

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Franconia Township, :  
Appellant :  
v. : No. 1148 C.D. 2009  
Property of Sogia Investments, LLC : Argued: February 8, 2010

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge  
HONORABLE PATRICIA A. McCULLOUGH, Judge  
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY JUDGE McCULLOUGH

FILED: May 26, 2010

Franconia Township (Township) appeals from the May 19, 2009, order of the Court of Common Pleas of Montgomery County (trial court), overruling the Township’s preliminary objections to the petition for appointment of a board of view filed by Sogia Investments, LLC (Sogia).<sup>1</sup> We vacate and remand.

Sogia owns 2.366 acres of land (the property) in the Township. The property is situated at the intersection of Green Hill Road, which is owned by the Township, and Allentown Road, which is owned by the Commonwealth. On March 24, 2008, Sogia submitted a request to the Township for a driveway permit, seeking access to Green Hill Road. On April 30, 2008, the Township zoning officer issued a letter informing Sogia that its permit request was denied. In relevant part, the letter stated that the “Board of Supervisors (BOS) along with the

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<sup>1</sup> Pa.R.A.P. 311(e) provides that an appeal may be taken as of right from an interlocutory order overruling preliminary objections to a petition for appointment for a board of viewers.

Public Works Director, Township Engineer and myself as Zoning Officer personally inspected the site and the BOS concur in the opinion of their professional staff that the proposed driveway location [presents] significant safety, health and welfare issues.”<sup>2</sup> (Reproduced Record (R.R.) at 10a.) The denial letter also references a report prepared by Metz Engineers, which indicates, among other things, that the driveway as proposed does not provide adequate sight distances as required by the Township’s Subdivision and Land Development Ordinance, and does not include a complete grading plan, required storm sewer calculations and drainage area plans. (R.R. at 11a-13a.) The report concludes that, because adequate sight distances cannot be obtained, “the only location for driveway access...that should be permitted utilizes the existing adjacent Hartman driveway,

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<sup>2</sup> In its entirety, the denial letter states as follows:

In response to your letter dated March 24, 2008, relating to a request for a Driveway Permit for the address referenced above, the township and its Public Works Director, Paul R. Nice, hereby Deny the request and the denial is supported by a report from Metz Engineers, dated April 21, 2008 (copy enclosed).

Additionally, on Friday, April 25, 2008, the Board of Supervisors (BOS) along with the Public Works Director, Township Engineer and myself as Zoning Officer personally inspected the site and the BOS concur in the opinion of their professional staff that the proposed driveway location represents significant safety, health and welfare issues. The BOS have cited their responsibility under the code of the Township of Franconia as the township legislative authority and also their obligations under the Commonwealth of Pennsylvania Second Class Township Code to protect the same.

A solution to your request has been recommended in the report dated April 21, 2008 and would most likely resolve the matter in favor of the application.

(R.R. at 10a.)

as no viable location exists on the property frontage of Green Hill Road or Allentown Road.” (R.R. at 13a.) The Hartman property is not owned or controlled by Sogia.

On June 9, 2008, Sogia filed a petition for the appointment of a board of view,<sup>3</sup> asserting that the Township’s denial of the driveway permit constitutes a de facto taking. Specifically, the petition alleged that the Township’s denial was contrived, in that no portions of the Township’s SALDO were violated by the driveway as proposed. The petition further alleged that the Township denied Sogia any access to its property, except by way of property Sogia does not own, thereby rendering the property wholly useless as a building lot. Sogia sought damages in the amount of the fair market value of the property, with interest, reimbursement of taxes and insurance premiums paid since the date of the taking, costs, attorneys fees, and other appropriate relief. (R.R. at 5a-7a.)

The Township filed preliminary objections to the petition on July 14, 2009, alleging that the trial court lacked jurisdiction to adjudicate the denial of the petition because Sogia failed to appeal the denial to the Township’s zoning hearing board (ZHB) as required by section 909.1 of Pennsylvania Municipalities Planning

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<sup>3</sup> Section 502 of the Eminent Domain Code provides the following:

**(c) Condemnation where no declaration of taking has been filed.--**

(1) An 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 substantially in the form provided for in subsection (a) setting forth the factual basis of the petition.

