IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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| In Re: Condemnation by the Commonwealth of Pennsylvania, Department of Transportation, of Right of Way for State Route 0083, Section 025, A Limited Access Highway in the Township of York | : | |
| All Seasons York South, L.P. | : | |
| v. | : | |
| Commonwealth of Pennsylvania, Department of Transportation, Appellant | : | No. 428 C.D. 2008 |
| | : | Argued: September 8, 2008 |

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE JOHNNY J. BUTLER, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY FILED: December 4, 2008

The Department of Transportation (DOT) appeals from an order of the Court of Common Pleas of York County (trial court), which dismissed its preliminary objections to a petition for the appointment of a Board of View filed by PFG Capital Limited Partnership (PFG), assignee of All Seasons York South, L.P. (All Seasons) and directed that the case proceed before a Board of View pursuant to the Pennsylvania Eminent Domain Code (Code).[1]

[1] Act of June 22, 1964, Sp. Sess., P.L. 84, *as amended*, formerly 26 P.S. §§ 1-101-1-903, repealed by Section 5 of the Act of May 4, 2006, P.L. 112, Act of 2006-34, effective Sept. 1, 2006. Although repealed, the Code governs this case because the the most recent code applies to condemnations occurring on or after September 1, 2006, its effective date. The declaration of taking here was filed on October 9, 2002. *See* In re Condemnation by County of Berks, 914 A.2d 962 (Pa. Cmwlth. 2007).

On October 9, 2007, PFG, as the assignee of All Seasons, petitioned for the appointment of viewers (petition for viewers) to assess damages and just compensation pursuant to the Code. In support of the petition for viewers, All Seasons represented the following:

> 1. The Condemnor . . . Department of Transportation . . . filed a Declaration of Taking . . . of land and the private access owned by All Seasons at the I-83 Leader[] Heights exit, such property being owned by the Condemnee [All Seasons] in fee simple . . . .[2]
>
> 2. The impact of the Leader Heights exit highway project upon Condemnee's [All Seasons'] land is depicted on a recorded plan referenced at paragraph 4 of said Declaration of Taking . . . . [T]he Right of Way Plan attached . . . specifically depict the lands owned by Plaintiff [All Seasons] that were taken in connection with the redesign of the Leader Heights Exit from I-83 (herein Private Access) . . . .
>
> 3. All Seasons filed preliminary objections to the said Declaration of Taking.[3] On December 3, 2002, the Condemnor and the Condemnee entered into a Settlement Stipulation-Preliminary Objections . . . .
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> 4. Per the Settlement . . . [DOT] represented to Condemnee that it had acquired in advance of filing the

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[2] In 2002, DOT began acquiring land in York County in proximity to the intersection between Interstate 83 and State Route 0182 to make interchange improvements. The improvements required DOT to obtain a strip of land owned by All Seasons that served as the sole means of ingress and egress to All Seasons' storage facility.

[3] DOT's declaration of taking filed October 9, 2002, was preliminarily objected to by All Seasons on November 15, 2002. A *de facto* taking of the property was alleged on the basis that DOT's condemnation of All Seasons' private access road amounted to a taking of all access to the remainder of All Seasons' property. Preliminary Objections to Declaration of Taking, November 15, 2002, at 1-3; Reproduced Record (R.R.) at 10a-12a.

> instant Declaration of Taking certain additional parcels to replace Condemnee's Private Access. (Replacement parcels) [4]
> . . . .

[4] Confronted with All Seasons' preliminary objections, DOT attempted to allay All Seasons' concerns and assured All Seasons that it was able to provide replacement access by constructing an exclusive private access road. DOT represented to All Seasons that it had acquired three adjoining parcels of property for ownership of and private access to All Seasons' property, including: (1) a parcel purchased from Atlantic Refining & Marketing Corporation (Atlantic), (2) a parcel taken from GIA Associations (GIA) by declaration of taking filed October 2, 2002, and (3) a parcel taken from Country Meadows Associates (Country Meadows) by the same declaration. *See* Board of Viewers' Plan; R.R. at 109a-110a. The parties stipulated that the land taken from GIA and Country Meadows was "acquired in fee simple title for the ownership of and private access for All Seasons." Settlement Stipulation-Preliminary Objections (Settlement Stipulation), December 3, 2002 at 2-3, Stip. Nos. 6(A)-6(B); R.R. at 18a-19a. The third parcel, acquired from Atlantic, was "acquired in fee simple for private access for All Seasons," but All Seasons could elect to take less than the fee simple interest based upon environmental concerns. Settlement Stipulation at 2-3, Stip. Nos. 6(C), 8; R.R. at 18a-19a.

