

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In Re: Condemnation by Athens :
Township, Bradford County, of :
Right of Way For Road "C" in the :
Township of Athens :
: No. 857 C.D. 2012
Appeal of: Bud George Rosh, : Argued: December 10, 2012
Tammie Rosh, Roman Rosh, and :
Carol Rosh :

BEFORE: HONORABLE DAN PELLEGRINI, President Judge
HONORABLE BONNIE BRIGANCE LEADBETTER, Judge (P.)
HONORABLE P. KEVIN BROBSON, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
PRESIDENT JUDGE PELLEGRINI FILED: January 4, 2013

Bud George Rosh, Tammie Rosh, Roman Rosh and Carol Rosh (collectively, Condemnees) appeal the order of the Court of Common Pleas of Bradford County (trial court) denying and dismissing their preliminary objections to the declarations of taking filed by Athens Township (Township)¹ pursuant to the Eminent Domain Code, 26 Pa. C.S. §§101-1106. We affirm.

¹ Athens Township is a Second Class Township. 120 The Pennsylvania Manual 6-122 (2011). Section 2304(a) of the Second Class Township Code, Act of May 1, 1933, P.L. 103, *as amended*, 53 P.S. §67304(a), provides, in relevant part, that "[t]he board of supervisors may by ordinance enact, ordain, survey, lay out, open, widen, straighten, vacate and relay all roads ... and parts thereof which are located wholly or partially within the township." However, a Second Class Township may authorize a declaration of taking for a road by resolution and the statutory formalities required for the passage of an ordinance are not required to authorize a condemnation **(Footnote continued on next page...)**

Condemnees own a parcel of property in excess of 120 acres located in Bradford County (County) that spans across a number of municipalities in the County. The property is an old railroad bed that is described in a December 23, 1976 quitclaim deed from the bankruptcy trustees of the Erie Lackawanna Railroad Company to Nickolay Rosh. The 1976 deed cites no acreage of the property, merely describing it as the property conveyed to the railroad through 25 other instruments that are dated between 1881 and 1906, and that are listed in a two-page exhibit to that deed.² By quitclaim deed dated December 29, 1987, Nickolay Rosh and his wife, Olga Rosh, conveyed to Condemnees all the property that they acquired by the 25 documents that were likewise listed in a two-page exhibit attached to the 1987 deed.

In 2011, the Township filed a declaration of taking and an amended declaration which included a partial taking of Condemnees' property to construct a

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for such purposes. *In re Condemnation of Property Situate in Perry Township*, 938 A.2d 517, 519 (Pa. Cmwlth. 2007), *appeal denied*, 599 Pa. 697, 960 A.2d 842 (2008). In this regard, Section 3401 of the Second Class Township Code, 53 P.S. §68401, states, in pertinent part:

When the right of eminent domain or the ascertainment and assessment of damages and benefits in viewer proceedings is exercised by a township, the proceeding shall be as set forth in this article. In addition to any provisions of this act, all eminent domain proceedings shall conform to ... the "Eminent Domain Code."

² The 1976 order of the bankruptcy court, the United States District Court for the Northern District of Ohio, Eastern Division, authorizing the railroad's trustees to sell the parcel, states that it is composed of 120.82 acres.

“Road C” to connect a business park in the Township with Interstate 86. The stated nature of the title condemned was easements for highway purposes, a drainage easement and a temporary construction easement.³ Condemnees filed preliminary objections to both declarations asserting, *inter alia*, that the Township’s notice of condemnation did not include a plot plan of Condemnees’ entire parcel as required by Section 305(c)(9) of the Eminent Domain Code, 26 Pa. C.S. §305(c)(9).⁴

Following a hearing, the trial court overruled Condemnees’ preliminary objections. In the opinion filed in support of its order, the trial court explained:

[A]pparently this property is an old railroad bed spanning across several municipalities through [the] County and not the usual 120 acre of farm land that is normally seen in large acreages. [Condemnees] want their 120+ acres plotted. A purpose of requiring a plot in a partial taking is for [the] owner to determine what property or part of a property has been taken. It would be [a] ludicrous reading of the statute to require the plotting of a 120+ acre railroad bed that spans through municipalities and not in close proximity to the property being taken. The plot of [Condemnees’] property, surrounding properties

³ Landowners note that “[t]he diagram of the ‘take’ area indicates that the total acreage owned by Landowners is 120.82 acres, and the total area taken is 0.120 acres with an additional area of just over 1 acre required for easements. For purposes of this appeal, the important fact is that the taking is partial in nature and is actually a very small portion of the entire tract owned by [Landowners].” Brief of Appellants at 6.

⁴ 26 Pa. C.S. §305(c)(9) states that “[t]he notice to be given to the condemnee shall state ... [i]n the case of a partial taking, a plot plan showing the condemnee’s entire property and the area taken.”

and the portions being taken was filed. This plot sufficiently describes the property being taken for all owners involved which is the intent of the statute's notice requirements.

