

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA  
CIVIL DIVISION

IN RE: CONDEMNATION BY THE :  
COMMONWEALTH OF PENNSYLVANIA, :  
DEPARTMENT OF TRANSPORTATION, :  
RIGHT-OF-WAY FOR STATE ROUTE :  
0443, SECTION 02S, IN THE :  
TOWNSHIP OF MAHONING, :  
:  
COMMONWEALTH OF PENNSYLVANIA, :  
DEPARTMENT OF TRANSPORTATION, :  
Condemnor/Petitioner: :  
:  
Vs. : No. 18-3744  
:  
BENNETT FAMILY PROPERTIES, :  
LLC, :  
Condemnee/Respondent:

FILED  
2020 JAN 21 PM 6:54  
CARBON COUNTY  
PROTHONOTARY

Robert Kopacz, Esquire  
Francis Hoegen, Esquire

Counsel for Condemnor/Petitioner  
Counsel for Condemnee/Respondent

MEMORANDUM OPINION

Matika, J. - ~~JANUARY~~ 20, 2020

Before this Honorable Court are the Preliminary Objections of the Condemnee, Bennett Family Properties, LLC (hereinafter "B.F.P.") to the Declaration of Taking filed by the Condemnor, Commonwealth of Pennsylvania, Department of Transportation (hereinafter "PennDOT"). After hearing and argument consisting of briefs and supplemental briefs of the parties, this Court finds no merit to the position taken by Bennett and overrules these objections.

## FACTUAL AND PROCEDURAL BACKGROUND

On December 12, 2018, PennDOT filed a Declaration of Taking to the above docket number. In this Declaration of Taking, it provided notice to B.F.P. that it was condemning three (3) parcels of real estate owned by B.F.P. and located adjacent to State Route 443 in Mahoning Township. These parcels<sup>1</sup> PennDOT claimed are necessary in furtherance of Pennsylvania's road widening project on State Route 443.

On January 11, 2019, B.F.P. filed timely preliminary objections in this Declaration of Taking. Namely, B.F.P. contends that: 1) PennDOT abused its discretion in failing to undertake an informed investigation and/or make an intelligent, informed judgment regarding this taking; and 2) PennDOT's power of right to appropriate the condemned property pursuant to 26 Pa.C.S.A. §306, et seq. was an excessive taking of the property.

A hearing was held on October 17, 2019 at which time B.F.P. presented two (2) witnesses<sup>2</sup> namely, Joseph Bennett (hereinafter "Bennett") and Gregory Haas (hereinafter "Haas"). PennDOT

---

<sup>1</sup> These parcels are identified as tax parcel numbers 84-35-A2.01, 84-35-A3 and 84-35-A4 and are recorded in Carbon County Deed Book 2341 page number 234.

<sup>2</sup> B.F.P. attempted to call Lisa Foreback as an expert witness to testify regarding highest and best use of the subject properties and to demonstrate the adverse economic impact to B.F.P. if the condemnation would be permitted to proceed. B.F.P. further argues that PennDOT should have considered this point. PennDOT objected to this witness being called countering that her testimony would be irrelevant to the issues raised in the preliminary objections. This Court sustained the objection of PennDOT at the hearing. After giving counsel an opportunity to further brief the issue after the hearing, by Order of Court dated November 14, 2019 we allowed that ruling to stand.

countered with two (2) witnesses of its own namely Kenneth Kutchinsky (hereinafter "Kutchinsky") and Joseph DiGirolamo (hereinafter "DiGirolamo").

At the hearing, Bennett testified B.F.P. purchased the subject parcels from St. Luke's Hospital in Bethlehem back in 2017 with the intention of developing this real estate. He further testified that B.F.P. was in contact with someone regarding the construction of a restaurant on that site. According to Bennett he met with various municipal officers in hopes of developing these parcels. Bennett also testified that he had meetings with representatives of PennDOT. During the course of at least one such meeting, it was made known to Bennett that PennDOT was interested in taking the B.F.P.'s properties for its road widening project. On May 10, 2018, at another such meeting, Bennett suggested to PennDOT representatives that they consider taking the neighboring property instead of the B.F.P. properties for purposes of the stormwater retention basin aspect of the road widening project.

