

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In Re: Private Road, Goshen Township :

Dennis J. Merrey and Elmo L. Braid :

v. :

No. 1399 C.D. 2007
Argued: February 11, 2008

Peerless Fuel Company, Inc. and
James M. Miller, III, et al. :

v. :

Greenwoods Hunting and Fishing
Club, Inc. :

Appeal of: Peerless Fuel Company, Inc. :
and James M. Miller, III :

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
SENIOR JUDGE FLAHERTY

FILED: March 10, 2008

Appellants, Peerless Fuel Company, Inc. (Peerless) and James M. Miller, III (Miller), appeal from an order of the Court of Common Pleas of Clearfield County (trial court) which confirmed the report of the Board of View (Board) and dismissed Appellants’ exceptions. The Board determined that a private roadway was necessary to access landlocked property owned by Dennis J. Merrey and Elmo L. Braid (collectively, Merrey) and that such roadway should pass over Appellants’ land and not over property owned by Greenwoods Hunting and Fishing Club, Inc. (Greenwoods). The Board also determined that no actual taking occurred, thereby

concluding that damages were not warranted. We affirm the laying out of the private road but remand for a jury trial with respect to the issue of damages.

On February 19, 2004, pursuant to Section 11 of the law commonly known as the Private Road Act (Act), Act of June 13, 1836, P.L. 551, as amended, 36 P.S. § 2731, Merrey filed a petition alleging the need for a private road and requesting that such private road be laid out over lands owned by Appellants. Appellants filed an answer and new matter and joined as additional defendants, the Pennsylvania Game Commission (Game Commission) and Greenwoods. The complaint filed by Appellants alleged that there was an alternate route for the laying out of a private road over property owned by the Game Commission and Greenwoods. Thereafter, in a stipulation dated October 1, 2004, it was agreed between the parties that the alternate road through the game lands was designated “open to the public the entire year.” Thereafter, the complaint against the Game Commission was withdrawn.

On January 7, 2005, the trial court appointed the Board, which thereafter viewed the subject properties. The Board conducted a hearing, at which testimony and exhibits were presented. The parties agreed that the matter should be bifurcated, in that the necessity of the road would be determined initially by the Board with further proceedings at a later date to determine damages. The Board determined that a private road was necessary given that Merrey’s property is landlocked, as he has no means of ingress and egress. The Board further determined that the best route for the road is over land owned by Appellants. The Board also observed that there had been a past permissible use over such land.

Thereafter, before a scheduled hearing for damages, the parties informed the Board that they had settled the matter. However, at a later date, the parties

informed the Board that an agreement had not been reached. The Board, thereafter, held a hearing solely as to the issue of damages.

Ultimately, in addition to determining that a road over Appellants' property was necessary, the Board determined that fencing was necessary and directed Merrey to construct fencing of smooth wire approximately three feet above grade to be attached to trees along or near the edge of the roadway. As to damages, the Board concluded that no actual damages existed as the course of the road which had been utilized by the parties did not need to be altered. The Board also rejected the testimony presented by Appellants relating to loss of privacy, inasmuch as there was no market data to support taking a discount for privacy.

Thereafter, the trial court approved and adopted the report of the Board and dismissed the exceptions filed by Appellants. This appeal followed.¹

The initial issue we address is whether the Board properly considered all of the criteria which must be examined in the laying out of a private road. According to Holtzman v. Etzweiler, 760 A.2d 1195, 1197 (Pa. Cmwlth. 2000):

The location of the road is wholly within the province of the viewers. Viewers go upon the premises of a proposed road and observe all the physical aspects of the land and are far better able to select the location than any judge sitting in a courthouse. The statute gives the viewers power to locate the road.

¹ Our review of a trial court's decision regarding a Board of View's opening of a private road is limited to determining the validity of the court's jurisdiction, the regularity of the proceedings, questions of law and whether there has been an abuse of discretion. In re: Private Road in East Rockhill Township, 645 A.2d 313 (Pa. Cmwlth.), petition for allowance of appeal denied, 539 Pa. 698, 653 A.2d 1235 (1994).