The parties agreed to an acquisition plan that noted the replacement private access road:

> 7. The parties acknowledge that the following plan note is . . . made binding per the Declaration of Taking:
>
> Areas required for Private Access are acquired in the estate or interest designated (fee simple for Driveway Purposes) <u>for the sole benefit and use of the property or properties designated (Parcel 5) [All Seasons' parcel]</u>, along with a temporary easement for construction purposes for the benefit and use of the Commonwealth . . . . (Emphasis added).

Settlement Stipulation at 3-4, Stip. No. 7; R.R. at 19a. The parties further agreed that "[a]ny change in circumstance which would cause any of the above explanations or assurances to change will constitute a basis for All Seasons, its successors and/or assigns, to institute the appropriate action to enforce the rights and assurances the Department has granted in this Settlement Stipulation," which included specific performance of rights and assurances. Settlement Stipulation at 4-5, Stip. No. 10; R.R. at 20a-21a.

> 6. In light of . . . [DOT's] assurance it would receive fee simple title to the Replacement Parcels, All Seasons withdrew its Preliminary Objections to the Declaration of Taking and agreed to accept payment of estimated just compensation without waiver of any legal right to pursue further just compensation under the provision[s] of the . . . Code . . . .
> . . . .
>
> 8. No estimated just compensation was ever paid to All Seasons for the Replacement Parcels since the Settlement purported to transfer these parcels in fee simple title solely to All Seasons.
>
> 9. When it became apparent that . . . [DOT] would not give fee simple title to All Seasons . . . but, instead . . . [DOT] would issue title jointly as Tenants in Common with All Seasons and another unrelated party, [5] on April

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[5] In separate litigation, Country Meadows preliminary objected *nunc pro tunc* on March 23, 2003, to the declaration of taking of its property. Country Meadows sought to add GIA as the co-owner with All Seasons of the parcel of land taken from Country Meadows for construction of the replacement private access road. DOT challenged the untimely preliminary objections. However, the trial court, on April 21, 2003, ordered DOT to revise its highway plans and add GIA to the plan note. Trial Court Order, April 21, 2003, at 1-3; R.R. at 26a-28a. The trial court determined that the plan note was the product of an "administrative breakdown" and "mutual mistake" such that it needed to be revised to recite that All Seasons and GIA would share title to the property as tenants in common as to the entire replacement private access road through all three properties. Trial Court Order at 2, No. 3; R.R. at 27a. The plan note was revised and re-recorded as directed:

> 5. The Department shall re-record an amended Plan Sheet . . . that shall contain the following plan note:
>
> Private Access. Areas required for Private Access are acquired in the estate or interest designated (fee simple for Driveway Purposes) for the sole benefit and use of the property or properties designated (Parcels 5 & 46), [All Seasons' and GIA's parcels], along with a temporary easement for construction purposes for the benefit and use of the Commonwealth . . . . (Emphasis added).

Trial Court Order at 2, Nos. 3, 5; R.R. at 27a.

> 19, 2007 Assignee [PFG] filed a Petition to Enforce Settlement Agreement. PFG was seeking among other things the appointment of Board of Viewers to award just compensation both for All Seasons Private Access and for the 'exclusive ownership or fee simple title alone to the . . .' Replacement Parcels the Condemnor had conveyed per the Settlement . . . .[6]
>
> 10. On September 18, 2007 Judge Thompson issued an Opinion and Order . . . that concluded the Condemnee was entitled to 'sole and exclusive ownership' of the Replacement Parcels and that Condemnor had breached its duty to provide such title.[7]
>
> 11. Judge Thompson granted the Petition to Enforce and directed as follows: 'Since sole and exclusive ownership cannot be afforded [to] All Seasons we accept their alternative solution that All Seasons proceed before the Board of View with regard to the before and after value of the property taken from All Seasons in the context of the value of all Seasons Property with exclusive ownership or fee simple title alone to the three

