Saucon Township Municipal Authority (collectively "Saucon") allowing Coopersburg to connect its sewer system to Saucon's sewer system. The agreement set limits on the amount of sewer inflow from Coopersburg into Saucon's sewer system during peak flow conditions.

In February 1996, Saucon imposed a moratorium on all new sewer connections within Coopersburg because inflow from the Coopersburg sewer system into the Saucon system regularly exceeded the maximum amount of inflow allowed under the 1970 agreement. Pursuant to that agreement, Saucon sought arbitration with Coopersburg to address its dispute over the sewer inflow problem. Under a May 8, 2003 award, confirmed by a September 24, 2003 common pleas court order, Coopersburg was required in good faith to take all appropriate steps to accelerate the elimination of excess infiltration and inflow from its system into the Saucon system and to complete its remedial efforts by the end of 2004.

In June 2003, FPM purchased an 8.5970-acre tract within Coopersburg with the intent of creating a residential development. The former owner had obtained conditional final approval in June 2002 to construct twenty-seven single homes on the lot. Pursuant to that conditional final approval, FPM had to obtain permits from Coopersburg to connect the proposed homes to Coopersburg's sewer system. When FPM purchased the property, it was aware of both the moratorium and the arbitration award requiring that repairs to Coopersburg's system be completed by the end of 2004. Expecting that Saucon would remove the moratorium by 2005, FPM intended to commence construction at that time. Notwithstanding Coopersburg's efforts after the arbitration award to repair its sewer system, Saucon has yet to remove the moratorium.[1]

[1] The common pleas court noted a recent agreement between Coopersburg and Saucon establishing deadlines for Coopersburg to complete corrective measures set forth in its October 2006 Corrective Action Plan (CAP) submitted to DEP. Therein, the parties agreed that the necessary repairs to the Coopersburg system should be completed by the occurrence of ten significant storm events that produce peak flows in excess of 1.4 million gallons per day at Coopersburg's metering station, or by December 20, 2011, whichever is later. Also pursuant to **(Footnote continued on next page…)**

In February 2007, FPM filed a petition for appointment of board of viewers, alleging that Coopersburg's failure to correct the inflow problem made development of its property impossible, which amounted to a *de facto* taking. In March 2007, Coopersburg filed preliminary objections to FPM's petition alleging, *inter alia*, that there was insufficient evidence that FPM had proven a *de facto* taking of its property.

Relying upon the parties' stipulated factual record, the trial court sustained Coopersburg's preliminary objection that its actions did not constitute a *de facto* taking, dismissed FPM's petition for appointment of a board of viewers and dismissed the remaining preliminary objections as moot. Common Pleas relied heavily on *Appeal of Jacobs*, 423 A.2d 442 (Pa. Cmwlth. 1980), in which we affirmed a determination that there was no *de facto* taking.

In *Jacobs*, the property owners experienced serious and excessive drainage problems attributable to a change in natural topography caused by the upstream erection of a high school, a retirement home and several single residential homes. The Jacobs alleged a *de facto* taking, maintaining that the township unlawfully issued the building permits, improperly approved the subdivision and wrongfully contributed to the design of the drainage plans for the high school. We agreed that there was no *de facto* taking, concluding that the township's actions were insufficient to demonstrate an actionable exercise of its power of eminent domain. We observed that courts were more likely to find a taking where the government's action complained of was purposeful and deliberate, such as the

---

(continued…)

that agreement, Saucon withdrew its appeal from DEP's approval of the CAP. The agreement, however, does not address the question of when Saucon would lift the moratorium.

drainage plans at issue in *Greger v. Canton Township*, 399 A.2d 138 (Pa. Cmwlth. 1979). In *Greger*, we affirmed the determination that there had been a *de facto* taking, noting the court's finding that the flooding of the Gregers' property was the direct and necessary consequence of the township's drainage plans. Specifically, the township had permitted the installation of septic tanks on properties too small to accommodate them, improperly maintained the streets bordering upon and bisecting the Gregers' tract and opened ditches to channel sewage effluent from adjoining streets and properties onto their land.

The common pleas court distinguished *Greger* from the present case and found *Jacobs* to be analogous, reasoning that Coopersburg's actions similarly were not purposeful and deliberate because it had made good faith efforts to abide by the arbitration award and correct the problem. The court concluded that FPM's harm was merely the unintended consequence of Coopersburg's inability to adequately repair its sewer system despite its efforts, and not related to or incidental to its condemnation power. FPM's appeal is now before us.

Section 502 of the Eminent Domain Code, 26 Pa. C.S. § 502, provides that an individual may petition for the appointment of viewers seeking compensation for an injury to property where no declaration of taking has been filed. A property owner in these cases bears a heavy burden of proof. *Genter v. Blair County Convention & Sports Facilities Auth.*, 805 A.2d 51 (Pa. Cmwlth. 2002). Although there is no bright-line test to determine whether governmental action has resulted in a *de facto* taking and each case must be decided on its own facts, *McElwee v. Southeastern Pennsylvania Transportation Authority*, 596 Pa. 654, 948 A.2d 762 (2008), "[a] *'de facto* taking' occurs when an entity clothed with the power of eminent domain has, by even a non-appropriative act or activity,

substantially deprive[d] an owner of the beneficial use and enjoyment of his property." *Genter*, 805 A.2d at 55. In *Jacobs*, we defined the elements that a property owner must allege and prove to establish a *de facto* taking: 1) condemnor has the power to condemn the land under eminent domain procedures; 2) exceptional circumstances have substantially deprived him of the use and enjoyment of his property and, 3) the damages sustained were the immediate, necessary and unavoidable consequences of the exercise of the eminent domain power. Additionally, we noted that when determining whether a *de facto* taking has occurred, one must focus on the governmental action in question. *Id*. Finally, we observed that where injuries result from the negligence of a condemning body's agents, there is no *de facto* taking. *Id*.

