IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Evelyn D. Nelson and Karen L. Fitts,	:	
	:	
Appellants	:	
	:	
v.	:	No. 1306 C.D. 2007
	:	
The County of Chester, Pennsylvania and Borough of West Chester, Pennsylvania	:	Argued: March 11, 2008

BEFORE: HONORABLE DORIS A. SMITH-RIBNER, Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE JOSEPH F. McCLOSKEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER **FILED: May 15, 2008**

Evelyn D. Nelson (Nelson) and Karen L. Fitts (Fitts) (collectively, Appellants) appeal from an order of the Court of Common Pleas of Chester County (trial court), which sustained the Preliminary Objections that were filed by the County of Chester (County) and the Borough of West Chester (Borough) (collectively, Appellees) in response to Appellants' Amended Petition for Appointment of a Board of Viewers (Amended Petition).[1] The issues before us on

[1] Appellants filed their Amended Petition pursuant to Section 502(e) of the former Eminent Domain Code, Act of June 22, 1964, Special Sess., P.L. 84, as amended, formerly 26

(Continued…)

appeal are: (1) whether the temporary loss of vehicular access to a detached garage for 15 to 18 months during governmental construction constitutes a partial *de facto* taking; and (2) whether a detached garage may be considered separately from a residence for purposes of determining whether there was a partial *de facto* taking.[2,3]

I. Facts and Procedural Posture

Nelson owned and resided at the property located at 234 West Gay Street, West Chester, Pennsylvania (the Nelson Property) from 1993 to early 2007.[4] Nelson's mother also resided with Nelson at the Nelson Property from 2002 to 2007. The Nelson Property extends from Gay Street in the front (on the north side) to Courthouse Alley in the rear (on the south side). The Nelson Property includes a detached garage, which is located at the rear of the property along Courthouse Alley. The only vehicular access to the detached garage is from Courthouse Alley between New Street to the west and Darlington Street to the east. Nelson had

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P.S. § 1-502(e), repealed by Section 5 of the Act of May 4, 2006, P.L. 112, which provided that "[i]f there has been a compensable injury suffered and no declaration of taking therefor has been filed, a condemnee may file a petition for the appointment of viewers substantially in the form provided for in subsection (a) of this section, setting forth such injury." A similar provision is now found in Section 502(c) of the Eminent Domain Code, 26 Pa. C.S. § 502(c).

[2] For purposes of this opinion, Appellants' arguments are presented in an order that is different from the order in which they were presented in Appellants' brief.

[3] In their Amended Petition, Appellants alleged a *de facto* taking of their backyard sitting areas, sunlight coming onto their properties, their detached parking garages, and their parking aprons. (Amended Petition ¶¶ 84, 86, 87.) However, on appeal, Appellants only challenge the trial court's determination that no *de facto* taking of Appellants' detached garages had occurred. Therefore, that is the claim that will be discussed in this opinion.

[4] Nelson sold her property on March 14, 2007, and moved out of West Chester.

purchased the Nelson Property, in part, because of the detached garage located thereon, and she was accustomed to parking her vehicle in her detached garage.[5]

Fitts has owned and resided at the property located at 236 West Gay Street, West Chester, Pennsylvania (the Fitts Property) since 2000. The Fitts Property, like the Nelson Property, extends from Gay Street in the front (on the north side) to Courthouse Alley in the rear (on the south side). The Fitts Property, like the Nelson Property, also includes a detached garage, which is located at the rear of the property along Courthouse Alley. Like the detached garage on the Nelson Property, the only vehicular access to the detached garage on the Fitts Property is from Courthouse Alley between New Street to the west and Darlington Street to the east. Fitts had purchased the Fitts Property, in part, because of the detached garage located thereon, and she was accustomed to parking her vehicle in her detached garage.[6]

In 2005, the County started constructing its new Justice Center, which will house the trial court as well as other associated departments. The Justice Center is located on Market Street, between New Street and Darlington Street, and extends

[5] Nelson particularly valued the ability to park her vehicle in her detached garage because both she and her mother are physically handicapped, and a walkway leading from the detached garage to the Nelson residence made it easier for Nelson and her mother to get from Nelson's vehicle to the house and vice versa. (Nelson Dep. at 13-14.)

[6] Fitts, who is a professor at West Chester University, particularly valued the ability to park her vehicle in her detached garage because it allowed her to walk safely from her vehicle to her house when she returned home after teaching classes late at night, without fear of slipping and falling or crossing a busy intersection. (Fitts Dep. at 5-7.)

in the rear to Courthouse Alley, directly across from the Nelson Property and the Fitts Property.