On or about June 12, 2018, PennDOT representatives responded to Bennett that PennDOT rejected B.F.P.'s proposal for the reasons provided in a letter from the Assistant District Executive-Design, Christopher J. Kufro, P.E.

B.F.P. next called Haas to testify as an expert in the field of professional engineering. Haas testified that he examined the PennDOT project plans as it related to the B.F.P. properties as well as neighboring parcels and concluded that the proposed

stormwater retentions basins could conceivably be located behind and north of the B.F.P. parcels on property known as the "Sergentakis properties", thus sparing the B.F.P. parcels from condemnation. On cross-examination, Haas conceded that he was unaware of any testing having been done on the Sergentakis properties to see if they were suitable for these basins. He also agreed that in order to relocate the proposed stormwater management aspect of this project to the Sergentakis properties, PennDOT would be required to install piping from State Route 443 to the infiltration basin, a considerable distance farther away and then additional piping from the Sergentakis property to Mahoning Creek. Additionally, Haas concurred that PennDOT would be required to maintain and/or obtain rights of way over five properties and that he did not perform a cost analysis regarding any aspects of his proposal.

PennDOT called two witnesses, namely District Right of Way Administrator - Engineering District 5, Kenneth Kutchinsky and its Design Engineer DiGirolamo. Collectively, they testified that PennDOT began studying the possibility of a highway safety improvement project on State Route 443 as far back as 2013. Over the course of several years, various studies were performed along the 443 corridor to ascertain the location of several areas that would be suitable for the location of certain necessary drainage facilities to collect water from State Route 443, the quantity of which would naturally increase due to additional impervious areas



being located there. One such area being considered was that of the B.F.P. properties. Based upon the topography on the opposite side of State Route 443 from the B.F.P. Properties, the likely natural drainage area would be at or near the B.F.P. properties. Additionally, in consideration of choosing the B.F.P. properties was the fact that wetlands and a stream were located nearby and more easily accessible from the B.F.P. properties. As a result of these studies and initial engineering analysis, the B.F.P. properties were targeted for condemnation to be used for these two drainage basins and related accessories.

PennDOT's witnesses also testified that after the May 10, 2018 meeting at the B.F.P. properties, it did in fact consider the alternative proffered by Bennett. Based upon PennDOT's examination of that possible alternative, PennDOT determined that this alternative would not be suitable for PennDOT's needs. On June 12, 2018, PennDOT sent correspondence to Bennett outlining the reasons why this alternative would not be suitable.<sup>3</sup> Additionally, DiGirolamo testified that despite the rational contained in that letter, it was cost and time prohibitive to conduct any further studies into Bennett's alternative. As a result, PennDOT maintained its position that it was necessary to condemn the B.F.P. properties as identified in the Declaration of Taking.

---

<sup>3</sup> See letter identified as Defendant's Exhibit 11.

### LEGAL DISCUSSION

The purpose of the Eminent Domain Code, 26 Pa.C.S.A. §301 et seq., is to "provide the procedure for the exercise of the sovereign's inherent power to condemn property for public purposes, not to deprive property." In *Re: Condemnation by Commonwealth, Department of Transportation of Right of Way for State Route 0095, Section BSR*, 131 A.3d 625, 633 (Pa. Cmmwlth. Ct. 2016). In interpreting the code, a court must narrowly construe it, but in doing so it should not be so literally construed or done without common sense so as to frustrate the intent of the court. In *Re: School District of Pittsburgh, Allegheny County*, 244 A.2d 42, 44 (1968). "Unless the property is acquired for an authorized use, and after a suitable investigation leading to an intelligent, informed judgment by the Condemnor, the condemnation is invalid." *Id.* at 46.

The exclusive means to challenging a declaration of taking is by the filing of preliminary objections. *Appeal of McKonly*, 618 A.2d 1169, 1170 (Pa. Cmmwlth. Ct. 1992). Pursuant to 26 Pa.C.S.A. §306(a)(3), preliminary objections shall be limited to and shall be the exclusive method of challenging: (i) The power or right of the condemnor to appropriate the condemned property unless it has been previously adjudicated. (ii) The sufficiency of the security. (iii) the declaration of taking. (iv) Any other procedure followed by the condemnor.

