

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Piast Home Builders Company :
 :
 v. : No. 2026 C.D. 2008
 :
 Rice Township, : Argued: June 8, 2009
 Appellant :

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
 HONORABLE BERNARD L. MCGINLEY, Judge
 HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
 BY SENIOR JUDGE KELLEY

FILED: August 12, 2009

Rice Township (Township) appeals from the October 1, 2008 order of the Court of Common Pleas of Luzerne County (trial court) overruling its preliminary objections and ruling that there had been a *de facto* taking of Piast Home Builders Company's (Piast) property by the Township for which just compensation is due. We reverse.

The following facts in this matter are not in dispute. Piast is a home builders company and is the owner and developer of Polonia Estates, a residential phased subdivision. The property at issue herein is certain unimproved real property located in the Township and owned in fee simple by Piast. Specifically, the property is an area of land located between lots 19 and 20 in Polonia Estates which is: (1) bounded on the north by lands of Presidential Land Company (Presidential) and (2) bounded on the south by Aleksander Boulevard, currently a private street situated within Polonia Estates. The record shows that the property is

also referred to by the parties as lot 19A and we note that the map attached as Exhibit “A” to Piast’s Petition for Appointment of Board of Viewers pursuant to Section 502(c) of the Eminent Domain Code¹ depicting the property at issue herein clearly shows this area as an easement. Reproduced Record (R.R.) at 11a.

¹ 26 Pa.C.S. §502(c). Section 502 of the Eminent Domain Code governs petitions for appointment of viewers and provides, in pertinent part, as follows:

(a) CONTENTS OF PETITION.-- A condemnor, condemnee or displaced person may file a petition requesting the appointment of viewers, setting forth:

- (1) A caption designating the condemnee or displaced person as the plaintiff and the condemnor as the defendant.
- (2) The date of the filing of the declaration of taking and whether any preliminary objections have been filed and remain undisposed of.
- (3) In the case of a petition of a condemnee or displaced person, the name of the condemnor.
- (4) The names and addresses of all condemnees, displaced persons and mortgagees known to the petitioner to have an interest in the property acquired and the nature of their interest.
- (5) A brief description of the property acquired.
- (6) A request for the appointment of viewers to ascertain just compensation.

.....

(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.
- (2) The court shall determine whether a condemnation has occurred, and, if the court determines that a condemnation has occurred, the court shall determine the condemnation date and the extent and nature of any property interest condemned.

(Continued....)

Presidential is the owner of approximately 141.34 acres of real property that adjoins Piast's Polonia Estates. Presidential's property is intended as a residential subdivision for 153 building lots located in the Township known as "Woodberry Estates." General Sikorski Court is a private undedicated street within Polonia Estates that intersects with Aleksander Boulevard and connects Polonia Estates with Woodberry Estates.

On May 18, 2005, Presidential filed an action for declaratory judgment against Piast seeking a declaration regarding its rights to open and use General Sikorski Court. The trial court in orders dated September 29, 2005, May 3, 2006, and May 11, 2006, respectively, set forth that Presidential could open and use General Sikorski Court in Polonia Estates with the written consent and authority of the Township. R.R. at 36a-42a.

On or about May 11, 2006, Presidential began connecting its development to Aleksander Boulevard, a private undedicated street within Polonia Estates, so that Presidential could connect its street system, sewer lines, and water lines to Piast's private undedicated streets, sewer lines and water lines. As a result, Piast filed a complaint against Presidential on June 21, 2006 alleging negligence, trespass, private nuisance, conversion, tortuous interference with property and ejectment. R.R. at 77a-89a. In preliminary objections to that complaint,

(3) The court shall enter an order specifying any property interest which has been condemned and the date of the condemnation.

(4) A copy of the order and any modification shall be filed by the condemnor in the office of the recorder of deeds of the county in which the property is located and shall be indexed in the deed indices showing the condemnee as grantor and the condemnor as grantee.

26 Pa.C.S. §502.

Presidential alleged that an October 11, 2005 Development Agreement (Agreement) [R.R. at 46a-52a] between it and the Township constituted written consent and authority by the Township for Presidential to open and use General Sikorski Court in Polonia Estates.²

On October 23, 2006, the trial court sustained Presidential's preliminary objections and dismissed Piast's complaint with prejudice specifically setting forth that the Agreement constituted the written consent and authority of the Township for Presidential to open and use General Sikorski Court in Polonia Estates. R.R. at 54a. The trial court's October 23, 2006 order was affirmed on appeal by the Superior Court. R.R. at 105a-115a.