In December of 2005, the County advised Appellants that Courthouse Alley would need to be closed for at least 15 months. (Letter from Theodore Jacobs, Director of Facilities, to Justice Center Neighbors on Gay Street, (December 2, 2005).) Courthouse Alley was subsequently closed on weekdays, and some weekends, between the hours of 7:30 a.m. and 3:30 p.m., for a period of 15 to 18 months.

When Courthouse Alley was closed during construction, Appellants were unable to park their vehicles in their detached garages. Appellants allege that when Courthouse Alley was open during construction, they were still unable to park their vehicles in their detached garages because the construction safety fencing that was erected narrowed the turning radius in Courthouse Alley to such an extent that they were unable to get their vehicles in and out of their detached garages without causing damage to them. (Nelson Dep. at 18-19; Fitts Dep. at 15-16.) Thus, Appellants argue that they were effectively denied vehicular access to their detached garages from December 2005 through the spring of 2007. Appellants were able to access their detached garages on foot and use them for storage throughout the construction of the Justice Center.

During the time period that Appellants allege they were unable to access their detached garages with their vehicles, the County offered Appellants

alternative parking in the Spaz parking lot and in the County parking garage.[7] Additionally, Appellees allege that Appellants were advised that they could obtain assistance in having construction equipment moved in order to access their detached garages during the construction.[8] There is no dispute that Appellants were consistently able to access the front of their properties from Gay Street throughout the construction of the Justice Center.

[7] Fitts used the parking that was provided by the County throughout the construction of the Justice Center. Fitts alleges that the alternative parking spaces provided by the County were inadequate because she was required to walk several blocks from those parking spaces to her house late at night, which caused her to have safety concerns regarding icy sidewalks. (Fitts Dep. at 5.) Nelson declined to park in the Spaz parking lot or the County parking garage, claiming that they were too far from the Nelson Property. Nelson requested that she be provided with a handicap parking space on New Street, near the Nelson Property. (Nelson Dep. at 47-48.) The Borough provided Nelson with the handicap parking space on New Street, and that space was dedicated to the Nelson Property for about two weeks. (Nelson Dep. at 48-49.) However, after two weeks, the space was no longer dedicated to the Nelson Property, and other people were able to park in it. (Nelson Dep. at 48-49.) There was also a handicap parking space on Gay Street, which was not dedicated to the Nelson Property. (Nelson Dep. at 22.) Nelson alleges that the handicap spaces near the Nelson Property were inadequate because they were often unavailable, and she received numerous parking tickets for parking in those spaces overnight. (Nelson Dep. at 22-24.) Nelson alleges that the Borough initially waived her parking tickets, but later refused to do so. (Nelson Dep. at 22-24.) Nelson also alleges that a warrant was issued for her arrest due to her unpaid parking tickets, but that the case was later dismissed by a Magisterial District Judge. (Nelson Dep. at 24; Appellants' Br. at 6-7.)

[8] Gary Matthias, Project Manager of the Justice Center, testified that he advised Appellants at a town meeting that if they needed access to their detached garages, they could contact him, and he would determine a safe time for them to access their detached garages. (Matthias Dep. at 3, 5) Mr. Matthias also testified that Fitts contacted him on one occasion because she could not get her vehicle out of her garage and that he removed the impediment so that Fitts could get out of her garage. (Matthias Dep. at 6.) Mr. Matthias further testified that he did not receive any other phone calls from Appellants regarding access to their detached garages. (Matthias Dep. at 12.)

On October 27, 2006, Appellants filed with the trial court a Petition for Appointment of a Board of Viewers (Petition), alleging that the County had caused a *de facto* taking of their detached garages. In response, on November 8, 2006, the County filed Preliminary Objections, alleging that the Borough was an indispensable party to the action and demurring on the issue of a *de facto* taking. Thereafter, Appellants filed their Amended Petition, which named the County and the Borough as parties. Appellees then filed Preliminary Objections to the Amended Petition, alleging that Appellants failed to state a cause of action for a *de facto* taking.