In raising these preliminary objections, B.F.P alleges that PennDOT's actions amounted to an abuse of their discretion and power to condemn. Accordingly, a court can review those actions where the condemnee alleges abuses of discretion and/or power. *Ewans v. Reading Parking Authority*, 124 A.2d 92 (1956).

Here, B.F.P. alleges that PennDOT abused its discretion in failing to follow the mandates set forth in the *School District of Pittsburgh* case. Additionally, B.F.P claims that PennDOT exceeded any power or rights conferred on it by the Eminent Domain Code by taking more of B.F.P.'s property than it needed for its stated purpose.

The Court, in the case of *In Re: Condemnation of Real Estate by Borough of Ashland*, 851 A.2d 992, 996-997 (Pa. Commwlth. Ct. 2006) stated that,

the burden of establishing fraud, collusion, arbitrariness, bad faith or an abuse of power or discretion has a 'heavy' burden and must overcome the presumption that the condemnor has acted properly. Our authority to review the exercise of the power of eminent domain is limited and is governed by judicial respect for the doctrine of the separation of powers of government. Our Supreme Court enunciated this principle in *Weber v. Philadelphia*, 437 Pa. 179, 183, 262 A.2d 297, 299 (1970) (citations omitted).

First, it is to be presumed that municipal officers properly act for the public good. Second, courts will not sit in review of municipal actions involving discretion, in the absence of proof of fraud, collusion, bad faith or arbitrary action equating an abuse of discretion. Third, on judicial review, courts, absent proof of fraud, collusion, bad faith or abuse of power, do not inquire into the Wisdom [sic] of municipal actions and Judicial discretion should not be substituted for Administrative discretion.

Our law is replete with this sort of admonition. We are to give deference to the judgment of municipal officials in the exercise of their discretion in eminent domain matters and will disturb their decisions only where the condemnee can offer proof of fraud, collusion, bad faith, or an abuse of power or discretion."

Here, B.F.P. bears the burden of proof in its quest to have the court sustain preliminary objections. *In re Condemnation of Real Estate by Borough of Ashland*, 851 A.2d 992, 996-97 (Pa. Commwlth. Ct. 2004). The same can be said for establishing fraud, collusion, arbitrariness, bad faith or an abuse of power or discretion. *In re School District of Pittsburgh*, 244 A.2d 42 (Pa. 1968). This burden is a "heavy" one and must overcome the strong presumption that the condemnor has acted properly. *Appeal of Waite*, 641 A.2d 25 (Pa. Commwlth. Ct. 1994).

B.F.P. argues that PennDOT failed to consider the alternative proffered by its expert, Gregory Haas in which Haas testified that a viable, more feasible alternative was available to PennDOT on other neighboring parcels of land. This failure B.F.P. contends, was an abuse of discretion by PennDOT.

All that is required of a condemnor is that the investigation be conducted so that the decision to condemn is an informed one. *In re: School District of Pittsburgh, Supra*. However, the taking must be carefully planned and the existence of a carefully considered development may be given great weight. *Middletown Township v. Lands of Stone*, 939 A.2d 331, 338 (2007). Further,

the *Middleton Township* court stated that in order for the condemnor to invoke the power to condemn,

"it was incumbent upon the Township to identify the fact that it could take for a recreations purpose and to take action to effectuate that purpose. Further, as stated previously, precedent demonstrates that condemnations have been consistently upheld when the taking is orchestrated according to a carefully developed plan which effectuates the stated purpose. Anything less would make an empty shell of our public use requirements. It cannot be sufficient to merely waive the proper statutory language like a scepter under the nose of a property owner and demand that he forfeit his land for the sake of the public. Rather, there must be some substantial and rational proof by way of an intelligent plan that demonstrated informed judgment to prove that an authorized public purpose is the true goal of the taking." *Id.* at 340 (internal citation omitted).

