[J-15A, B & C-2005]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

CAPPY, C.J., CASTILLE, NIGRO, NEWMAN, SAYLOR, EAKIN, BAER, JJ.

IN RE: DE FACTO CONDEMNATION AND TAKING OF LANDS OF WBF ASSOCIATES, L.P. BY LEHIGH-NORTHAMPTON AIRPORT AUTHORITY C. THOMAS FULLER, INTERVENOR APPEAL OF: LEHIGH-NORTHAMPTON AIRPORT AUTHORITY	:	No. 172 MAP 2004 Appeal from the Order of the Commonwealth Court, entered on March 26, 2004 at No. 1615 CD 2003, that affirmed in part and reversed in part the Order of the Court of Common Pleas of Lehigh County, entered on June 27, 2003 at No. 96-C-2334.
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	:	ARGUED: March 8, 2005

CONCURRING AND DISSENTING OPINION

MR. JUSTICE SAYLOR **DECIDED: August 22, 2006**

I agree with the majority's legal conclusion in Part I of its opinion that delay compensation should be due in favor of WBF Associates, but I would offer different reasons in support of this decision and believe that the availability of delay damages should be ultimately contingent upon jury findings in the de novo appeal; I respectfully differ with majority's holding concerning the allowance of mortgage interest as a separate component of damages above and apart from delay compensation; and I would affirm the Commonwealth Court's holding on the coordinate jurisdiction question. My reasoning follows.

Regarding Part I of the majority opinion and the issue of delay compensation, at the outset, I would treat the issue as narrower than the question considered and resolved by the majority. In the relevant portion of its brief as the appellant in this case, the Airport Authority takes as settled the proposition that there was a constitutionally significant de facto taking as of September 30, 1996, the date on which WBF Associates filed its petition for appointment of a board of viewers. Presumably, it does so as the issue was the subject of a prior appeal in which WBF Associates prevailed, see Lehigh-Northampton Airport Auth. v. WBF Assoc., L.P., 728 A.2d 981 (Pa. Cmwlth. 1999), and this Court did not accept that appeal for further review. See Lehigh-Northampton Airport Auth. v. WBF Assoc., L.P., 560 Pa. 751, 747 A.2d 372 (1999) (per curiam). Thus, the Airport Authority expressly frames the relevant question as whether a condemnee's entitlement to delay compensation under Section 611 of the Eminent Domain Code may start on a date sometime after a de facto taking. See Brief for Appellant at 4. The framing of the issue in the majority opinion, however, appears to

effectively subsume the question presented in the initial appeal, see Majority Opinion, slip op. at 9 ("The threshold issue before is what constitutes the date of taking for purposes of computing delay damages."), and the majority's analysis on the merits seems to revisit and approve the Commonwealth Court's holding in that regard. See, e.g., Majority Opinion, slip op. at 11 ("This is the same scenario presented in Conroy-Prugh Glass where we found that a de facto taking had occurred and that to hold otherwise would deprive a property owner of her property without due process of law.").

It is my position that the takings issue is a highly significant question in its own right that is not directly before the Court at this juncture in this case. As the majority puts it into play here, I note that the issue of whether and to what extent pre-condemnation activity on the part of the government can arise to a de facto taking has been addressed by many other jurisdictions as a discrete category of takings jurisprudence, frequently couched under the rubric of condemnation or planning blight. See generally 4 J. SACKMAN, NICHOLS ON EMINENT DOMAIN §12B.17[6] (Rev. 3d ed. 1995); Robert H. Freilich, Planning Blight: The Anglo-American Experience, 29 URB. LAW. vii, viii (1997) (defining planning blight as denoting "the effect upon the value of land for which condemnation is threatened, imminent or potential" (footnotes omitted)). Many courts refuse to treat planning blight as a de facto taking, but rather, find the phenomenon to be relevant only to the issue of establishing fair and just compensation.