The trial court received evidence on the Amended Petition and the Preliminary Objections. This evidence included the deposition testimony of Appellants, as well as the deposition testimony of Theodore Jacobs, Director of Facilities for the County, and Gary Matthias, Project Manager for the Justice Center. After considering this evidence, the trial court found that no *de facto* taking occurred and issued an order sustaining Appellees' Preliminary Objections and dismissing Appellants' Amended Petition. Appellants appealed the trial court's determination to this Court. Pursuant to Rule 1925 of the Pennsylvania Rules of Appellate Procedure, the trial court filed an opinion in support of its order. In its opinion, the trial court explained that Appellants failed to establish that exceptional circumstances substantially deprived them of the use and enjoyment of their properties because the highest and best use of their properties as residences was unaffected. (Trial Ct. Op. at 3-4.) The trial court also found that, although the use of the garages had been "substantially impacted," it had "not been entirely eliminated." (Trial Ct. Op. at 3) The trial court further found that even if

use of the garages had been entirely eliminated for a period of time, the use had been restored, and the trial court could not consider the garages separately from the main use of the property. (Trial Ct. Op. at 3.)

II. Discussion

A. Partial *De facto* Taking

On appeal, Appellants contend that the trial court erred in failing to conclude that the temporary loss of vehicular access to their detached garages for 15 to 18 months during construction of the Justice Center constituted a partial *de facto* taking of their properties.[9]

A *de facto* taking occurs when an "entity clothed with the power of eminent domain substantially deprives an owner of the beneficial use and enjoyment of his property." Conroy-Prugh Glass Co. v. Department of Transportation, 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), rev'd on other grounds, 369 U.S. 84 (1962)). In order to establish a *de facto* taking, a property owner must aver and prove that: (1) the condemnor has the power of eminent domain; (2) "exceptional circumstances" have "substantially deprived [the property owner] of the use and enjoyment of his

[9] In an eminent domain case that is before us on appeal from a trial court's grant or dismissal of preliminary objections, our scope of review is limited to determining whether the trial court's findings of fact are supported by substantial evidence, whether the trial court abused its discretion, or whether an error of law was committed. Newman v. Department of Transportation, 791 A.2d 1287, 1289 n.4 (Pa. Cmwlth. 2002).

property"; and (3) the damages sustained were the "immediate, necessary and unavoidable consequence of" the exercise of the eminent domain power. Jacobs Appeal, 423 A.2d 442, 443 (Pa. Cmwlth. 1980). The burden on the property owner to prove *a de facto* taking is a heavy one, and each case must be decided based on its own particular facts. Darlington v. County of Chester, 607 A.2d 315, 318 (Pa. Cmwlth. 1992).

Here, there is no question that the County and the Borough are both entities clothed with the power of eminent domain. What remains at issue is whether Appellants have sufficiently alleged and proven that exceptional circumstances substantially deprived them of the use and enjoyment of their properties as the immediate, necessary and unavoidable consequences of the exercise of the eminent domain power. Appellants contend that they have done so.

In support of their argument, Appellants rely on Harrington v. Department of Transportation, 792 A.2d 669 (Pa. Cmwlth. 2002). In Harrington, the property owner alleged a *de facto* taking of her property, pursuant to Section 612 of the Eminent Domain Code,[10] when the Department of Transportation regraded and widened U.S. Route 322 in front of her residence, which caused flooding and permanent interference with any reasonable and safe access to her property. Id. at 671. In response, the Department of Transportation filed preliminary objections. Id. The trial court determined that the property owner had made sufficient

[10] Formerly 26 P.S. § 1-612, repealed by Section 5 of the Act of May 4, 2006, P.L. 112. A similar provision is now found in Section 714 of the Eminent Domain Code, 26 Pa. C.S. § 714.

allegations to establish that she was substantially deprived of the use and enjoyment of her property and, thus, found a *de facto* taking. Id. at 671-72. On appeal, this Court affirmed the trial court's determination, concluding that the totality of the Department of Transportation's actions, which included a change of grade and a *permanent* interference with access to property, could constitute a substantial deprivation of the property owner's use and enjoyment of her property. Id. at 675-76. Appellants contend that here, like in Harrington, the totality of the County's and/or the Borough's actions constitute exceptional circumstances that substantially deprived them of the use and enjoyment of their properties.[11]

Appellants also rely on Newman v. Department of Transportation, 791 A.2d. 1287 (Pa. Cmwlth. 2002). In Newman, the property owner alleged a *de facto* taking of his property pursuant to Section 612 of the Eminent Domain Code where he was required to *permanently* close his business due to a lack of access during a 27-month construction project undertaken by the Department of Transportation. Id. at 1288. The Department of Transportation filed preliminary objections in the nature of a demurrer. Id. The trial court concluded that the property owner had sufficiently alleged that he had suffered a *de facto* taking of his property and, therefore, dismissed the Department of Transportation's preliminary objections.

