

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

A Condemnation Proceeding in REM :  
by the New Hanover Township :  
Authority for the Purpose of :  
Acquiring Property from Larry and :  
Denise Emel, his wife, for Municipal :  
Sanitary Sewer Facilities :  
: No. 1090 C.D. 2007  
Appeal of: Larry and Denise Emel : Argued: March 11, 2008

BEFORE: HONORABLE DAN PELLEGRINI, Judge  
HONORABLE ROBERT SIMPSON, Judge  
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY JUDGE PELLEGRINI

FILED: April 2, 2008

We had remanded this matter in a previous appeal to the Court of Common Pleas of Montgomery County (trial court) to allow an amendment by the New Hanover Township Authority (Authority) to either a resolution or declaration of taking condemning a strip of land owned by Larry and Denise Emel (Property Owners) so that the two were in conformity. Currently, Property Owners appeal from an order of the trial court overruling their preliminary objections to that amendment arguing, among other things, that the trial court erred in applying the “law of the case” doctrine to forego deciding the legal issues they raised in their preliminary objections.

To briefly recount the facts leading to the instant appeal,<sup>1</sup> this case concerns a 25-foot wide strip of land that runs along and through the side yard toward the rear of Property Owners' property (Emel Property), in Gilbertsville, New Hanover Township (Township), Pennsylvania. Once Property Owners acquired the Emel Property on December 13, 2002, a dispute arose regarding their ability to connect into a record sewer line on their property. The Authority refused to permit connection to this system and, instead, demanded that they convey an easement to the Township for the portion of their property in which a new sewer line had been installed by Property Owners' predecessor-in-interest. Such an easement was critical to the Township because neighboring lots were to be serviced by an interceptor located on the Emel Property. After the Authority and Property Owners failed to successfully negotiate a sewer easement agreement, the Authority passed a resolution, Resolution No. 04-03 (Original Resolution), taking the aforesaid 25-foot wide strip of land in fee simple. On November 19, 2003, it filed a declaration of taking condemning only the 25-foot wide strip of land through the Emel Property to acquire a sewer easement.

In response, Property Owners filed preliminary objections arguing that (1) the Authority acquired a fee simple interest in the 25-foot wide strip which was more land than public use required; (2) the declaration was defective because the Authority failed to comply with the New Hanover Township Code; (3) the

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<sup>1</sup> For a full recitation of the facts, see *A Condemnation Proceeding In Rem by the New Hanover Township Authority for the Purpose of Acquiring Property from Larry and Denise Emel, His Wife, For Municipal Sanitary Sewer Facilities*, Pa. Cmwlth., No. 258 C.D. 2005, filed May 9, 2006 (*Emel I*).

declaration was defective because a description of the property to be condemned was not attached to the Original Resolution; and (4) the Authority acted in an arbitrary, capricious and/or bad faith manner. The Authority filed a timely answer denying the allegations, and after an evidentiary hearing, the trial court overruled Property Owners' preliminary objections.

On appeal to this Court, we rejected Property Owners' claim that the Authority violated the Township Code and, therefore, lacked the power to appropriate such property because subdivision requirements contained in a local ordinance had no application to the ability of a governmental unit to exercise its powers under the Eminent Domain Code.<sup>2</sup> We next determined that Property Owners' contention that the Authority's declaration was defective because the Original Resolution failed to provide a sufficient description of the condemned property to be without merit because Section 402(b)(4) of the Eminent Domain Code, 26 P.S. §1-402(b)(4), only required a brief description of the purpose of the condemnation, and the Authority's Exhibit C, a metes and bounds description as well as a plot plan that depicted the property to be condemned which was appended to the declaration, was sufficient to notify Property Owners of the property to be condemned for the sewer lines. We also found that, contrary to

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<sup>2</sup> Act of June 22, 1964, Special Sess., P.L. 84, *as amended*, formerly 26 P.S. §1-101 – 1-903, repealed by Section 5 of the Act of May 4, 2006 P.L. 112, Act 2006-34, effective September 1, 2006. The Eminent Domain Code is now consolidated, 25 Pa. C.S. §§101-1106; however, this matter was decided under the former unconsolidated Code.

Property Owners' assertion, the Authority had not acted in an arbitrary, capricious and/or bad faith manner.<sup>3</sup>

As to Property Owner's other contention regarding the Authority's taking a fee simple which exceeded the amount of land required for public use, we concluded that the Authority, by virtue of its Original Resolution, acquired the 25-foot strip of land in fee simple and had no authority to condemn only an easement in its declaration. Because "the proper procedure required the Authority to conform the declaration to the resolution taking a fee simple or the resolution to the declaration taking an easement pursuant to Section 406(e) of the Eminent Domain Code, 26 P.S. §1-406(e), which provides that the 'court may allow amendment or direct the filing of a more specific declaration of taking,'" (Reproduced Record at 631a), we vacated the decision of the trial court and remanded the matter to allow for the amendment of the Original Resolution or declaration so that they were in conformity.<sup>4</sup>

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<sup>3</sup> Property Owners also argued that the Authority violated Section 804(9) of the New Hanover Township Code (Township Code) which provides, "Sanitary sewer lines shall be placed in the public street cartway except where permitted in an easement by the Township Board of Supervisors and the Township Municipal Authority." We determined that this issue was neither raised in their original preliminary objections nor addressed at the evidentiary hearings before the trial court, and it was, therefore, waived and not to be considered on appeal. See footnote 5 in *Emel I*.