Moreover, a court will not disturb the Board's decision regarding the location of the road absent a manifest abuse of discretion. In re: Private Road Cogan Township, 684 A.2d 237, 241 (Pa. Cmwlth. 1996).

In determining the layout of a road, Section 2 of the Act, 36 P.S. § 1785, provides that the Board:

[S]hall view such ground, and if they shall agree that there is occasion for a road, they shall proceed to lay out the same, having respect to the shortest distance, and the best ground for a road, and in such manner as shall do the least injury to private property, and also be, as far as practicable, agreeable to the desire of the petitioners.

As such, the Board, in determining the site for a private road, is to consider four factors: (1) the shortest distance, (2) the best ground, (3) the least injury to private parties and (4) the desire of the petitioners. Holtzman, 760 A.2d at 1197.

In this case, Appellants claim that the Board did not conduct an independent analysis of the four factors. Rather, Appellants claim that the Board merely assumed that because Merrey had prior consensual use of the Appellants' lands to access his landlocked property, that such route was the best route. We disagree and conclude that the Board considered the proper requirements in laying out the road over Appellants' land.

The Board in its report made the following finding:

19. The Board finds the property of Peerless and . . . [Miller] to be the most appropriate for the layout of the private road due to the following:
 - a. it is the desire of the Petitioners to establish the roadway over this property;
 - b. the route is the shortest distance to the property of Petitioners;

- c. there has been past permissible use over this route to Petitioners' pieces of property;
- d. given the route is already established, it is the best ground for the property and will do minimal injury to the property even though given the topography of the land certain improvements will be necessary.

(R.R. at 257a.)

Appellants claim that the Board impermissibly placed the private road over Appellants' property due to the prior permissive use without considering whether it was the best ground or would pose the least injury to private parties and property. In essence, Appellants argue that merely because there was prior permissible use of the road, it does not follow that such was the best route.

We observe that it was appropriate for the Board to consider the past permissible use of the road. In In re: Forester, 773 A.2d 219, 224 (Pa. Cmwlth. 2001), aff'd, 575 Pa. 365, 836 A.2d 102 (2003), this court stated that “[t]he fact that the viewers may have considered the past permissive use does not constitute an abuse of discretion.” In addition to considering the past permissive use, the Board in the case sub judice also found that because the road had been in existence since the early 1900's, it was an established road. The Board further found that the road would do minimal injury to the property, even though certain improvements would be necessary because of the land topography.

The Board also concluded that the route chosen is the shortest distance to the Merrey's property. Appellants argue, however, that the length of the private road over their land is approximately three miles, whereas the alternate road proposed by them over the Greenwoods' property, is approximately one mile. Appellants acknowledge that the Act does not specifically delineate where the starting point is in determining the shortest route.

Merrey responds that although the Greenwoods' route may be the shortest distance passing over private property, it would take Merrey fifteen minutes longer to reach his property using the Greenwoods' route. Moreover, in In re: Private Road Cogan Township, this court confirmed a situation in which the Board chose a longer established route in favor of a shorter route that had not been established.

In this case, although the road chosen may be the longest in terms of passing over private property, distance is only one of the factors to be considered. The Board properly considered all of the factors necessary in laying out a private road and chose to lay out the road over land owned by Appellants and such was within the Board's province.

Next, Appellants claim that the type of fencing ordered to be erected is dangerous and in violation of the Act.

Section 15 of the Act, 36 P.S. § 2735 provides:

Repair of Private Roads

All private roads shall be opened, fenced and kept in repair by and at the expense of the person or persons respectively at whose request the same were granted and laid out, and by their heirs and assigns.