[11] Specifically, the exceptional circumstances which Appellants contend substantially deprived them of the use and enjoyment of their detached garages are: Nelson had to install a hand rail at the steps in front of her house; Nelson incurred parking tickets; Nelson lost the services of her mother's caregivers; Nelson moved; Fitts was required to park in remote parking areas; Appellants sustained damage to their vehicles; Appellants lost light in their yards; Appellants lost their privacy; and Appellants lost the use of their garages for 15 to 18 months. We are unable to discern how Appellants' claims regarding a loss of light and a loss of privacy relate to the temporary loss of vehicular access to their detached garages.

Id. at 1288-89. On appeal, this Court affirmed the trial court's determination, concluding that the loss of access to the property owner's business during the Department of Transportation's construction project, which resulted in the closure of the business, could constitute a substantial deprivation of the use and enjoyment of his property. Id. at 1290. Appellants contend that here, like in Newman, the temporary loss of vehicular access to their detached garages for a significant period of time—15 to 18 months—constituted a substantial deprivation of the use and enjoyment of their properties.

However, Harrington and Newman are distinguishable from the present case. Unlike in Harrington and Newman, here there was no *permanent interference* with Appellants' use and enjoyment of their properties. Appellants concede that vehicular access to their detached garages was restored in the spring of 2007.

We believe that this case is more analogous to Genter v. Blair County Convention and Sports Facilities Authority, 805 A.2d 51 (Pa. Cmwlth. 2002). In Genter, the property owner alleged a *de facto* taking of her property when the Blair County Convention and Sports Facilities Authority (Authority) constructed a convention center and adjoining highway near her property, which caused a reconfiguration of the roads leading to her property. Id. at 53-54. Specifically, the property owner alleged that the construction project: (1) impeded access to her property during daytime hours because of open construction ditches; (2) destroyed the rural setting of her property; (3) would cause a loss of use and enjoyment of her property because of highway noise; (4) caused the loss of use and enjoyment of her

property because of noise and dust from construction of the highway; and (5) would cause the death of mature trees near her property. Id. at 54. "In response, the Authority filed preliminary objections in the nature of a demurer . . . ." Id.

The trial court entered an order dismissing the Authority's preliminary objections. The trial court found that the construction of the convention center and the adjoining highway had permanently altered the setting of the property to such an extent that the property owner was deprived of her use of the property as a private and secluded residence. Id. at 56. The trial court attributed the deprivation of use to: a change in the ingress and egress to the property; a change in the wooded wetlands setting of the property; interference with access to the property during construction; and dust, dirt and noise caused by the construction. Id. at 56 n.11.

This Court, on appeal, reversed the trial court, concluding that Genter failed to present sufficient allegations and testimony to establish a *de facto* taking of her property. Id. at 59. In reaching this conclusion, we recited our holding from Department of Transportation v. Steppler, 542 A.2d 175 (Pa. Cmwlth. 1988), in which we stated that:

> where the owner of a residential property has not lost the use of his property as a residence, no *de facto* taking of the entire property has occurred, notwithstanding the fact that the residence has a reduced market value, unless the unmarketability was the result of the property's inevitable *total* condemnation, such that a cloud would be placed on the property's title, *rendering it completely valueless*.

Genter, 805 A.2d at 57 (quoting Steppler, 542 A.2d at 178) (emphasis in original).[12] Applying our holding from Steppler to the facts of Genter, where there was no evidence that the property owner lost the use of her property as a residence, we stated that:

> we overrule the trial court's holding that a *de facto* taking of Genter's residence has occurred. Where it is shown that the owner can still use his property as a residence and the whole property will not be condemned, there is no substantial deprivation of a property's highest and best use. Thus, there can be no *de facto* taking.

Id. at 58. As to the property owner's allegations regarding a partial loss of access during construction, we specifically stated that "the Code does not permit any award of damages for the temporary loss of access during construction . . . ." Id. (citing Truck Terminal Realty Co. v. Department of Transportation, 486 Pa. 16, 403 A.2d 986 (1979); Berk v. Department of Transportation, 651 A.2d 195 (Pa Cmwlth. 1994)). We further noted that the property owner "had reasonable and consistent access to her property throughout the construction" and that the Authority made "extraordinary efforts . . . to design and construct reasonable permanent access from her property to the public road system." Id. at 58 n.15.