Trial Court Opinion at 4 (citation omitted). Condemnees filed the instant appeal of the trial court's order.⁵

The sole claim raised by Condemnees in this appeal is that the trial court erred in dismissing their preliminary objections because the Township failed to provide them with a plot plan of their entire property in the notice of condemnation as required by Section 305(c)(9) of the Eminent Domain Code. Condemnees argue that the provisions of the Eminent Domain Code are to be strictly construed and the trial court erred in disregarding the unambiguous notice provisions of Section 305(c)(9) under the guise of pursuing its spirit. Condemnees also assert that the required plot plan is necessary to determine the "just compensation" due under Section 702(a) of the Eminent Domain Code, 26 Pa. C.S. §702(a),⁶ and must be submitted to a board of viewers under Section 509(a), 26 Pa. C.S. §509(a).⁷

⁵ This Court's scope of review where a trial court has sustained or overruled preliminary objections to a declaration of taking is limited to a determination of whether the trial court abused its discretion or committed an error of law. *In re Redevelopment Authority of City of Philadelphia*, 595 Pa. 241, 247, 938 A.2d 341, 345 (2007).

⁶ 26 Pa. C.S. §702(a) states:

(a) Just compensation.—Just compensation shall consist of the difference between the fair market value of the condemnee's entire property interest immediately before the condemnation and as unaffected by the condemnation and the fair market value of the

(Footnote continued on next page...)

However, as this Court has explained:

While condemnation proceedings affect the rights of individual citizens to use and enjoy their land, and must, therefore, be strictly construed, the doctrine of strict construction has been used to guard against *unauthorized use or extension* of the power to condemn. We know of no constitutional or legal mandate which requires us to apply the standard of strict construction to *non-prejudicial* irregularities in the procedural aspects of condemnation....

Avery v. Commonwealth, 276 A.2d 843, 845 (Pa. Cmwlth. 1971) (citations omitted and emphasis in original). *See also In re Condemnation of Outdoor Advertising Device in an Area Adjacent to Legislative Route 68*, 512 A.2d 79, 82 (Pa. Cmwlth. 1986), *appeal denied*, 513 Pa. 636, 520 A.2d 1386 (1987) (“Notice, of course, is indispensable to due process. That is why strict compliance is usually required. But to require strict compliance, where, as here, notice in fact was given, is to exalt form over substance and ignores the purposes of the requirement. Whatever

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property interest remaining immediately after the condemnation and as affected by the condemnation.

⁷ 26 Pa. C.S. §509(a) states:

(a) Duty of condemnor.—The condemnor shall provide the viewers at or before the view with a plan showing the entire property involved, the improvements, the extent and nature of the condemnation and any other physical data, including grades, as may be necessary for the proper determination of just compensation.

mechanism is used, it must reasonably be calculated to apprise the interested parties of the pendency of the action and afford them an opportunity to present their objections.”) (citations omitted).

As noted by the trial court, strict compliance with the 26 Pa. C.S. §305(c)(9) requirement to include a plot plan of Condemnees’ entire parcel is virtually impossible in this case due to the unique chain of title to the property based on 25 instruments dated 1881 to 1906 that are attached as exhibits to the deeds and the unique configuration of the 120.82-acre former railroad bed that spans multiple municipalities. The Amended Notice of Condemnation that Condemnees received shows that a plan of the entire “Road C” project was recorded in the County’s Recorder’s Office showing the location of all the properties condemned, including reference to the specific portion of Condemnees’ property in the Township that will be impacted by the project. (*See Reproduced Record (R.R.) at 33a-47a.*)

In addition, as noted by Condemnees, the survey, as it pertains to Condemnees’ property, clearly shows that 0.120 acres of the 120.82 acres are being condemned and that an area of just over one acre is required for easements. (*See R.R. at 100a-102a.*) Thus, Condemnees are fully aware of the portion of their property within the Township that is being condemned and they have failed to allege or prove any prejudice resulting from the Township’s failure to include a plot plan of their entire 120.82-acre parcel as part of the 26 Pa. C.S. §305 notice. *See Avery*, 276 A.2d at 845 (“The court below has held that the Department substantially complied with all notice and authorization procedures and that

appellants were not prejudiced by any irregularities. We agree. Appellants attended the hearings and were fully aware of the Department's intentions with respect to their properties. They were never misled as to the authority or finality of the steps being taken by the Department. This afterthought is mere makeweight. We therefore affirm the dismissal of these preliminary objections by the court below.”).

Finally, the Township has substantially complied with the notice requirements of 26 Pa. C.S. §305(c)(9) because Condemnees merely own the railroad's former right-of-way over the parcels in the Township involved in the road's construction. As noted above, the Township recorded a plot plan for the parcels in the Township over which “Road C” will be constructed and which part of the Condemnees' right-of-way will be taken. 26 Pa. C.S. §305(c)(9) requires a plot plan showing “the condemnee's entire property and the area taken,” and Condemnees merely own the railroad's former right-of-way over the parcels in the Township involved in the road's construction.⁸

Accordingly, the trial court's order is affirmed.

DAN PELLEGRINI, President Judge

⁸ Further, 26 Pa. C.S. §305(b)(2) provides that the plot plan may be entirely omitted from the notice where personal service cannot be effectuated. In such cases, service by publication and posting of the property is appropriate and the plot plan required by 26 Pa. C.S. §305(c)(9) is expressly waived. *Id.* Thus, the Eminent Domain Code specifically contemplates situations in which strict compliance with the notice requirements is not possible.

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ORDER

AND NOW, this 4th day of January, 2013, the order of the Court of
Common Pleas of Bradford County dated April 2, 2012, at No. 11 CO 000115, is
affirmed.

DAN PELLEGRINI, President Judge