IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Louis Arpino, Sr. and Ronald W. Downey	:	
	:	No. 763 C.D. 2011
v.	:	Submitted: October 7, 2011
	:	
Pleasant Valley School District, Appellant	:	

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE KELLEY FILED: December 21, 2011

Pleasant Valley School District (the District) appeals from an order of the Court of Common Pleas of Monroe County (Trial Court) that overruled the District's Motion to Determine Condemnation challenging the sufficiency of the averments of the Petition for Appointment of Board View (Petition) filed by Louis Arpino, Sr. and Ronald W. Downey (collectively, Landowners). Landowners' Petition sought the appointment of a Board of View pursuant to the Eminent Domain Code (Code)[1] to assess the extent of a taking by the District in the form of the difference between the value of Landowners' homes prior to the District's

[1] 26 Pa.C.S. §§101-1106.

construction of sewer lagoons adjacent to the Landowners' properties, and the current value. We vacate and remand.

Landowners are the owners of real property, upon which each maintains a primary residence, adjacent to property owned by the District. The District constructed and operates two new sewage lagoons on its land, immediately adjacent to Landowners' respective properties. On September 29, 2010, Landowners filed their Petition averring that the District's construction and operation of the two new sewage lagoons negatively impacted the value and enjoyment of Landowners' properties to an extent constituting a *de facto* governmental taking, and seeking appointment of a Board of View to assess the extent of that taking. The Trial Court, by order dated November 1, 2010, appointed a three-person Board of View to, *inter alia,* assess damages in the matter. The District thereafter filed preliminary objections in the nature of a Motion for Hearing to Determine Condemnation (Motion)[2] requesting that the Trial Court hold a hearing to determine whether a condemnation had occurred, and the extent and nature of any property interest condemned, prior to any appointment of a Board of View.[3] A hearing before the Trial Court ensued.

Both parties presented the Trial Court with a synopsis of the facts, and with oral argument, after which each party filed a supplemental brief.

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[2] Neither party in the instant matter has objected to the Trial Court's proper address of the District's Motion as preliminary objections. Preliminary objections are the sole and exclusive method of raising objections to a petition for appointment of viewers alleging a *de facto* taking. Steen v. Pennsylvania Turnpike Commission, 3 A.3d 747 (Pa. Cmwlth. 2010), petition for allowance of appeal denied, __Pa.__, 27 A.3d 226 (2011).

[3] Pursuant to Section 504(d)(1) of the Code, 26 Pa.C.S. §504(d)(1), the District had thirty days from its receipt of notice of the appointment of the Board of View in which to file its objections.

Landowners, in their brief to the Trial Court, argued in part relevant hereto that the operation of the sewage lagoons cast negative effects including intolerable noise levels and disgusting odors. Landowners argued that exceptional circumstances existed that substantially deprived them of their use and enjoyment of their respective properties.

Following the conclusion of oral argument,[4] the Trial Court issued its Opinion,[5] noting:

> The following facts, while not agreed upon by the parties, are relevant and support [Landowners'] claim that a *de facto* taking has occurred:
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> 6. The aerial map clearly establishes that the sewage lagoons are within a line of sight from [Landowners'] properties.
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> 7. The lagoons are operated by aeration pumps that generate continuous noise, twenty-four (24) hours per day from early spring through the summer months and into November. Respondent does not contradict the duration of the pumps' operation.
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> 8. The noise generated by the lagoons' aeration pumps makes it difficult for [Landowners] to watch TV, entertain guests, or even talk to or hear each other at times while inside their homes. The noise generated by the pumps is even worse outside the home where [Landowners] used to utilize their property for recreation.
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> 9. The sewage lagoons also generate noxious odors during the hot and humid days of summer, which smells permeate [Landowners'] properties, both inside and out.

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[4] No witnesses were called during the hearing before the Trial Court.

[5] The District has failed to include within its brief to this Court a copy of the Trial Court's Opinion and Order, which can be found within the Original Record (O.R.).