[12] In Genter, we determined the facts of that case to be far removed from the exceptional circumstances that existed in Griggs v. County of Allegheny, 369 U.S. 84 (1962), which is the seminal case on residential *de facto* takings. Genter, 805 A.2d at 56 n.13. In Griggs, planes traveled as low as thirty feet above the property owner's house every few minutes when taking off from or landing at the Allegheny County Airport. Griggs, 369 U.S. at 87. As a result, the individuals living inside could not talk in person or on the phone and could not sleep, even with sleeping pills. Id. In addition, the noise from the planes caused the windows to rattle and plaster to fall. Id. The Supreme Court found that because the house was rendered uninhabitable, there was a *de facto* taking. Id. at 88-90. Like Genter, the facts of this case are far removed from the exceptional circumstances involved in Griggs.

Here, like in Genter, although Appellants allege that they suffered a temporary loss of vehicular access to their detached garages during construction of the Justice Center, there was no *permanent interference* with Appellants' use and enjoyment of their properties as residences. Appellants had reasonable and consistent access to their residential properties throughout the construction of the Justice Center. Moreover, like the Authority in Genter, the County and/or the Borough made significant efforts to accommodate Appellants in this case by providing them with alternative parking.[13] Because the temporary loss of vehicular access alleged by Appellants did not cause a *permanent interference* with the use and enjoyment of their properties as residences, there can be no *de facto* taking.

Therefore, the trial court did not err in failing to conclude that there was a partial *de facto* taking of Appellants' properties.

B. Detached Garages Considered Separately from Residences

Appellants further argue that the trial court erred by failing to consider their detached garages separately from their residences because they have never claimed a *de facto* taking of their residences, but rather have only claimed a *de facto* taking of *part* of their properties—their detached garages.

[13] While it may have been inconvenient for Appellants to use the alternative parking provided and/or contact Mr. Matthias, the Project Manager, who testified that he had offered to assist Appellants in accessing their detached garages, those inconveniences do not rise to the level of a *de facto* taking.

We have consistently stated that: "[w]hether a particular activity deprives a property owner of the beneficial use and enjoyment of a property is . . . dependent upon the type of use the owner has given to the property." Department of Transportation v. Kemp, 515 A.2d 68, 72 (Pa. Cmwlth. 1986). "The beneficial use of a property includes not only its present use, but also all potential uses, including its highest and best use. In the absence of evidence to the contrary, the presumption is that the property's present use is the highest and best use . . . ." Visco v. Department of Transportation, 498 A.2d 984, 986 (Pa. Cmwlth. 1985). In applying these principles, we have traditionally found *de facto* takings only in cases where there was a *permanent interference* with the use of a property, *as a whole*, as a residential or a commercial property. See, e.g., Thomas A. McElwee & Son, Inc., 896 A.2d 13 (Pa. Cmwlth. 2006) (*de facto* taking found where property owner was forced to close its business, thus resulting in *permanent interference* with the use and enjoyment of its property).

In this case, Appellants argue that we should look at the particular use of their detached garages for parking vehicles separately from the use of the remainder of their properties as residences. However, Appellants do not cite to, nor are we aware of, any prior precedent in which the use of a particular part of a residential property was considered separately from the use of the whole property for purposes of determining whether a temporary partial *de facto* taking occurred. Appellants, here, were able to use their properties as residences during the construction of the Justice Center. They were also able to use their garages for storage, and they were provided alternative parking. There was no permanent loss of the use and enjoyment of Appellants' properties as residences, no permanent

loss of their garages, and there was no evidence of a reduction of the fair market values of the properties resulting from the construction.[14] Under these facts, we cannot consider Appellants' use of their detached garages for parking separately from the use of their properties as a whole—as residences. Therefore, we conclude that the trial court did not err in failing to consider Appellants' detached garages separately from their residences.

III. Conclusion

Accordingly, because Appellants' allegations are not sufficient to establish a *de facto* taking of their detached garages, the order of the trial court is affirmed.

RENÉE COHN JUBELIRER, Judge

[14] During her deposition, Nelson testified that she purchased her property for $149,000 and that she agreed to sell her property for $480,000. (Nelson Dep. at 43, 46.)

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	:	
Appellants	:	
	:	
v.	:	No. 1306 C.D. 2007
	:	
The County of Chester, Pennsylvania and Borough of West Chester, Pennsylvania	:	

O R D E R

NOW, May 15, 2008, the order of the Court of Common Pleas of Chester County in the above-captioned matter is hereby **affirmed**.

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RENÉE COHN JUBELIRER, Judge