In accordance with Fleming v. Ramsey, 46 Pa. 252 (1863), Section 15 of the Act, 36 P.S. § 2735, imposes a duty on all persons for whose use a private road is laid out and opened, to fence the same. Appellants maintain that they argued that the fencing to be erected should consist of "rails to trails" type fencing, with at least four equally spaced strands of smooth wire to be affixed to either trees or wooden posts and that the Board disregarded the mandates of the Act by not requiring the same to be

erected. Appellants claim that the single strand of fencing that Merrey was ordered to erect does not constitute a fence, is dangerous, and poses a significant liability risk.

Merrey responds that the fencing ordered is appropriate, in that neither Miller nor his family live in the vicinity of the road's location. Moreover, there are no animals or cliffs requiring a barrier. The single wire strand is in keeping with the nature of the land.

In this case, the Board acknowledged that the Act mandates that private roads be fenced. The Board found that the fencing proposed by Appellants was excessive, environmentally evasive and an impediment to wildlife, whereas the single wire fencing proposed by Merrey was in keeping with Appellants' stated desire to maintain the areas natural condition. The Act does not mandate what type of fencing must be erected, such that it was therefore within the Board's discretion to determine the type of fencing necessary.

Finally, we address the issue of whether Appellants are entitled to a jury trial on the issue of damages. In this case, the Board determined that there were no actual damages because there was no actual taking of the land. Appellants thereafter timely filed exceptions to the Board's report and requested a jury trial on the issue of damages with the trial court on March 6, 2007. The trial court, in approving and adopting the report of the Board and dismissing the exceptions, did not specifically address Appellants' request for a jury trial relating to damages. We agree with Appellants that the Act specifically provides that Appellants are entitled to a jury trial as to the issue of damages.

Section 16 of the Act, 36 P.S. § 2736, provides that "[t]he damages sustained by the owners of the land through which any private road may pass shall be estimated in the manner provided in the case of a public road" An appeal from

an award of damages by a board of view for opening a public road is provided in Section 1 of the subsequently enacted Act of April 15, 1891, P.L. 17, 36 P.S. § 2151, which provides that any owner of property for which a public road has been laid out “shall have the right to appeal to the court of common pleas . . . for the determination of the question of damages by a jury”

In In re Private Road in Union Township, 611 A.2d 1362, 1365 (Pa. Cmwlth. 1992), this court stated that “Section 16 of the Act [36 P.S. § 2736] authorizes a right to a jury trial on damages in proceedings to open a private road when owners of condemned property appeal to the trial court from an award of a board of view.” Although Merrey claims that the evidence presented to the Board relating to damages was incompetent, such that there was no issue for a jury, we observe that the Act plainly states that Appellants are entitled to a jury trial with respect to the issue of damages. It is difficult to accept that as a matter of law there is no factual issue to be determined by a jury where a past permissible use of Appellants’ property is now changed so as to further burden the fee of the property owner with a legally binding roadway or other conditions adversely affecting the property owner. Even if such burdens are minimal, such as erosion and trampling of grass, the law provides a forum for the property owner to have that evaluation made by a jury.

In accordance with the above, we affirm the decision of the trial court insofar as it affirms the decision of the Board laying out a private road over land owned by Appellants. The matter is remanded for a jury trial with respect to the issue of damages.

JIM FLAHERTY, Senior Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In Re: Private Road, Goshen Township :
:
Dennis J. Merrey and Elmo L. Braid :
:
v. : No. 1399 C.D. 2007
:
Peerless Fuel Company, Inc. and :
James M. Miller, III et al. :
:
v. :
:
Greenwoods Hunting and Fishing :
Club, Inc. :
:
Appeal of: Peerless Fuel Company, Inc. :
and James M. Miller, III :

ORDER

Now, March 10, 2008, the Order of the Court of Common Pleas of Clearfield County, in the above-captioned matter, is affirmed insofar as the laying out of the private road. However, this case is remanded to the trial court for a jury trial on the issue of damages.

Jurisdiction relinquished.

JIM FLAHERTY, Senior Judge