Code (MPC).<sup>4</sup> (R.R. at 22a.) The Township also asserted that the petition does not set forth facts sufficient to establish a de facto taking.<sup>5</sup>

On July 23, 2008, Sogia filed an answer and new matter to the Township's preliminary objections. The new matter alleged that the approval or denial of a driveway permit is a determination made by the Township's Board of Supervisors pursuant to section 64-1 of the Franconia Township Driveway Ordinance, not a determination of the zoning officer or municipal engineer.<sup>6</sup> (R.R. at 40a.) The Township subsequently filed an answer denying the majority of Sogia's allegations as conclusions of law. (R.R. at 65a.) Following oral argument, by order dated May 19, 2009, the trial court overruled the Township's preliminary objections.

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<sup>4</sup> Act of July 31, 1968, P.L. 805, as amended, added by the Act of December 21, 1988, P.L. 1329, as amended, 53 P.S. §10909.1.

<sup>5</sup> In order to establish a de facto taking, a property owner carries a heavy burden to demonstrate exceptional circumstances exist that substantially deprive the property owner of the use of its property and that such deprivation is a direct result of the action of an entity clothed with the power of eminent domain,. Elser v. Department of Transportation, 651 A.2d 567 (Pa. Cmwlth. 1994). There is no bright line test for determining if a de facto taking has occurred; instead, each case must be decided on its own facts. Newman v. Department of Transportation, 791 A.2d 1287 (Pa. Cmwlth. 2002).

<sup>6</sup> The Township's Driveway Ordinance provides the following permit requirement:

[I]t shall not be lawful for any person to construct or reconstruct any driveway or alter the grade line or width of any shoulder within the right-of-way of township roads until a permit to perform such construction or reconstruction has been issued by the Board of Supervisors of the township.

Township Driveway Ordinance, Adopted 8-5-1969, Ord. No. 54, Article I, Section 64-1. (R.R. at 125a.)

The trial court concluded that Sogia satisfied its burden to establish a de facto taking and explained its reasoning in a August 19, 2009 opinion. Quoting the Township’s denial letter and portions of the accompanying engineer’s report, the trial court stated that “[e]xceptional circumstances are established by the Township’s denial of Sogia’s driveway permit and its suggestion that the only location for driveway access that it would approve utilizes the existing driveway of a third party.” (R.R. at 115a.) The trial court determined that the lack of any driveway access to the property substantially deprived Sogia of the use of the property and found that the deprivation is the direct and necessary consequence of the Township’s action.

The trial court rejected the Township’s contention that Sogia was required to appeal the permit denial to the ZHB, noting that the Driveway Ordinance grants the Board of Supervisors authority to approve or deny applications for driveway permits. Finally, the trial court concluded that it was not required to hold an evidentiary hearing before ruling on the preliminary objections because no disputed questions of fact existed.

On appeal to this court,<sup>7</sup> the Township again argues that the trial court lacked jurisdiction to consider the petition based on Sogia’s failure to file an appeal with the ZHB. The Township contends that section 64-1 of the Driveway Ordinance vests the authority to deny or grant a driveway permit with the Board of

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<sup>7</sup> Appellate review of a trial court’s order overruling preliminary objections to a petition for appointment of board of view is limited to determining whether the trial court’s findings are supported by competent evidence in the record, and whether the trial court abused its discretion or committed an error of law. Elser v. Department of Transportation, 651 A.2d 567 (Pa. Cmwlth. 1994).

Supervisors unless another regulation imposes greater restrictions.<sup>8</sup> The Township asserts that section 909.1 of the MPC is such a regulation and grants the ZHB exclusive jurisdiction to render a final adjudication on appeals of determinations by the zoning officer and municipal engineer.<sup>9</sup> The Township contends that the zoning officer and engineer relied on other applicable Township ordinances and regulations, including the Township's Subdivision and Land Development Code, to recommend denying the permit. Therefore, the Township asserts that section 909.1 of the MPC requires Sogia to appeal the denial of the driveway permit to the ZHB in order to obtain a final determination.

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<sup>8</sup> Section 64-4 of the Driveway Ordinance provides the following guidelines for interpretation:

The provisions of this article shall be held to be minimum requirements to meet the above-stated purposes. Where the provisions of this article impose greater restrictions than those of any statute, other ordinance or regulations, the provisions of this article shall prevail. Where the provisions of any statute, other ordinance or regulation impose greater restrictions than those of this article, the provision of such statute, ordinance or regulations shall prevail.

(R.R. at 126a.)