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[6] In All Seasons' petition to enforce settlement it alleged that DOT breached the settlement by failing to grant All Seasons exclusive ownership to the replacement parcels. In light of the April, 21, 2003, intervening order, All Seasons requested that the trial court either:

> 1) enforce the Settlement Agreement by appointing three Viewers to assess the damages . . . including specifically, awarding All Seasons just compensation for the designated parcels as one element of damages for the Department's breach of Settlement or, 2) in the alternative, to terminate the Settlement as a result of the Department's material breach and, in that event appoint Board of View to award just compensation in the amount of the difference between the value of All Seasons property immediately before the taking with guaranteed exclusively controlled access and immediately after the taking with no certain access.

Petition to Enforce Settlement, April 19, 2007, at 10; R.R. at 38a.

[7] *See* Decision & Order, September 18, 2007, at 2; R.R. at 73a.

> parcels providing access less the value of All Seasons property with the three parcels being held as tenants in common.' (emphasis added).
>
> 12. Having granted the Petition to Enforce, Judge Thompson ordered that Petitioner, All Seasons 'may proceed to appoint a Board of View to determine just compensation in accordance with the Decision entered this date.' [8] (emphasis added).
>
> 13. Accordingly for purposes of the Board of View proceedings the Property taken consists of the Private Access together with the Replacement Parcels, the Petitioner [All Seasons] is the sole owner of that Property, and no other persons have any interest in the Property.
> . . . .
>
> **WHEREFORE** the Petitioner . . . requests . . . your Honorable Court [the trial court] to appoint a three person Board of View to ascertain just compensation in accordance with the attached order of court dated September 18, 2007.

Petition for Viewers, October 9, 2007, at 1-4, Nos. 1-4, 6, 8-13; R.R. at 77a-80a.

In response, on October 22, 2007, DOT filed an answer. DOT argued that All Seasons' petition was contrary to the action for just compensation under the Code and a mischaracterization of the remedy crafted by the trial court for breach of the settlement stipulation. DOT's answer specifically denied All Seasons' assertion that "the Property taken consists of the Private Access together with the Replacement Parcels . . . ." Petition for Viewers at 4, No. 13; R.R. at 80a

[8] DOT did not appeal the trial court's September 18, 2007, decision and order granting All Seasons' petition to enforce.

(emphasis added). DOT argued All Seasons' assertion was inconsistent with the trial court's September 18, 2007, decision and order.[9] DOT's Preliminary Objections to the Petition for Appointment of Board of View (DOT's Preliminary Objection to the Petition for View), October 22, 2007, at 4; R.R. at 93a.

Furthermore, All Seasons preliminarily objected to the petition for viewers and sought to have the Viewers make two separate determinations: (1) "first determine just compensation damages for the taking as per the filed declaration of taking and plans of record . . . ."; and (2) "add to said damages additional damages . . . for the *'value of All Seasons property with exclusive ownership or fee simple title alone to the three parcels providing access less the value of All Seasons property with the three parcels being held as tenants in common."* DOT's Preliminary Objection to the Petition for View at 6-7; R.R. at 95a-96a (emphasis in original).

Without hearing, the trial court entered an order dated February 8, 2008, dismissing DOT's preliminary objections. In its memorandum opinion the trial court restated its damage formula for breach of settlement set forth in the decision and order dated September 18, 2007:

[9] DOT argues that All Seasons ostensibly asserted in its petition for viewers that the property taken included both the original private access condemned from All Seasons through declaration of taking together with the replacement parcels. DOT argued, contrary to All Seasons' assertions, the trial court's order and decision of September 18, 2007, did not conclude that DOT "took" the replacement parcels from All Seasons since the Settlement Stipulation merely granted All Seasons exclusive ownership of the replacement parcels after condemnation of the original private access road.

> This case was the subject of a prior opinion resolving a dispute over a settlement agreement entered into by the parties. That Order dated September 18, 2007 provided that All Seasons may proceed to appoint a board of view to determine just compensation in accordance with the decision of the same date. In the decision leading to the order, it is stated succinctly 'since sole and exclusive ownership cannot be afforded All Seasons, we accept their alternative solution that All Seasons proceed before a board of view with regard to the before and after value of the property taken from All Seasons in the context of value of All Seasons property with exclusive ownership or fee simple title alone to the three parcels providing access less the value of All Seasons property with the three parcels being held as tenants in common.' In light of that, we deem the Preliminary Objections without merit and they will be dismissed.