For example, in a seminal decision in this line of cases, City of Buffalo v. J.W. Clement Co., 269 N.E.2d 895, 903 (N.Y. 1971), the New York Court of Appeals explained:

> [I]t is clear that a De facto taking requires a physical entry by the condemnor, a physical ouster of the owner, a legal interference with the physical use, possession or enjoyment of the property or a legal interference with the owner's power of disposition of the property. On the other hand,

> "condemnation blight" relates to the impact of certain acts on the value of the subject property. It in no way imports a Taking in the constitutional sense, but merely permits of a more realistic valuation of the property at the time of the De jure proceeding. In such a case, compensation shall be based on the value of the property at the time of the taking, as if it had not been subjected to the debilitating effect of a threatened condemnation.

City of Buffalo v. J.W. Clement Co., 269 N.E.2d 895, 903 (N.Y. 1971); cf. Danforth v. United States, 308 U.S. 271, 285, 60 S. Ct. 231, 236 (1939) ("A reduction or increase in the value of property may occur by reason of legislation for or the beginning or completion of a project. Such changes in value are incidents of ownership. They cannot be considered as a 'taking' in the constitutional sense[.]").[1] A central concern of these courts is that governmental planning should not be unduly restrained by a

[1] See also National By-Products, Inc. v. City of Little Rock, 916 S.W.2d 745, 748-49 (Ark. 1996) ("Our holding . . . is consistent with the law in several jurisdictions which adhere to the general rule that mere plotting or planning in anticipation of an improvement does not constitute a taking or damaging of the property affected where the government has not imposed a restraint on the use of the property."); Westgage Ltd., 843 S.W.2d at 542-43; Lone Star Ind. v. Sec. of Kan. Dep't of Transp., 671 P.2d 511, 518-19 (Kan. 1983); State ex rel. Washington University Med. Center Redevelopment Corp. v. Gaertner, 626 S.W.2d 373, 376 (Mo. 1982); DUWA, Inc. v. City of Tempe, 52 P.3d 213, 217 (Ariz. App. 2003) (characterizing New York's City of Buffalo approach as the prevailing one); State ex rel. Mo. Highway & Transp. Comm'n v. Edelen, 872 S.W.2d 551, 558 (Mo. App. 1994) ("The threat of condemnation is neither a taking nor an element of damages in a condemnation suit."). See generally 29A C.J.S. EMINENT DOMAIN §88 (2005) ("A taking will not be found based on the mere diminution or reduction in value of property, even if it is severe, or on the basis that the highest or best use of property is frustrated or denied, or on the basis that some particular right or interest in a parcel of land is burdened, or because the owner is unable to develop the property to its maximum economic potential, or to exploit a property interest that was believed to be available for development."); J.R. Kemper, Annotation, Plotting or Planning in Anticipation of Improvement as Taking or Damage of Property Affected, 37 A.L.R.3d 127 (1971 & Supp.).

concern that it will implicate a premature and unduly burdensome accrual of damages.[2] A number of jurisdictions will recognize a de facto taking in some instances involving planning blight, but only when there is direct and substantial interference with existing property rights caused by extraordinary delay or unreasonable or oppressive conduct on the part of condemning party.[3]

In its decision resolving the first appeal, the Commonwealth Court aptly summarized seminal Pennsylvania cases touching on the subject. See Lehigh-Northampton Airport, 728 A.2d at 985-89. Significantly, however, none of this Court's relevant decisions have directly addressed the impact of a contemplated condemnation on prospective land development or have implemented a particular construct which

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[2] See, e.g., City of Buffalo, 269 N.E.2d at 904 ("To hold the date of the announcement of the impending condemnation, whether directly to the condemnee or by the news media, constitutes a De facto taking at that time, would be to impose an 'oppressive' and 'unwarranted' burden upon the condemning authority."); Westgage Ltd. v. State, 843 S.W.2d 448, 453 (Tex. 1992) ("Construction of public-works projects would be severely impeded if the government could incur inverse-condemnation liability merely by announcing plans to condemn property in the future.").