> 10. The noise generated by the aeration pumps used to operate the sewage lagoons and the odors emanating from the lagoons are the direct and necessary consequence of the actions of [the District which] has the power of eminent domain.

Trial Court Opinion at 5-6. Noting that the circumstances of the noise volume and air quality emanating from a neighboring property are within the scope of the protections envisioned under eminent domain, the Trial Court concluded:

> After reviewing the aerial map showing the proximity of the sewage lagoons to the [Landowners'] properties and after carefully considering the arguments presented, we believe that [Landowners] have stated a cause of action for a *de facto* taking of their properties, which taking occurred when the aeration pumps were put into operation in or around March 2010. There is no question that such a burdensome deprivation would not only affect one's use and enjoyment of his property as a residence, but that it would also have a substantial detrimental effect on the value and marketability of the property as well.

Id. at 7.

Accordingly, the Trial Court entered an order dated April 1, 2011, overruling the District's Motion, and affirming its November 1, 2010 order appointing a Board of View to assess damages. The District now appeals to this Court from the Trial Court's order.[6]

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[6] In eminent domain cases, this Court's scope of review is limited to a determination of whether the trial court committed an abuse of discretion or an error of law. Condemnation by Valley Rural Elec. Co-op., Inc. v. Shanholtzer, 982 A.2d 566 (Pa. Cmwlth. 2009).

The District presents two issues: whether the Trial Court erred in appointing a Board of View to determine damages on Landowners' claims without first deciding whether the District's construction of the sewage lagoons at issue constituted a *de facto* taking, and; whether the Trial Court erred by permitting Landowners to assert damages claims where Landowners failed to create an evidentiary record to support a *de facto* taking claim.

Within Pennsylvania's jurisprudence, it is a long-standing axiom that a *de facto* condemnation or taking "occurs when the entity clothed with the power of eminent domain[7] substantially deprives an owner of the use and enjoyment of his property." Conroy–Prugh Glass Co. v. PennDOT, 456 Pa. 384, 388, 321 A.2d 598, 599 (1974) (quoting Griggs v. Allegheny County, 402 Pa. 411, 414, 168 A.2d 123, 124 (1961)). Further, Section 502(c)(1) of the Code specifically provides that the "owner of a property interest who asserts that the owner's property interest has been condemned without the filing of a declaration of taking may file a petition for the appointment of viewers ..." 26 Pa.C.S. §502(c)(1). The Code charges the trial court with the responsibility to determine whether a *de facto* taking has occurred. Section 502(c)(2) of the Code, 26 Pa.C.S. §502(c)(2).

Upon the filing of preliminary objections to a petition for the appointment of viewers, the Code provides that the trial court shall "promptly" determine the same and "shall conduct an evidentiary hearing" if an issue of fact is raised. Section 504(d)(4) and (5) of the Code, 26 Pa.C.S. §504(d)(4), (5). We have held:

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[7] In the instant matter, neither party disputes that the District is an entity clothed with the power of eminent domain.

> In order for a condemnee to prove that a *de facto* taking has occurred, he must show exceptional circumstances which have substantially deprived him of the use and enjoyment of his property… A condemnee must show that an entity, clothed with the power of eminent domain, exercised that power and that the damages sustained by the condemnee were the immediate, necessary and unavoidable consequence of that exercise.

Department of Transportation v. Kemp, 515 A.2d 68, 71 (Pa. Cmwlth. 1986)[8] (citing Department of Transportation v. Lawton, 412 A.2d 214 (Pa. Cmwlth. 1980)).

The District's issues herein, when addressed in their entirety, argue that the Trial Court erred in failing to make a clear and express finding of a *de facto* taking, and further erred in failing to receive evidence on the noise and odors emanating from the sewage lagoons at issue. The Trial Court's less-than-precise language on the issue of a clear and express finding of a *de facto* taking cannot be read by this Court, given the record to this matter, as a clear actual finding of a *de facto* taking. As excerpted above, the Trial Court concluded merely that its review of the parties' arguments, and the map stipulated to by both parties showing the location of the lagoons, led the Trial Court to "believe that [Landowners] have stated a cause of action for a *de facto* taking of their properties…" Trial Court Opinion at 7. Thus, remand is necessary for a clear and express finding by the Trial Court not on whether Landowners stated a cause of action for a *de facto* taking, but on whether said taking did or did not actually occur.