Memorandum Opinion & Order, February 8, 2008, at 1-2; R.R. at 104a-105a. DOT filed a statement of matters complained of on appeal. The trial court responded that it had "nothing to add to its formal ruling on the preliminary objections," but added that DOT's "appeal may be premature." Pa. R. Civ. P. 1925 Opinion at 2; R.R. at 112a.

On appeal,[10] DOT raises two issues: (1) whether the trial court erred in failing to recognize that two distinct valuations must be presented to the Board of View: one pursuant to the declaration of taking and the other as a result of the petition to enforce the settlement stipulation; and (2) whether the trial court erred when it refused to preliminarily resolve the threshold issue raised in the petition for viewers on how the Board of View must value the property under the trial court's

[10] This Court's review is limited to a determination of whether the trial court's findings are supported by substantial evidence or whether an error of law or abuse of discretion was committed. Elser v. Department of Transportation, 651 A.2d 567 (Pa. Cmwlth. 1994).

prior order which granted the petition to enforce settlement stipulation before the matter went to Viewers.

The current controversy has a unique procedural history,[11] but what is before this Court is an appeal from the denial of preliminary objections filed by DOT to the petition for viewers filed by PFG, assignee of All Seasons.[12] DOT's preliminary objections in this matter were filed pursuant to Section 504[13] of the Code, 26 P.S. §1-504, which provides:

> Any objection to the appointment of viewers not theretofore waived may be raised by preliminary objections filed within twenty days after receipt of notice of the appointment of viewers. Objections to the form of the petition or the appointment or the qualifications of the

[11] Pursuant to 42 Pa.C.S. §762(a)(6), this Court has jurisdiction over appeals from final orders of courts of common pleas in eminent domain proceedings. An appeal will lie only from a final order, unless otherwise permitted by rule or statute. In re Condemnation of 23.015 Acres More or Less Known as Tax Map, 895 A.2d 76 (Pa. Cmwlth. 2006).

Orders overruling preliminary objections are typically interlocutory, but Pa.R.A.P. 311 identifies the categories of interlocutory orders from which an appeal may be taken as of right. Interlocutory orders from which an appeal may be taken as of right in eminent domain cases are identified in Pa.R.A.P 311(e): "**Orders overruling preliminary objections in eminent domain cases.** An appeal may be taken as of right from an order overruling preliminary objections to a declaration of taking and an order overruling preliminary objections to a petition for appointment of a board of viewers." (Emphasis added). DOT's appeal from the February 8, 2008, order dismissing its preliminary objections to the petition for viewers falls within the exception where an appeal may be taken as of right, therefore, this Court assumes jurisdiction over DOT's appeal. Pa. R.A.P. 311(e).

[12] This Court does not have before it an appeal relating to All Seasons' preliminary objections alleging a *de facto* taking in response to the declaration of taking filed by DOT because All Seasons withdrew those preliminary objections after entering into the settlement stipulation of December 3, 2002.

[13] Again, because the declaration of taking was filed on October 9, 2002, this matter is governed by the applicable law prior to the enactment of the most recent code. *See* 26 Pa.C.S. §101-1106, Act of May 4, 2006, P.L. 112, No. 34, effective in 120 days (September 1, 2006).

> viewers are waived unless included in preliminary objections.
>
> The court shall determine promptly all preliminary objections and make such orders and decrees as justice shall require. If an issue of fact is raised, evidence may be taken by deposition or otherwise as the court shall direct.

## I. Whether the trial court erred in failing to recognize that two distinct valuations must be presented to the Board of View?