[3] See, e.g., Barsky v. City of Wilmington, 578 F. Supp. 170, 173 (D. Del. 1984); State ex rel. Dep't of Transp. v. Barsy, 941 P.2d 971, 976 (Nev. 1997) ("extraordinary delay or oppressive conduct" (citing Klopping v. City of Whittier, 500 P.2d 1345, 1355 (Cal. 1972)), overruled on other grounds GES, Inc. v. Corbitt, 21 P.3d 11 (Nev. 2001); Littman v. Gimello, 557 A.2d 314, 319 (N.J. 1989) (indicating that "[t]he cases are legion that hold that decreases in the value of property during governmental deliberations, absent extraordinary delay, are incidents of ownership and to not constitute a taking," and explaining that "[s]trong policy considerations underpin our holding that lost economic opportunities, forgone financing, and diminution in market value arising from government plans and their attendant publicity do not alone give rise to a compensable taking."). See generally Gideon Kanner, SH025 ALI-ABA 327 (2002) (presenting the issue of de facto taking on account of planning blight under the unreasonable/oppressive government conduct paradigm).

would dictate the outcome of such cases.[4] In this regard, I respectfully disagree with the majority's position that cases such as Conroy-Prugh Glass Co. v. PennDOT, 456 Pa. 384, 321 A.2d 598 (1974), are directly on point. Conroy-Prugh involved interference with an already established use of the property involved to support existing leasehold interests, see id. at 392-93 & n.2, 321 A.2d at 601-02 & n.*. In contrast, in the present case it is undisputed that the subject property's existing uses remained unrestrained, and it was a prospective use (which was dependent upon successful negotiation of many uncertain contingencies) that was affected by publicity associated with future condemnation. Further, I can find no support in the cases for the majority's apparent reasoning in reconciling the present case with the line of cases represented by Conroy-Prugh that, for purposes of takings jurisprudence, the existing or present use of a property should be viewed in terms of its status as the subject matter of a planned, prospective use. See Majority Opinion, slip op. at 10-12. To the contrary, present or existing use is generally evaluated in terms of actual use exclusive of prospective application, see, e.g., Pittsburgh North, Inc. v. PennDOT, 514 Pa. 316, 320, 523 A.2d 755, 757 (1987) (distinguishing present from prospective use in the setting of delay

[4] The majority suggests that Petition of Lakewood Memorial Gardens, Inc., 381 Pa. 46, 112 A.2d 135 (1955), stands for the proposition that the date of taking in these cases is the date that a governmental entity makes known its intent to appropriate property. See Majority Opinion, slip op. at 11 n.6. However, that decision is distinguishable, as it concerned an unusual circumstance in which the government sought acceleration of the date of taking on account of the condemnee's unreasonable activities in inflating damages after a state agency had adopted a resolution of condemnation. See id. at 58-59, 112 A.2d at 141. The case was also fairly fact specific, as it involved the Court's extension of a legal principle derived from the State Highway Law to the Turnpike Commission, based on the equities involved. See id. at 53-54, 58-59, 112 A.2d at 139, 141. Moreover, as the majority acknowledges, there is considerable room for interpretation among this Court's decisions regarding the general question of whether, and under what circumstances, a de facto condemnation will have occurred.

compensation); whereas, it is the beneficial (including highest and best) use criterion that takes potential uses into account. See, e.g., Genter v. Blair County Convention and Sports Facilities Auth., 805 A.2d 51, 57 (Pa. Cmwlth. 2002) ("The beneficial use of a property includes not only its present use, but also all potential uses including its highest and best use.").