FPM argues that the common pleas court erred in relying upon *Jacobs*. To the contrary, FPM maintains that a *de facto* taking resulted from Coopersburg's purposeful and deliberate adoption and implementation of a plan to repair its sewer system, not from any potentially negligent repair efforts. FPM further asserts that the borough parties made selections from various repair options, with the one chosen and implemented still inadequate to end the moratorium.

We agree with the common pleas court that Coopersburg's actions were not related to or incidental to its condemnation powers.[2] Further, we agree that Coopersburg did not act in an unreasonable manner, let alone purposefully and

[2] Although the common pleas court did not make a direct determination, Coopersburg most likely was exercising its police power in attempting to repair its existing sewage system. *See McNaughton Co. v. Witmer*, 613 A.2d 104, 108 (Pa. Cmwlth. 1992) (holding that "[t]here can be no doubt that the adequate disposal of sewage affects the health and welfare of the public and is therefore subject to regulation by the government pursuant to the police power.") Reasonable exercises of police power do not constitute unconstitutional takings. *Estate of Blose ex rel. Blose v. Borough of Punxsutawney*, 889 A.2d 653 (Pa. Cmwlth. 2005).

deliberately. As the court found, Coopersburg has been making good faith efforts over the years to repair its system, attempting to abide by the arbitration agreement, outlaying approximately thirty to thirty-five percent of its annual budget in repair attempts over the last few years, expending $800,000 on corrective measures through July 2009, and submitting numerous corrective action plans to DEP. The mere fact that Coopersburg's efforts have failed to result in a lifting of the moratorium does not necessarily mean that either its repair efforts or its adoption and implementation of a repair plan were "purposeful and deliberate" for purposes of deciding whether a *de facto* taking occurred. Notwithstanding FPM's frustration, therefore, we agree with the common pleas court that Coopersburg's actions did not constitute a *de facto* taking.

Accordingly, for the above reasons, we affirm.[3]

---

[3] At this Court's September 2011 oral argument, borough counsel indicated that the Borough had always contemplated two connections per month but that FPM had never submitted any connection requests. Counsel referenced pages 15 and 16 of the CAP pertaining to proposed limited connections for very small non-residential businesses and residential facilities such as single-family houses, twin houses and townhouses. On those pages, the Borough specifically requested "DEP approval to connect an average of two EDU's per month for a total of 24 EDU's per year to the sewer system *without the use of flow equalization facilities*, conditioned on approval of this plan." CAP at 16; Reproduced Record (R.R.) at 279 (emphasis added). Although FPM never officially requested such connections, we note that Saucon did not withdraw its appeal from the DEP's approval of the CAP until October 2008 by way of a Stipulation for Settlement. Moreover, certain statements from key witnesses indicate that two connections per month, *without* requiring flow equalization, may have been either difficult or impossible to obtain.

Borough President Balascak agreed that the Borough could issue permits only for connections requiring flow equalization until the obligations set forth in paragraph seven of the stipulation were satisfied. July 17, 2009 Deposition of Dennis Balascak, Notes of Testimony (N.T.) at 52; Supplemental Reproduced Record (S.R.) at 14. In pertinent part, paragraph seven provides that "the corrective measures set forth in the CAP shall be completed by the occurrence of ten storm events of significant magnitude to produce peak flows in excess of 1.4 MGD at the Borough's metering station or by December 20, 2011, whichever is later." Stipulation for Settlement at 2; S.R. at 20. As of the July 2009 deposition of William Erdman, the Borough's **(Footnote continued on next page…)**

BONNIE BRIGANCE LEADBETTER,
President Judge

(continued…)

municipal engineer, there had been only five significant storm events. July 24, 2009 Deposition of William Erdman, N.T. at 49, S.R. at 13. Also, Erdman indicated that it was his understanding of the DEP's position that the Borough also would need to approach Saucon for approval of such connections. *Id*. at 78; S.R. at 42. Connections requiring flow equalization, however, seem to be somewhat more obtainable.

Assuming that an applicant also submitted an acceptable planning module, Balascak testified that the Borough would issue a permit for a connection utilizing flow equalization. Balascak Deposition, N.T. at 41; S.R. at 11. Further, in response to questions concerning whether Saucon and the Borough would approve individual flow equalization systems for FPM's development, Erdman stated that he would recommend approval to the Borough. Erdman Deposition, N.T. at 85-86; S.R. at 43-44. In any event, although it was somewhat disingenuous for borough counsel to suggest that all FPM had to do was to request two connections per month, the testimony of Balascak and Erdman regarding connections requiring flow equalization suggests that FPM was not without options. *See In re Matter of Condemnation by Municipality of Penn Hills*, 870 A.2d 400 (Pa. Cmwlth. 2005) (temporary deprivation from using property for highest and best use does not constitute *de facto* taking); *Appeal of D.R.E. Land Developing, Inc.*, 613 A.2d 96 (Pa. Cmwlth. 1992) (increased burden of existing easement over property for drainage system did not constitute *de facto* taking).

Finally, we note that the property, in this respect, is in the same condition as when it was purchased by FPM, i.e., without sewer connections but with the hope of getting them some months in the future.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

FPM Development, LLC, Appellant	:	
v.	:	No. 55 C.D. 2011
The Borough of Coopersburg and Municipal Authority of the Borough of Coopersburg	:	

O R D E R

AND NOW, this 28th day of October, 2011, the order of the Court of Common Pleas of Lehigh County is hereby AFFIRMED.

BONNIE BRIGANCE LEADBETTER,
President Judge