On February 21, 2008, Piast filed its Petition for Appointment of Board of Viewers. R.R. at 2a-55a. Piast alleged that all damage to its property was due to Presidential connecting its development to Polonia Estates with the consent of the Township. Piast alleged further that as a result of the foregoing actions of the Township in executing the Agreement between it and Presidential, the

² See R.R. at 46a-52a. Article III of the Agreement, entitled OPENING OF FAIRWOOD BOULEVARD, WOODLAND ESTATES AND GENERAL SIKORSKI COURT, POLONIA ESTATES CONNECTIONS TO WOODBERRY ESTATES, provides, in pertinent part, as follows:

1. Rice Township agrees to take all necessary formal action to accept dedication of the following platted, but presently unopened roads expressly upon the following terms and conditions set forth in this Article:

....

b. General Sikorski Court extension in Polonia Estates at its intersection with Aleksander Boulevard between Lots 19 and 20 as depicted upon the approved subdivision plat recorded in Luzerne County Map Book , at page , dated .

R.R. at 51a.

Township has effected a *de facto* condemnation of Piast's property. Piast alleged that in so doing, Presidential affected Piast's property, an action tantamount to a taking and caused damages to its property.

By order of February 21, 2008, the trial court ordered that a board of viewers be appointed. R.R. at 56a-57a. A notice to view was issued on March 17, 2008. Id. at 138a-139a.

On March 27, 2008, the Township filed preliminary objections to Piast's petition for appointment of a board of viewers.³ R.R. at 61a-116a. Therein, the Township alleged that Piast could not meet the heavy burden of demonstrating a *de facto* taking. Id. The Township also filed a motion to suspend action by the board of viewers. Id. at 134a-136a. By order of April 4, 2008, the trial court issued a rule to show cause upon Piast to show cause why the relief requested in the Township's motion to suspend should not be granted. R.R. at 128a.

On April 9, 2008, Piast filed preliminary objections to the Township's preliminary objections. R.R. at 150a-154a. On April 28, 2008, the Township filed an answer to Piast's preliminary objections to its preliminary objections. Id. at 178a-181a.

By order of May 5, 2008, the trial court granted the Township's motion to suspend action by board of viewers pending the determination of the Township's preliminary objections and Piast's preliminary objections thereto.

³ Preliminary objections are the exclusive method under the Eminent Domain Code of raising objections to a petition alleging a *de facto* taking. Lehigh Northampton Airport Authority v. WBF Associates, 728 A.2d 981 (Pa. Cmwlth.), petition for allowance of appeal denied, 560 Pa. 751, 747 A.2d 372 (1999). In eminent domain proceedings, preliminary objections serve a different purpose than preliminary objections filed in other civil actions; 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

(Continued....)

R.R. at 197a. Thereafter, discovery was conducted by the parties which included the deposition testimony of Wledzimierz Jaskiewicz, Piast's corporate designee. R.R. at 217a-306a.

By order of October 23, 2008, the trial court overruled the Township's preliminary objections and further ordered that the court's prior order of October 23, 2006 is in full force and effect, in that the Township has granted, at all times pertinent hereto and continuing through the present, the authority, right and privilege for Presidential to open and use General Sikorski Court, thereby effectuating a *de facto* taking of Piast's property by the Township for which just compensation is due. This appeal by the Township followed.⁴

The sole issue presented by the Township for our review is whether any actions taken by the Township deprived Piast of the use and enjoyment of a parcel of land which Piast designed as an easement.

It is well settled that 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, 321 A.2d 598, 599 (1974). "A landowner alleging a *de facto* taking is under a heavy burden to establish that such

A Condemnation Proceeding by South Whitehall Township, 822 A.2d 142 (Pa. Cmwlth. 2003).

⁴ In an eminent domain case disposed of on preliminary objections to a claim for a *de facto* taking, our 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. Nolen v. Newtown Township, 854 A.2d 705 (Pa. Cmwlth. 2004). The trial court, as fact finder, must resolve evidentiary conflicts, and its findings will not be disturbed if supported by substantial evidence. In re Condemnation by the Commonwealth Department of Transportation, 827 A.2d 544 (Pa. Cmwlth. 2003), petition for allowance of appeal denied, 577 Pa. 737, 848 A.2d 930 (2004).

a taking has occurred." Miller & Son Paving v. Plumstead Township, 552 Pa. 652, 656, 717 A.2d 483, 485 (1998).

In order to establish a *de facto* taking, the burden is on the property owner to show that exceptional circumstances exist which substantially deprives the property owner of the beneficial use and enjoyment of his or her property. German v. City of Philadelphia, 683 A.2d 323 (Pa. Cmwlth. 1996), petition for allowance of appeal denied, 549 Pa. 707, 700 A.2d 444 (1997). Further, the property owner must show that this substantial deprivation was occasioned by the actions of an entity clothed with the power of eminent domain, resulted from the exercise of that power and that the damages sustained by the owner were the immediate, necessary and unavoidable consequence of that exercise. Id. The mere fact that a taking has occurred does not necessarily give rise to a cause of action under the Eminent Domain Code because acts not done in the exercise of the right of eminent domain cannot serve as the basis of a proceeding in eminent domain. Id. Thus, when determining whether a compensable taking under the Eminent Domain Code has occurred, the dispositive question becomes whether the act complained of was, in fact, an exercise of eminent domain power. Id.