<sup>4</sup> We remanded to the trial court with the following order:

AND NOW, this 9<sup>th</sup> day of May, 2006, the order of the Court of Common Pleas of Montgomery County, dated December 29, 2004, is vacated, and the matter is remanded to the trial court to allow the amendment of the resolution or declaration so that they are in conformity.

**(Footnote continued on next page...)**

Responding to this Court's direction on remand, the trial court, on June 16, 2006, issued the following order:

AND NOW, this 16<sup>th</sup> day of June, 2006, in accordance with the Order, dated May 9, 2006, of the Commonwealth Court of Pennsylvania vacating the Order of December 29, 2004 issued by the undersigned, the trial court hereby ORDERS AND DECREES the following:

1. That the New Hanover Township Authority, with regard to its condemnation for the purpose of acquiring property from Larry Emel and Denise Emel for municipal sanitary sewer conveyance facilities, is expressly authorized to amend either Resolution No. 4-03, adopted September 29, 2003, or the Declaration of Taking, filed November 19, 2003 in the Court of Common Pleas of Montgomery County, so that the Resolution and the Declaration aforementioned are in conformity, particularly with regard to the description of the property interest taken by the Authority.

(Reproduce Record at 664a). In turn, the Authority amended the Original Resolution to conform to the declaration of taking by passing Resolution No. 06-06 (Amended Resolution) which authorized the acquisition of an easement, rather than a fee simple, on the 25-foot wide strip of land running through the Emel Property. Also, by its express language, the Amended Resolution stated that "all other terms and provisions of Resolution 4-03 of the New Hanover Township

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**(continued...)**

(Reproduced Record at 650a).

Authority shall remain unchanged and in full force and effect.” (Reproduced Record at 640a).

Still opposing the condemnation of a portion of their property, Property Owners filed a second set of preliminary objections to the declaration of taking asserting arguments similar to those in their first preliminary objections. They alleged that (1) Section 804(9) of the Township Code required a sanitary sewer line to be located in a public street cartway except where permitted to be placed elsewhere via easement by the Township Board of Supervisors (Board) and the Township Municipal Authority, and because neither body granted the Authority such permission, the easement was invalid; (2) the Amended Resolution adopted the Original Resolution which authorized the acquisition of a fee simple in the 25-foot strip in an introductory “Whereas” clause,<sup>5</sup> and because there were no provisions in the Amended Resolution amending this clause or otherwise prohibiting the taking of a fee simple, the Authority was again acquiring an interest in land greater than public use required; and (3) the paragraph of the Amended Resolution amending the Original Resolution contained an insufficient description of the property being condemned in that it failed to identify whether the Authority was obtaining an easement only to the land or to the improvements, including, but not limited to, the sanitary sewer line. The Authority filed an answer to the preliminary objections denying Property Owners’ allegations.

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<sup>5</sup> The Original Resolution provided, “WHEREAS, in order to effectively and efficiently operate and maintain the municipal sanitary sewer conveyance facility...it is necessary that the Authority **acquire title in fee simple to land, improvements, and properties** including a certain twenty-five foot (25’) wide sanitary sewer easement through Lot #70 of the Covered Bridge Estates, II Subdivision.” (Reproduced Record at 16a). (Emphasis added).

In once again overruling Property Owners’ preliminary objections, the trial court stated that due to the “law of the case” doctrine, upon remand, it was prevented from altering a legal question that had already been decided by an appellate court in the matter. Determining that Property Owners were raising the same legal issues raised in their second set of preliminary objections that had been previously resolved by this Court during their first appeal, the trial court took the position that it was foreclosed from reopening those issues. It also stated that Pa. R.C.P. No. 1028(b)<sup>6</sup> required all preliminary objections to be raised at one time, and Property Owners should have raised all issues in their first set of objections because any subsequent issues were waived. The trial court ordered that the Authority was authorized to take any necessary action to acquire and secure a sanitary sewer easement over the 25-foot strip of land, and this appeal by Property Owners followed.<sup>7</sup>

Property Owners first argue that the Authority continues to take a fee simple in the 25-foot strip of land on their property because, while it may have amended the body of the Original Resolution to only take an easement, the Amended Resolution otherwise adopted the remainder of the Original Resolution which contained an introductory “Whereas” clause taking the land in fee simple.

