IN THE COMMONWEALTH COURT OF PENNSYLVANIA

John H. Stitely and Sally Stitely, his wife, Appellants	:	
v.	:	
Commonwealth of Pennsylvania, Department of Transportation, Bureau of Highways	:	No. 1128 C.D. 2011
	:	Argued: April 17, 2012

BEFORE: HONORABLE DAN PELLEGRINI, President Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
PRESIDENT JUDGE PELLEGRINI FILED: May 10, 2012

John and Sally Stitely (Property Owners) appeal from an order of the Court of Common Pleas of Westmoreland County (trial court) sustaining preliminary objections filed by the Department of Transportation (Department) to Appellants' petition for appointment of a board of viewers for a *de facto* taking of their property because Property Owners failed to make out that Route 130 encroached on their property. For the reasons that follow, we affirm.

Property Owners have owned property adjacent to the northern border of State Route 130 in the City of Jeannette since March 19, 1963.[1] On October 6,

[1] The property, as described in a 1926 deed, covers an area:

(Footnote continued on next page…)

2010, Property Owners filed a Petition to Appoint a Board of Viewers seeking compensation for an alleged *de facto* taking[2] of their Property. Property Owners alleged that since they have owned the property, the Department—through its agents, contractors, and the like—have "repaired, repaved, reconstructed, widened and otherwise enlarged the boundaries of the right-of-way of [Route] 130, over and onto the property of the [Appellants]." (R.R., at 4b.) The alleged encroachment encompasses 1,280 square feet of Appellants' property. The Department filed preliminary objections, alleging that no encroachment had occurred and seeking dismissal of the petition to appoint a board of viewers.[3]

(continued…)

> "Beginning at a point at the northwest corner of Julia Street and Harrison City Road; thence northwardly along the westerly side of Julia Street a distance of ten (10) feet to a point on the line dividing Lots Nos. 434 and 435; thence by said dividing line westwardly a distance of one hundred twenty-five (125) feet to the easterly line of an alley; thence southwardly by said alley a distance of one hundred thirty (130) feet to the northerly side of the Harrison City Road; thence eastwardly by same a distance of one hundred seventy-five (175) feet to the point at the place of beginning."

(Supplemental Reproduced Record [R.R.], at 18b.) The property remains the same and the validity of the 1926 deed has not been challenged.

[2] A *de facto* taking occurs where an entity vested with the power of eminent domain substantially deprives a property owner of the beneficial use and enjoyment of his property. *Conroy-Prugh Glass Company v. Department of Transportation*, 456 Pa. 384, 321 A.2d 598 (1974). When a property owner seeks damages for a *de facto* taking, he bears a heavy burden of showing exceptional circumstances that establish such deprivation and that the deprivation was a direct consequence of the actions of the governmental entity. *Thomas A. McElwee & Son, Inc. v. SEPTA*, 896 A.2d 13, 19 (Pa. Cmwlth. 2006). *De facto* taking cases must be examined on a case-by-case basis and decided on their own facts. *Id.*

[3] This Court has noted that:

(Footnote continued on next page…)

Before the trial court, Mr. Stitely testified that he purchased the property in 1963 for business purposes, and he built a garage on the lot, which he now rents. He stated that he was required to put a curb in to limit access onto and off the property. Mr. Stitely testified that, over the course of his ownership of the property, the roadway was raised 12 inches, making his property lower than the road and completely covering the curb he installed. He testified that the road encroached on his property in the last two years due to road reconstruction. On cross-examination, Mr. Stitely said that when he purchased the property in 1963, the roadway was cobblestone. When asked about road widening that occurred in 1972 and 1982, Mr. Stitely responded that he had not seen any roadwork of that nature being done. It was with the most recent roadwork, in the last two years, that Mr. Stitely noticed the roadway, including painted "fog lines," encroaching on his property along a bend in the road on Route 130. He testified that there have not been any significant changes in the property—such as access from the roadway or rental loss—beyond the encroachment due to the Department's road widening.

(continued…)

> Preliminary objections in the context of eminent domain actions serve a different purpose than preliminary objections filed in other civil actions. Not only are the Rules of Civil Procedure not applicable to eminent domain proceedings, but preliminary objections filed pursuant to Section 406 of the Eminent Domain Code serve a very different purpose than those filed under the Rules of Civil Procedure. In eminent domain cases, preliminary objections are intended as a procedure to resolve expeditiously the factual and legal challenges to a declaration of taking before the parties proceed to determine damages.

In re Condemnation by City of Coatesville, 898 A.2d 1186, 1194, n.7 (Pa. Cmwlth. 2006) (citations omitted)

Donald Harper (Harper), a certified land surveyor and engineer, hired by Property Owner, testified that his survey determined that Route 130 encroaches into the property. He testified that the Property consists of two lots, laid out in 1890. Harper located the actual pavement of the road and based on his calculation, he opined the encroachment to be a total of 1,280 square feet. On cross-examination, Harper testified that the road did not encroach upon the property when the plan was originally drawn in 1890. He also said he did not know what the nature of the roadway was in 1963 when Property Owners purchased the Property. Harper also admitted that he was unable to find the curb Mr. Stitely purportedly installed along Route 130.