In support of this appeal, the Township argues that Piast has not shown that exceptional circumstances have substantially deprived it of the use and enjoyment of its property and that the alleged damages sustained were the immediate, necessary and unavoidable consequences of the exercise of eminent domain power. The Township argues further that Piast owns the property as an easement, which is located between lots 19 and 20 and clearly marked on the map depicting Polonia Estates Final Plan, Phase II. The map was approved by the Township on January 10, 2006, and recorded by Piast in the Luzerne County Map Book on January 18, 2006. Moreover, the Township argues, that even though

Piast's corporate designee contended that it was not intended to be an easement, he acknowledged that it is depicted as an easement on the map. The map clearly shows that the Township approved the development with an easement located between Lots 19 and 20; therefore, the property in dispute remains an easement.

The Township contends further that it only agreed to take all necessary formal action to accept dedication of the unopened easement known as General Sikorski Court and that said easement has never been dedicated to the Township nor had the Township ever given consent to anyone to use the easement. The Township contends further that while Piast and Presidential litigated multiple matters before the trial court, the Township was not a party to any of the litigation and it has taken no action but to agree to accept Piast's easement upon dedication of the same. Thus, the terms of the Agreement have not substantially deprived Piast of the use or enjoyment of any of its property. All the damages allegedly suffered by Piast are the result of Presidential's actions not the Township's. Finally, the Township argues that it never gave Presidential permission to use any of Piast's property.

Upon review, we conclude that the trial court erred in finding that a *de facto* taking by the Township has occurred as a result of Presidential's actions in connecting its development to Piast's development known as Polonia Estates via the use of either Aleksander Boulevard or General Sikorski Court. The basis for Piast's claim that the Township took its property is the trial court's orders in two separate litigations involving only Piast and Presidential. Piast first relies upon the trial court's orders dated September 29, 2005, May 3, 2006, and May 11, 2006, at docket number 4858 of 2005, proclaiming that Presidential could open and use General Sikorski Court in Polonia Estates with the written consent and authority of the Township. R.R. at 36a-42a. Piast next relies upon the trial court's order dated

October 23, 2006, at docket number 6731-C of 2006, proclaiming that the Agreement between the Township and Presidential constitutes the written consent and authority of the Township for Presidential to open and use General Sikorski Court in Polonia Estates as contemplated in the trial court's orders at docket number 4858 of 2005. Id. at 54a.

However, as the Township points out, it was not a party to any of the foregoing litigation between Presidential and Piast wherein Presidential sought a declaration regarding its rights to open and use General Sikorski Court and the later action brought by Piast seeking an award of damages as a result of Presidential's actions in connecting its development to Piast's Polonia Estates. Therefore, the trial court's orders determining that Presidential could open and use General Sikorski Court with the written consent and authority of the Township and that the Agreement, to which the Township is party, constituted such authority were rendered without the participation of the Township. As such, the trial court erred in relying upon its prior orders in litigation to which the Township was not a party to find a *de facto* taking of Piast's property by the Township.⁵

In addition, the record clearly supports the fact that the property is an easement duly approved by the Township and recorded by Piast. While Piast contends that the property was originally designed as an easement and that the easement was planned to be utilized only if Piast purchased the land next to Polonia Estate and therefore the property is not really an easement, the fact

⁵ While Piast contends that the Township failed to intervene in the actions, we conclude that the Township had no duty to intervene in a dispute between two private developers. As the Township points out, if it was an indispensable party as Piast now claims, it was Piast's responsibility to join the Township as an indispensable party or name it as a defendant in the first instance.

remains that Piast's corporate designee acknowledged that on the approved map depicting the final phase of the Polonia Estates the area between lots 19 and 20 is clearly marked as an easement.⁶

Accordingly, Piast has failed to show that a substantial deprivation of its property was occasioned by the actions of the Township, that said deprivation resulted from the Township's exercise of its power of eminent domain, and that such exercise of that power resulted in damages sustained by Piast that were the immediate, necessary and unavoidable consequence of that exercise. The trial court's order is reversed.

JAMES R. KELLEY, Senior Judge

⁶ As stated previously herein, the map attached as Exhibit "A" to Piast's Petition for Appointment of Board of Viewers depicting the property at issue herein clearly shows the same as an easement.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Piast Home Builders Company	:	
	:	
v.	:	No. 2026 C.D. 2008
	:	
Rice Township,	:	
	:	
Appellant	:	

ORDER

AND NOW, this 12th day of August, 2009, the order of the Court of Common Pleas of Luzerne County entered in the above-captioned matter is reversed.

JAMES R. KELLEY, Senior Judge