<sup>9</sup> Section 909.1 of the MPC provides as follows:

(a) The zoning hearing board shall have exclusive jurisdiction to hear and render final adjudications in the following matters:

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(9) Appeals from the determination of the zoning officer or municipal engineer in the administration of any land use ordinance or provision thereof with reference to sedimentation and erosion control and storm water management insofar as the same relate to development not involving Article V or VII applications.

53 P.S. §10909.1.

Sogia responds that the denial letter is sufficient to establish that the Board of Supervisors made the determination to deny Sogia's permit and, therefore, Sogia is not required to appeal to the ZHB to obtain a final determination. We agree. Although the denial letter is signed by the Township's zoning officer, the letter indicates that the decision to deny the permit was made collectively by the Township's employees, that this decision was in reliance on an engineer's report and that the Board of Supervisors concurred in the permit denial. (R.R. at 10a.) Significantly, the denial letter specifically states that the Board of Supervisors "have cited their responsibility under the Code of the Township of Franconia as the township legislative authority and also their obligations under the Commonwealth of Pennsylvania Second Class Township Code to protect the same." (R.R. at 10.) Thus, the evidence reflects that the Board of Supervisors exercised its authority under section 64-1 of the Driveway Ordinance and denied the permit. We conclude that, under these circumstances, the provisions of section 909.1 of the MPC are not applicable and Sogia is not required to appeal the permit denial to the ZHB.<sup>10</sup>

The Township next argues that the petition does not, as a matter of law, state an action for a de facto taking because the denial of the driveway permit constitutes a valid regulatory action. We agree with the Township that the denial of the driveway permit, in and of itself, does not constitute a per se taking of the property. There has been no declaration of taking filed and no entry upon or intrusion into Sogia's property. The Township also argues, and we agree, that the

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<sup>10</sup> Under Local Agency Law, the authority to review the denial of Sogia's permit by the Board of Supervisors is vested with the court of common pleas. 2 Pa. C.S. §752. However, Sogia did not appeal the Board of Supervisors' decision, challenge the validity of the ordinance, or seek an order in mandamus for the issuance of a permit.

trial court erred in dismissing the preliminary objections without holding an evidentiary hearing. Although Sogia asserts that the Township denied all access to its property,<sup>11</sup> Sogia does not allege that it has applied for or been denied access to Allentown Road, address whether a variance is feasible, or indicate that it attempted to comply with the ordinance requirements identified in the engineer's report as prerequisites to acquiring the permit. Thus, even if the trial court believed that the facts alleged *might* establish a de facto taking, the trial court erred in dismissing the preliminary objections without first holding an evidentiary hearing.<sup>12</sup> We have held that where, as here, the preliminary objections raise an

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<sup>11</sup> A property owner's "right of access is a constitutionally protected interest, incidental to ownership or occupancy of the land, and may be denied only under compelling circumstances." Sienkiewicz v. Department of Transportation, 584 Pa. 270, 282, 883 A.2d 494, 502 (2005) (citing Hardee's Food Systems, Inc. v. PennDOT, 495 Pa. 514, 517-18, 434 A.2d 1209, 1211 (1981)). Right of access is defined as "the right to reasonable ingress and egress to the property." Elser, 651 A.2d at 570. Thus, substantial and permanent interference with a property owner's right of access can rise to level of a de facto taking. See Elser (holding that the placement of stone in a landowner's driveway substantially impaired access and resulted in a de facto taking); see also Department of Transportation v. Richards, 556 A.2d 674 (Pa. Cmwlth. 1989) (holding that a property owner unable to access his property without scraping the bottom of his vehicle due to grading differences was entitled to just compensation as a result of a de facto taking).

<sup>12</sup> Section 504 of the Eminent Domain Code provides as follows:

**(d) Preliminary Objections.—**

(2) Objections to the form of the petition or the appointment or the qualifications of the viewers in any proceeding or to the legal sufficiency or factual basis of a petition filed under section 402(c) (relating to the petition for appointment of viewers) are waived unless included in 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



issue of fact as to whether a de facto taking has occurred, the trial court must take evidence, even if the parties have not requested an evidentiary hearing. Hill v. City of Bethlehem, 909 A.2d 439, 443 (Pa. Cmwlth. 2006) (citing Millcreek Township v. N.E.A. Cross Company, 644 A.2d 739 (Pa. Cmwlth. 1993)).

Accordingly, we vacate the trial court's order and remand this matter to the trial court for an evidentiary hearing.

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PATRICIA A. McCULLOUGH, Judge

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or otherwise, but in no event shall evidence be taken by the viewers on this issue.

26 Pa. C.S. §504.