I also find it significant that acceleration of the time of taking to account for pre-condemnation activity is in tension with the statutory eminent domain scheme, which expressly attempts to account for the effect of pre-condemnation activity by removing it from the fair market value determination, akin to the approach of the New York Court of Appeals in the City of Buffalo case. See 26 P.S. §1-604 ("Effect of imminence of condemnation").[5] In light of all of the above considerations, I believe that resolution by this Court of the foundational issue of whether a taking occurred by virtue of the Airport Authority's announcement of its intention to appropriate the subject property and/or surrounding properties at some future time is a distinct matter of first impression that would merit this Court's focused consideration in a case in which the question has been squarely accepted for review and fully briefed.[6]

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[5] The statute prescribes:

> Any change in the fair market value prior to the date of condemnation which the condemnor or condemnee establishes was substantially due to the general knowledge of the imminence of condemnation, other than that due to physical deterioration of the property within the reasonable control of the condemnee, shall be disregarded in determining fair market value.

26 P.S. §1-604.

[6] I tend toward the view that pre-condemnation activity may yield a constitutionally significant taking where the government engages in unreasonable delay and/or (continued . . .)

Putting the taking issue aside in accordance with the Airport Authority's framing of the question presented, I believe that resolution of the delay compensation issue is relatively straightforward. Section 611 of the Eminent Domain Code disallows the payment of delay compensation during the period that the condemnee remains in possession unless "the condemnation is such that possession is not required to effectuate it[.]" 26 P.S. §1-611. Where possession is not required to effectuate a condemnation, however, under the plain terms of the statute "delay compensation shall be paid from the date of condemnation." Id. The Airport Authority's present argument is that the statutory concept of possession is different from the taking determination and centers on the "full and normal use" as opposed to "highest and best use." This argument, however, fails to take into account the requirement deriving from federal constitutional doctrine that delay compensation must be paid from the time of a taking.[7]

(continued...)
oppressive conduct. Further, I note that the Airport Authority's conduct in failing to commence de jure condemnation proceedings for at least two years following the announcement of its expansion plans may perhaps suffice to satisfy such criteria. Again, however, I recognize that the Airport Authority has not had the opportunity to brief such issue in this Court because its petition for allowance of appeal challenging the Commonwealth Court's first order was denied. Therefore, I offer no definitive opinion on this point, and I respectfully disassociate myself from the majority's various expressions in this regard.

[7] The United States Supreme Court has explained that, when payment of fair market value is deferred for a period following a taking, "something more than fair market value is required to make the property owner whole, to afford him 'just compensation.'" Albrecht v. United States, 329 U.S. 599, 602, 67 S. Ct. 606, 608 (1947); see also United States v. Klamath and Moadoc Tribes, 304 U.S. 119, 123, 58 S. Ct. 799, 801 (1938) (describing just compensation as "value at the time of the taking plus an amount sufficient to product the full equivalent of that value paid contemporaneously with the taking." (citing Jacobs v. United States, 290 U.S. 13, 16, 54 S. Ct. 26, 27 (1933)). The Takings Clause of the Fifth Amendment of the United States Constitution applies to the states through the Fourteenth Amendment. See Phillips v. Wash. Legal Found., 524 U.S. 156, 163-64, 118 S. Ct. 1925, 1930 (1998).

Since we are to presume that the Legislature intended to conform its enactments to constitutional requirements, see 1 Pa.C.S. §1922(3); because the Pennsylvania General Assembly could not limit the availability of delay compensation in the event of a constitutionally significant taking by keying the availability of delay damages to some different conception; and as it is uncontested for purposes of this issue that a taking occurred at least as of September 30, 1996, I agree with the majority that delay compensation is due as of that date relative to damages found by the jury in the de novo appeal.[8]

As to Part II of the majority opinion, I respectfully disagree with the majority's determination that Section 609 of the Eminent Domain Code applies to mortgage interest. See Majority Opinion, slip op. at 15-16. Section 609 provides that:

> Where proceedings are instituted by a condemnee under section 502(e), a judgment awarding compensation to the condemnee for the taking of property shall include reimbursement of reasonable appraisal, attorney and