The primary question on appeal is how to value All Seasons' entitlement. All Seasons and DOT differ in their understanding of the terms in the September 18, 2007, decision and order, which were restated in the trial court's February 8, 2008, decision and order. It is clear that All Seasons is entitled to just compensation and DOT does not dispute that "All Seasons is entitled to damages for the breach as found by the trial court." All Seasons Reply Brief at 1. In essence, this controversy depends upon the construction and interpretation of the remedy crafted by the trial court for the assessment of those damages.[14]

Just compensation under the Code consists of "the difference between the fair market value of the condemnee's entire property immediately before the condemnation and as unaffected thereby and the fair market value of his property remaining immediately after such condemnation and as affected thereby, and such

[14] Courts are called upon to interpret orders made by another judge. *See e.g.* McCandless Township Appeal, 401 Pa. 428, 165 A.2d 23 (1960). When doing so, a "court is bound by the words of the order itself, supplemented, if at all, only by statements or documents of record at the time the order was made." Commonwealth v. Brennan, 195 A.2d 150, 151 (Pa. Super. 1963).

other damages as are provided for in this code." Section 602(a) of the Code, 26 P.S. § 1-602(a). This definition is referred to as the "before and after rule."[15]

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[15] To assist in clarifying the application of the "before and after rule" in the current controversy, this Court notes at the outset that All Seasons' property "immediately after" the taking shall not be valued as a landlocked parcel.

Under Section 402 of the Code, the taking of All Seasons' original private access occurred upon the filing of the declaration of taking on October, 9, 2002. All Seasons preliminarily objected on November 15, 2002. All Seasons challenged DOT's declaration of taking and asserted a *de facto* total taking and alleged that the remainder of its property was rendered landlocked since the property had only one access point, its original private access drive, prior to the taking. However, DOT implemented curative measures prior to the taking which affected the "after" value.

DOT circumvented landlocking All Seasons' property when it previously acquired three adjoining parcels for exclusive ownership of and private access to All Seasons' property. Because the acquisition of access rights for and on behalf of All Seasons occurred in advance of the October 9, 2002, taking, All Seasons property was not landlocked as of the date of the taking. DOT had acquired parcels from GIA and Country Meadows by a declaration of taking filed on October 2, 2002. Settlement Stipulation at 2-3, Stip. Nos. 6(A)-6(B); R.R. at 18a-19a. DOT also purchased a parcel from Atlantic as evidenced by deed dated September 10, 2002, and recorded November 20, 2002. Settlement Stipulation at 2-3, Stip. No. 6(C); R.R. at 18a-19a.

After preliminarily objecting to the declaration of taking, All Seasons learned of the access rights previously acquired by DOT. Both parties entered into a Settlement Stipulation on December 3, 2002, reflecting that DOT "acquired additional lands in advance of the filing of the Declaration of Taking for the Tract for replacement of the private access for the All Season's [sic] property . . . ." Settlement Stipulation at 2, Stip. No. 6; R.R. at 18a. All Seasons withdrew its preliminary objections to the declaration of taking in light of the Settlement.

In All Seasons' petition to enforce settlement it aptly recognized the effect of the Settlement on the declaration of taking and subsequent valuations of All Seasons' property:

> 21. Stated otherwise, the effect of including the Settlement as part of the Declaration of Taking was to ensure that in the event of a subsequent Board of View proceeding, All Seasons property would be valued as having guaranteed access by a private road exclusive [sic] controlled by All Seasons **immediately before and after the taking** by virtue of the Department's commitment to transfer the designated parcels [from GIA, Country Meadows and Atlantic] . . . to All Seasons in **fee simple** for access.

Petition to Enforce Settlement at 5; R.R. at 33a.

**(Footnote continued on next page…)**

### A. DOT Interpretation: Two Valuation Formulae for Just Compensation and Damages

DOT argues that the September 18, 2007, order, which established terms of reference, was insufficiently clear to permit the Board of View to render an award of just compensation. DOT argues that the formula for determining just compensation under Section 602(a) of the Code was improperly modified by the trial court. DOT contends there was no need for the trial court to alter the traditional "before and after" formula for just compensation under Section 602(a) of the Code, rather the trial court only needed to fashion a remedy for the breach of the settlement stipulation. Consequently, DOT asserts that the trial court erred when it failed to recognize two distinct formulae were needed to ascertain just compensation under the Code and damages for breach of contract.