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<sup>6</sup> Pa. R.C.P. No. 1028(b) provides, “All preliminary objections shall be raised at one time. They shall state specifically the grounds relied upon and may be inconsistent. Two or more preliminary objections may be raised in one pleading.”

<sup>7</sup> In an eminent domain proceeding where the trial court has sustained or overruled preliminary objections to a declaration of taking, our scope of review is limited to determining whether the trial court committed legal error or abused its discretion. *In re Condemnation by County of Allegheny*, 861 A.2d 387 (Pa. Cmwlth. 2004).

Because this clause was left unchanged and no other provision exists in the Amended Resolution prohibiting the taking of a fee simple, the Authority once again is acquiring a greater interest in the land than public use requires.

Even though the Amended Resolution failed to change the Original Resolution's "Whereas" clause taking the 25-foot strip of land in fee simple, this is only that resolution's preamble, and while it may be considered in the construction of the resolution, only the body of the resolution controls. *English v. Commonwealth*, 816 A.2d 382 (Pa. Cmwlth. 2003); 1 Pa. C.S. §1924. By amending the body of the Original Resolution to take only an easement in the land, the taking is effective because the authorizing resolution and the declaration of taking are in agreement that only an easement is the interest taken.

Property Owners next contend that the trial court erred in applying the law of the case doctrine for their remaining issues because those issues were raised and answered by this Court in their previous appeal. They argue that issues raised in this litigation concerning the Amended Resolution are not governed by the law of the case because the Amended Resolution was adopted after this Court's original decision, and it presents new circumstances that would not alter the outcome of legal questions heretofore resolved.

In *Riccio v. American Republic Insurance Company*, 550 Pa. 254, 705 A.2d 422 (1997), our Supreme Court described the law of the case doctrine stating, "A court involved in the later phases of a litigated matter should not reopen questions decided by another judge of that same court or by a higher court in the



earlier phases of the matter.” *Id.*, 550 Pa. at 261, 705 A.2d at 425. The related yet distinct rules embodied by the law of the case doctrine are that (1) upon remand for further proceedings, a trial court may not alter the resolution of a legal question previously decided by the appellate court in the matter; (2) upon a second appeal, an appellate court may not alter the resolution of a legal question previously decided by the same appellate court; and (3) upon transfer of a matter between trial judges of a coordinate jurisdiction, the transferee trial court may not alter the resolution of a legal question previously decided by the transferor trial court.<sup>8</sup> *Commonwealth v. Starr*, 541 Pa. 564, 664 A.2d 1326 (1995). Here, we are concerned only with the first rule and whether the trial court properly forewent addressing the issues raised in Property Owners’ second set of preliminary objections so as to not alter the manner in which this Court had previously resolved them.

In the instant appeal, the issues raised by Property Owners before the trial court following remand are essentially identical to those already resolved by this Court in *Emel I.*<sup>9</sup> The amendment of the Original Resolution was not a

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<sup>8</sup> The law of the case doctrine, however, does not apply when there has been an intervening change in the controlling law; there has been a substantial change in the evidence or facts giving rise to the litigation; or the prior ruling was clearly erroneous and would create a manifest injustice if followed. *Starr*.

<sup>9</sup> With regard to their argument that the Authority had failed to comply with Section 804(9) of the Township Code, we concluded that this issue was not raised by Property Owners in their original preliminary objections or at the initial evidentiary hearing and was waived. Also, Property Owners’ other argument that the Amended Resolution failed to contain a sufficient description of the property being acquired was also resolved when we determined that the Authority’s Exhibit C, a metes and bounds description as well as a plot plan that depicted the property to be condemned which was appended to the declaration, was sufficient to notify **(Footnote continued on next page...)**

substantial change as it did not affect the original and still extant facts underlying our decision in the first appeal, and neither the trial court nor this court can reexamine those issues in this appeal under the law of the case doctrine. Because this Court previously decided the issues raised by Property Owners, the trial court did not err in applying that doctrine to forego addressing those issues.<sup>10</sup> *See Peden v. Gambone Brothers Development Company*, 798 A.2d 305 (Pa. Cmwlth. 2002).

Accordingly, the order of the trial court is affirmed.

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DAN PELLEGRINI, JUDGE

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**(continued...)**

Property Owners of the property to be condemned for the sewer lines in accordance with Sections 402(b)(4) and 402(b)(5) of the Eminent Domain Code, 26 P.S. §§1-402(b)(4), 1-402(b)(5).

<sup>10</sup> Because of the manner in which we have resolved this case, we need not address whether the trial court erred in determining that Pa. R.C.P. No. 1028(b) precluded Property Owners from raising issues in a second set of preliminary objections or the merits of the issues raised in those preliminary objections.

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**ORDER**

AND NOW, this 2<sup>nd</sup> day of April, 2008, the order of the Court of  
Common Pleas of Montgomery County, dated May 4, 2007, is affirmed.

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DAN PELLEGRINI, JUDGE