[8] Contrary to the Airport Authority's arguments, I do not read the decision in Hughes v. PennDOT, 514 Pa. 300, 523 A.2d 747 (1987), as militating to the contrary. While Hughes clearly recognized that infringement on full and normal use implicates delay compensation, see id. at 309-10, 523 A.2d at 752, this holding was not framed as an exclusive one. Although the reasoning applied in Pittsburgh North does tend to support the Airport Authority's position, the case is distinguishable, because it involved a de jure condemnation, where there was no uncontested finding of a prior de facto condemnation, as there is here. See Pittsburgh North, 514 Pa. at 320, 523 A.2d at 757.

Again, I would emphasize, however, that the above analysis as applied to the circumstances of this case assumes that the Airport Authority's activities in contemplation of a de jure condemnation thwarted the highest and best use of the subject property as a planned residential development and amounted to a constitutionally significant taking, since these matters as established by the Commonwealth Court's first opinion in this case are not challenged by the Airport Authority in connection with its presentation of the issue in question.

> engineering fees and other costs and expenses actually incurred.

26 P.S. §1-609. For several reasons, I read the statute as addressed to litigation expenses which are specially incurred by a condemnee who is forced to invoke the judicial process, and not to distinct holding and/or carrying costs associated with property ownership. First, under the principle of ejusdem generis, general words in a statute are construed to take their meaning and be restricted by preceding, particular words. See Independent Oil and Gas Ass'n of Pa. v. Board of Assessment Apps. of Fayette County, 572 Pa. 240, 246, 814 A.2d 180, 183-84 (2002) (citing 1 Pa.C.S. §1903(b)). In this regard, it seems to me that holding and/or carrying costs such as mortgage interest are substantially different in character from the litigation-related costs (appraisal, attorney, and engineering fees) that are specified in Section 609.[9] Cf. 66, Inc. v. Crestwood Commons Redevelopment Corp., 130 S.W.3d 573, 589 (Mo. App. 2003) ("No court has ever held that mortgage interest, much less interest on a loan to secure cash to lend to others, falls within the category of attorney's fees, costs, or other reasonable expenses and losses.").[10] Furthermore, the General Assembly separately provided for delay compensation in Section 611 of the Code, 26 P.S. §1-611, which I

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[9] Parenthetically, the comment of the Joint State Government Commission from a 1971 report as reprinted in Purdon's Pennsylvania Statutes and Consolidated Statutes Annotated reflects that Section 609 captures the costs and expenses identified by Section 304 of the Federal Relocation Act, 42 U.S.C. §4654, which is captioned, "Litigation expenses." See 26 Pa.C.S. §1-609, Comment - Joint State Government Commission.

[10] I recognize that the Airport Authority does not advance the specific argument that Section 609 does not by its terms pertain to mortgage interest. However, I find its argumentation pointing to the prospect of a double recovery, see, e.g., Brief for Appellant at 43-45 ("It is unfair, absurd, and unjust for WBF to recover both delay compensation and ownership expenses for the same period of time."), sufficient to avoid a waiver.

believe substantially overlaps with holding and/or carrying costs.[11] Thus, in my view, the majority's approach creates the substantial risk of a double recovery. Accord 66, Inc., 130 S.W.3d at 589-90 ("To allow plaintiff to recover interest on loans securing the property, in addition to statutory interest, would result in a duplicative recovery for one loss, the practical deprivation of its ability to sell the property.").[12]

In its rejoinder to my position on the Section 609 issue, the majority develops the facts underlying the 66, Inc. decision and suggests that they are much less appropriate to an award of mortgage interest than are the present circumstances. See Majority Opinion, slip op. at 15-16 n.11. There are also many other cases in which an award of mortgage interest in the just compensation calculus would be unwarranted.[13] This, in my view, tends to support, rather than negate the understanding that the General

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[11] In this regard, while the General Assembly attempted to limit delay compensation to a six percent interest figure, see 26 P.S. §1-611, this Court has found such limitation inconsistent with the concept of just compensation. See Hughes, 514 Pa. at 310-12, 523 A.2d at 752-53.