DOT's interpretation of the order is that the trial court "did not direct that just compensation be based on the difference between the value of the property with exclusive ownership of the three parcels less its value with joint ownership . . . but rather with regard to the before and after value of the property taken 'in the context' of the stated difference." DOT's Brief at 11. DOT contends the only reasonable interpretation is that "the statement following 'in the context' was directed to additional damages which would be payable because DOT breached the settlement stipulation by not providing exclusive title to the three parcels providing

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**(continued…)**

By acquiring access rights in advance, the "replacement" access must be taken into account in establishing the value of the property "immediately after" the taking and as affected thereby as per the Code. Consequently, in view of a valid and enforceable Settlement, All Seasons' property was not landlocked "immediately after" the taking.

access." DOT's Brief at 11. In other words, DOT argues that just compensation must be determined based on the traditional "before and after rule" as defined in the Code, but the statement following "in the context" was directed towards ascertaining additional damages.

DOT seeks a judicial determination that two distinct valuation formulae utilizing three separate valuations must be used to determine damages. DOT argues that its interpretation gives effect to the Code's "before and after rule", the trial court's order and, further, is consistent with the remedies sought by All Seasons in its petition to enforce settlement. First, just compensation must be established pursuant to the "before and after" valuation formula in Section 602(a) of the Code, with the "before" value based on the access All Seasons had unaffected by the taking and the "after" value based on the replacement access actually provided in common with GIA. Second, additional just compensation must be determined for breach of the settlement based on the second "before and after"—the value of the All Seasons property with exclusive ownership or fee simple title alone to the three parcels providing access, as agreed to in the Settlement Stipulation, less the value of the All Seasons property with the three parcels being held as tenants in common.[16] DOT Brief at 13-14.

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[16] In summation, the valuations and corresponding formulae are as follows:

> The three separate valuations are:
> 1. The value of the entire property immediately before the taking and as unaffected thereby.
>
> 2. The value of the entire property immediately after the taking and as affected thereby with the three parcels providing access being held as tenants in common with GIA.

**(Footnote continued on next page…)**

### B. All Seasons' Interpretation: Just Compensation as Modified by the Decision

In comparison, All Seasons' interpretation of the September 18, 2007, decision and order is that the trial court directed the "after" value be determined "in the context" of the trial court's stated formula. In other words, All Seasons contends that the trial court directed that the "effect of the after-take stipulation [to convey fee simple title to the three replacement parcels] be taken into account when determining the after-take value for purposes of applying the before and after rule." All Seasons Brief at 11-12.

All Seasons admits that *both* after-take values, based upon exclusive and joint ownership, may be reasonably viewed as going to the value of the property "immediately after" the taking within the meaning of Section 602(a) of the Code. All Seasons Brief at 12. DOT stipulated that All Seasons maintained access in fee simple to the replacement parcels "immediately after" the taking. All

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**(continued…)**

> 3. The value of the entire property immediately after the taking and as affected thereby with All Seasons having exclusive ownership or fee simple title to the three parcels providing access.
>
> The two formulae are:
>
> 1. Valuation No. 1 less valuation No. 2 [for the actual taking]—the traditional before and after rule pursuant to Section 602(a) of the Code.
>
> 2. Valuation No. 3 less Valuation No. 2 [for the breach]—the 'before and after' remedy crafted by the trial court for breach of the settlement stipulation based on the 'settlement' after value and the actual after value.

DOT Brief at 13-14.

Seasons, however, never received fee simple ownership to those parcels; instead, All Seasons received the access as a tenant in common. Consequently, All Seasons contends that the trial court correctly directed the Board of View to value All Seasons' property as DOT assured All Seasons it existed following the take less the value of the property as it ultimately existed following the take.

All Seasons concedes that "the Board of View may need to place a value on each of the three components identified by PennDOT in order to reach its award of just compensation" but, adds "there is no need for the board to deliver anything but a standard, unitary determination of just compensation." All Seasons Brief at 11.

**C. Valuing All Seasons' Entitlement**

In effect, three remedies were sought by All Seasons in its April 19, 2007, petition to enforce settlement. First, the petition to enforce addressed specific performance but indicated, and the trial court confirmed, that remedy was not available because DOT had bound itself in the Country Meadows proceeding and was unable to convey exclusive title to the replacement parcels to All Seasons. Petition to Enforce Settlement at 9, Nos. 45-46; R.R. at 37a. Second, All Seasons sought to have the settlement stipulation enforced and have a Board of View "determine estimated just compensation . . . including compensation for the breach of the Settlement." Petition to Enforce Settlement at 9, No. 48; R.R. at 37a. Lastly, in the alternative, All Seasons sought to have the settlement stipulation voided and the property valued "as having guaranteed and exclusive access immediately before the taking and as having no certain access immediately after

the taking." Petition to Enforce Settlement at 10, Nos. 49-50; R.R. at 38a. As far as this Court is able to discern, the settlement stipulation was not voided; therefore, the trial court crafted a remedy based on breach of contract to award just compensation that included compensation for breach of the settlement stipulation.