In opposition, the Department called a number of witnesses who gave the history of the right-of-way, conducted studies regarding the roadway, and testified as to when maintenance occurred. Ed Sciulli (Sciulli), a geologist with L.R. Kimball was admitted as an expert and testified that he conducted a geophysical survey of the area via ground penetrating radar for the Department. He determined that the original concrete roadway was approximately 16½ feet wide. Sciulli said the original concrete roadway was approximately seven feet wide from the now-center line to the northern border at one point, but just over 11 feet wide at another point right in front of the Stitely property.

Eric Wanson (Wanson), chief of surveys for the Department, testified that the roadway was 16 feet wide (not including the shoulders) in 1962, based on Department records. He also said that the travel portion of the roadway was

widened in 1972 to 20 feet wide, and again in 1982 to 24 feet.[4] According to Department records, the last activity on Route 130 abutting the Stitely property occurred in 1993, but that was only for milling and resurfacing and did not change the width of the road. Wanson said he did not know of and the Department had no records showing that any paving occurred in the last two years. He also testified that, although the original right-of-way for the road was 33 feet, it was expanded in 1890 to 50 feet. Wanson said that, based on Sciulli's study, the concrete road ran closer to the Stitely property than the property on the southern side of the road. He said that the historic, 33-foot-wide right-of-way would cover the entire area Harper listed as "hatched and encroached." (Trial Court Proceedings Transcript dated March 22, 2011, at 146.) He testified that the entire roadway and shoulder, as it exists today, is within the 33-foot limit. Wanson also said it is not unusual for a deed to show a road on the property. He testified that, based on his study, it appeared that the road had migrated toward the property on the southern side of Route 130, not toward the Stitely property, but the road was still within the 33-foot right-of-way. On cross-examination, Wanson conceded that the side of the road,

[4] Robert Hoone (Hoone), a geologic specialist for the Department testified that he went to the Stitely property and cut through the roadway to determine the composition of all the layers of paving to establish where the earlier concrete roadway ran. He said that the first core bore hole, in the southern travel portion of the roadway away from the Stitely property, contained asphalt over a stone base, and no concrete was present. Another hole in the same area contained blacktop on top of a stone base. The third hole, at the end of the asphalt in the lane of traffic closest to the Stitely property, contained blacktop over concrete. A fourth hole, north of the third, contained all blacktop. Finally, a fifth hole was drilled near the center line of the road, and it contained blacktop over concrete. On cross-examination, Hoone said that his interpretation of the fourth hole, which was drilled closest to the Stitely property, was that there was no concrete roadway there. Since holes three and five revealed a concrete base, it established that the edge of the concrete surface was somewhere between holes two and five on one side, and may have been located at hole three on the other.

not the middle or any other portion thereof, was listed as the boundary of the lot in the 1926 deed.

Finally, Timothy Cook (Cook), the Westmoreland County maintenance manager for the Department, testified that it was his duty to oversee any repaving or resurfacing of state roadways within the county. He said that Route 130 in front of the Stitely property had not been resurfaced or widened at all in the last three years, and he had no reason to believe that any work had been done on that roadway between 1993 and when he took over his position on April 1, 2008.

Based on the testimony, the trial court sustained the Department's preliminary objections and dismissed Property Owners' Petition for Appointment of Viewers, finding that Property Owners had not made out that a *de facto* taking had occurred because the paved roadway of Route 130 running in front of the Stitely property was entirely within the 50-foot right-of-way. This appeal followed.[5]

Property Owners argue that the trial court abused its discretion by ignoring Mr. Stitely's testimony that he installed a curb that purportedly marked the boundary of the roadway; that the Department painted fog lines on the property

[5] "In an eminent domain case disposed of on preliminary objections to a claim for a *de facto* taking, the appellate court's scope of review is limited to determining whether the trial court's findings of fact are supported by substantial evidence in the record and whether an error of law or an abuse of discretion was committed. The trial court, as fact finder, must resolve evidentiary conflicts, and its findings will not be disturbed if supported by substantial evidence." *Thomas A. McElwee & Son, Inc. v. SEPTA*, 896 A.2d 13, 17 n.5 (Pa. Cmwlth. 2006)

two years ago; that the location of concrete slabs for gas pumps that would "lead to a clear understanding of the extent of the right-of-way at the time of the expansion of the roadway;" (Property Owners' Brief, at 10); that no official state highway plan existed for this portion of Route 130; that the trial court should have relied on the original plan of lots filed in 1890, from which "[i]t can be argued that distance across the highway from the [Property Owners'] property to the property on the south, at is narrowest point could be 33 feet. (Landowners' Brief p. 11). Simply put, Property Owners are contending that the trial court did not consider their evidence.

Contrary to Landowners' claim, the trial court stated in its Rule 1925(b) opinion that it considered the issues mentioned but did not find them probative. In making its determination that there was no *de facto* taking, it relied on Property Owners' surveyor, Harper, and the Department's experts, especially Wanson, who said that, in the 1890 plan of lots, the dedicated right-of-way went from 33 to 50 feet. Based on the evidence and testimony, the trial court went on to find that Route 130 did not encroach on Property Owners' property. Because there was testimony and evidence to support those findings, the trial court did not abuse its discretion in finding that a *de facto* taking had not occurred.

Accordingly, the order of the trial court is affirmed.

DAN PELLEGRINI, President Judge

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John H. Stitely and Sally Stitely, his wife,	:	
Appellants	:	
	:	
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O R D E R

AND NOW, this 10th day of May, 2012, the decision of the Court of Common Pleas of Westmoreland County, dated May 19, 2011, is hereby affirmed.

DAN PELLEGRINI, President Judge