Additionally, to the extent that the Trial Court may have concluded that a "taking occurred when the aeration pumps were put into operation in or

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[8] Aff'd, Department of Transportation v. Smoluk, 517 Pa. 309, 535 A.2d 1051 (1988).

around March 2010," the District's second stated issue also requires a remand of this matter for the receipt of evidence on the factual issues upon which the Trial Court's order is founded. Section 504(d)(5) of the Code controls the dispositive issue of the evidence supporting the Trial Court's conclusion herein, and states:

> (d) Preliminary objections.--
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> * * *
>
> (5) If an issue of fact is raised, **the court shall conduct an evidentiary hearing or order that evidence be taken by deposition or otherwise**, but in no event shall evidence be taken by the viewers on this issue.

26 Pa.C.S. §504(d)(5) (emphasis added). However, the Trial Court's Opinion, and the transcript of proceedings before the Trial Court on the District's Motion, make clear that the Trial Court erred in failing to request or receive actual evidence on the factual issues upon which the Trial Court founded its order. Under Section 504(d)(5), the Trial Court erred in failing to request or receive evidence on any issue of fact, to the extent that the Trial Court determined that issues of fact existed in this matter.[9]

The District correctly notes that the transcript of proceedings, when reviewed in its entirety, reveals that the Trial Court accepted only oral argument from the parties' attorneys in the hearing on the District's Motion, and heard no witnesses. O.R., Notes of Testimony of February 14, 2011. Further, the Trial Court's Opinion clearly relies solely upon the parties' briefs, and specifically upon the averments within Landowners' brief, in finding as fact that the noise and odors upon which the Court's order is founded existed. <u>See</u> Trial Court Opinion at 2, 4-

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[9] We note that we agree with the Trial Court's implicit conclusion that issues of fact do indeed exist herein.

7. Most notably on this point, the Trial Court expressly notes that the facts upon which it relies on this issue are facts that were not agreed upon by the parties. Id. at 5-6. As the record clearly shows that the Trial Court received no testimony or evidence on the existence of the noise and odors, we agree with the District's contention that the Trial Court failed to "conduct an evidentiary hearing or order that evidence be taken by deposition or otherwise" in accordance with the mandate of Section 504(d)(5) of the Code. See O.R., Notes of Testimony of February 14, 2011. Indeed, the entirety of the Notes of Testimony herein, when combined with the Trial Court's Opinion and a review of the parties' briefs to the Trial Court, reveal that the issues of the existence of noise and odors emanating from the District's lagoons was not addressed at all in the proceedings before the Trial Court, but were merely accepted by the Trial Court from Landowners' briefs. See Trial Court Opinion; O.R., Notes of Testimony of February 14, 2011; Landowners' Brief, Reproduced Record at 25a-30a.

The support of dispositive findings in this matter by the Trial Court, consisting solely of the averments from one party's brief to the Court and in the absence of the receipt of any evidence or testimony in the actual proceedings on the District's Motion, cannot be held to constitute evidence resulting from "an evidentiary hearing or order that evidence be taken by deposition or otherwise" in accordance with the clear and express mandate of Section 504(d)(5) of the Code.

Accordingly, we vacate the Trial Court's order, and remand this matter for an evidentiary hearing pursuant to Section 504(d)(5) of the Code.

JAMES R. KELLEY, Senior Judge

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O R D E R

AND NOW, this 21st day of December, 2011, the order of the Court of Common Pleas of Monroe County, dated April 1, 2011, at No. 9477 CIVIL 2010, is vacated, and this matter is remanded for proceedings in accordance with the foregoing opinion.

Jurisdiction relinquished.

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JAMES R. KELLEY, Senior Judge