In light of this understanding, the use of the term "just compensation" in the trial court's February 8, 2008, decision and order denying DOT's preliminary objections, which reiterated the terms established in the September 18, 2007, decision and order, was consistent with the "before and after rule," as set forth in the Code, but as modified by the decision. This Court has not found any legal authority that would prevent the trial court from directing a Board of View to arrive at just compensation under such terms. This Court does not accept DOT's competing valuation formulae because the trial court's order was sufficiently clear with instructions as to how the Board of View was to proceed and quantify All Seasons' award.

Oddly enough, under either proposed scenario All Seasons will receive damages for the taking and the breach by DOT. However, this Court finds no error in the trial court's February 8, 2008, decision and order which dismissed DOT's preliminary objections and directed that the Board of View render an award of just compensation consistent with the trial court's directions.

## II. Whether the trial court erred when it refused to preliminarily resolve the threshold issue?

DOT's second argument is that the trial court erred in refusing to hold an evidentiary hearing to resolve factual and legal issues raised by DOT's

preliminary objections. The law generally provides that preliminary objections in eminent domain proceedings serve as "a vehicle by which the common pleas court can resolve all legal and factual questions of entitlement at the outset, with an evidentiary hearing if necessary, before appointing the viewers and assigning them to their work of quantifying the award." Carroll Township v. Jones, 481 A.2d 1260, 1261 (Pa. Cmwlth. 1984). "If the [condemnor] were to be permitted to go before the viewers without resolution of the threshold questions and then to seek to raise them again on appeal from the viewers, such an approach would defeat the scheme and purpose of the Code's special procedure." Id.

DOT argues that in All Seasons' petition for viewers it mischaracterized how the Viewers were to determine just compensation because the assertions were not in accord with the remedy crafted in the trial court's September 18, 2007, decision and order which granted All Seasons' petition to enforce settlement. DOT contends that All Seasons "did not merely ask for the appointment of viewers, but included a statement in its petition [for viewers] asserting that the taking consists of the Private Access together with the Replacement Parcels." All Seasons Reply Brief at 3. On this basis DOT contends it raised threshold issues to the petition for viewers that required judicial review, namely, whether the property "taken" consists of not only the land acquired by the declaration of taking, but also the replacement parcels as asserted by All Seasons such that the replacement parcels were to be considered as part of the "before" property.

The trial court did not refuse to act on any threshold dispute. The trial court's February 8, 2008, decision and order which dismissed DOT's preliminary objections directed a resolution in the form of a damage formula restated from its earlier September 18, 2007, decision and order. The remedy crafted by the trial court did not contemplate that the replacement parcels were part of the "before" property as was asserted by All Seasons in its petition for viewers. The trial court did not defer resolution of the threshold issues to the Board of View, rather, it properly dismissed DOT's preliminary objections. The trial court neither erred as a matter of law in refraining from clarifying its prior September 17, 2008, decision and order nor when it refused to employ two distinct valuation formulae. Consequently, at this juncture there are no outstanding threshold issues requiring judicial determination and the trial court properly assigned the Board of View the task of reaching an award of damages.

Accordingly, this Court affirms.

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BERNARD L. McGINLEY, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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| In Re: Condemnation by the Commonwealth of Pennsylvania, Department of Transportation, of Right of Way for State Route 0083, Section 025, A Limited Access Highway in the Township of York | : | |
| All Seasons York South, L.P. | : | |
| v. | : | |
| Commonwealth of Pennsylvania, Department of Transportation, Appellant | : | No. 428 C.D. 2008 |

**O R D E R**

AND NOW, this 4th day of December, 2008, the Order of the Court of Common Pleas of York County dismissing the Department of Transportation's preliminary objections to PFG Capital Limited Partnership's, assignee of All Seasons York South, L.P., petition for the appointment of a board of view is hereby affirmed.

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BERNARD L. McGINLEY, Judge