[12] I also have substantial difficulty with any bright-line rule that would strictly require the payment of holding and/or carrying costs as such as a component of just compensation, in light of the myriad forms of financial arrangements entered into between parties in the commercial marketplace, including non-market-rate insider mortgages.

[13] For example, in Department of Conservation v. Lawless, 426 N.E.2d 545 (Ill. App. 1981), the reviewing court found a claim by a homeowner for mortgage interest from the time of a taking as an element of just compensation to be "completely meritless." Id. at 550. The court explained:

> Does Mr. Lawless expect to live on the condemned premises for a two year period for nothing? Such is the result, if we accept the argument he advances. As long as people pay for housing, either by mortgage or rental payments, Mr. Lawless can expect to do no less.

Id. at 550.

Assembly intended a more limited construction of Section 609 than the majority implements. Again, I take no issue with the proposition that some accounting for ownership expenses could be an appropriate and necessary element of just compensation in some de facto condemnation cases (either via the delay compensation provision as modified by this Court's interpretation in Hughes, see supra note 11, or otherwise). To the extent that the Eminent Domain Code would foreclose such an award in circumstances where it is essential to just compensation, the statutory scheme may have to yield to constitutional dictates, consistent with the Court's reasoning in Hughes. See supra note 11. My difference is solely with the majority's decision to categorize mortgage interest costs among the "appraisal, attorney and engineering fees and other costs and expenses" that are required to be awarded under Section 609, contrary to the Legislature's prescription that "[g]eneral words [in a statute] shall be construed to take their meanings and be restricted by preceding particular words," 1 Pa.C.S. §1903(b).

Finally, I believe that the effect of the Airport Authority's payment of estimated just compensation upon its obligation to pay delay compensation must be resolved after the final determination of just compensation, because, until then, it is unknown whether, or to what degree, the initial estimation was accurate.

On the last point resolved in Part III of the majority opinion concerning the effect of the de facto taking determination in the context of the de novo appeal, I agree with the majority that the assessment of highest and best use made in the taking context presents a factual question, or at least, a mixed question of law and fact. See generally 27 AM. JUR.2D EMINENT DOMAIN §548 (2005) ("The question of the highest and best use

of a property is a question of fact.").[14] This Court has established that factual matters in eminent domain proceedings are subject to de novo consideration by a jury in a statutory appeal. See In re Condemnation by Pa. Turnpike Comm'n, 548 Pa. 433, 439, 698 A.2d 39, 42 (1997).[15] Therefore, I am in agreement with the Commonwealth Court that the jury should not be constrained on the highest-and-best-use point, albeit that I realize that a finding unfavorable to WBF Associates could undermine the trial court's initial holding that there was a de facto taking, since it was grounded on the fact-based assessment of such beneficial use. My difference with the majority arises because I do not regard this possibility as a concern of the law of the case doctrine and/or the interrelated coordinate jurisdiction principle. Rather, and again, I believe that it is merely corollary to the de novo character of the jury proceedings in the eminent domain context.

[14] Nevertheless, I recognize that the matter was properly before the common pleas court in the first instance on the Airport Authority's initial preliminary objections to the petition for an appointment of viewers, under the unique preliminary objections procedure pertaining in eminent domain proceedings. See 26 P.S. §1-504 (authorizing the common pleas court to resolve factual disputes on preliminary objections in eminent domain proceedings).

[15] A plain-meaning interpretation of the governing statute, 26 P.S. §1-517, suggests that the line of division between matters to be decided by the judge and those to be decided by the jury should be defined according to whether the matter pertains solely to valuation; however, this Court has endorsed the Commonwealth Court's rejection of such division in favor of the legal/factual distinction. See In re Condemnation by Pa. Turnpike Comm'n, 548 Pa. at 439, 698 A.2d at 42.