As long as the record demonstrated that it [the project] was "carefully planned and painstakingly thought out with a view toward present and future requirements" (see *Pidstawski v. South Whitehall Township*, 380 A.2d 1322, 1324 (Pa. Commwlth. Ct. 1987), this Court will not disturb the decision of the condemnor. In *Downingtown Area School District v. DeFrancesco*, 557 A.2d 819, 821-822 (Pa. Commwlth. Ct. 1989) the Court stated that

A court has "no power to substitute [its] discretion for that of the [condemnor], nor to correct mistakes in judgment. It is presumed that the officials have performed their duties in good faith . . ." Mere evidence that a decision is unwise will not warrant a conclusion that a condemnor has abused its discretion in its selection of a site." (internal citations omitted).

Additionally, the fact that B.F.P. proposed another location for the installation of PennDOT's drainage basins which was rejected is not a basis for sustaining preliminary objections

provided the investigation which led to the conclusion of condemning B.F.P.'s properties was an informed judgment.

The fact that PennDOT's witnesses testified to the project's evolution since 2013, explained the extent to which surveys, studies and analysis were conducted and that PennDOT considered, but rejected B.F.P.'s alternative, affirms to this Court that the decision, as laid out, and specifically that part dealing with the ultimate taking of B.F.P.'s properties, was well thought out and planned and clearly an intelligent, informed judgment exercised by PennDOT and not an abuse of discretion as alleged by B.F.P.

B.F.P. also argues that PennDOT's taking of its property was excessive. Courts have found that,

"[i]nasmuch as property cannot constitutionally [be] taken by eminent domain except for public use, no more property may be taken than the public use requires—a rule which applies both to the amount of property and the estate or interest to be acquired." In *re Condemnation by Beaver Falls Municipal Authority for Pennedale Water Line Extension*, 960 A.2d 933, 937 (Pa. Commwlth. 2008) (citation omitted). We have also previously noted the "[t]he quantum of land to be acquired is, within reasonable limitations, a matter within the condemnor's discretion. *Appeal of Waite*, 641 A.2d 25, 28 (Pa. Commwlth.), *appeal denied*, 651 A.2d 543 (Pa. 1994) (citing *Truitt v. Borough of Ambridge Water Authority*, 133 A. 2d 797, 799 (Pa. 1957)).

Here PennDOT's testimony and supporting documentation revealed that its taking was a taking of a fee simple interest along with a private access easement in the B.F.P. properties. According to Defendant's Exhibits 1 and 6, the total acreage of these parcels is 2.558 acres and that the amount needed for the



project amounted to 2.381 acres, or 93.1 percent of the total acreage condemned. Clearly, this total taking, in the discretion of the condemnor was necessary, reasonable and prudent under the circumstances and condemnee presented no contradictory evidence to refute this issue.

#### CONCLUSION

Based upon the foregoing, this Court enters the following order:

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA  
CIVIL DIVISION

IN RE: CONDEMNATION BY THE :  
COMMONWEALTH OF PENNSYLVANIA, :  
DEPARTMENT OF TRANSPORTATION, :  
RIGHT-OF-WAY FOR STATE ROUTE :  
0443, SECTION 02S, IN THE :  
TOWNSHIP OF MAHONING, :

COMMONWEALTH OF PENNSYLVANIA, :  
DEPARTMENT OF TRANSPORTATION, :

Condemnor/Petitioner:

Vs.

No. 18-3744

BENNETT FAMILY PROPERTIES, :  
LLC, :

Condemnee/Respondent:

FILED  
2020 JAN 21 PM 8:54  
CARBON COUNTY  
PROTHONOTARY

Robert Kopacz, Esquire  
Francis Hoegen, Esquire


Counsel for Condemnor/Petitioner  
Counsel for Condemnee/Respondent

ORDER OF COURT

AND NOW, this ~~20th~~ day of January, 2020, upon consideration of the "Condemnee/Respondent, Bennet Family Properties, LLC's Preliminary Objections to the Condemnor/Petitioner, Commonwealth of Pennsylvania, Department of Transportation's Declaration of Taking, the brief and supplemental brief lodged in support thereof, the Supplemental Brief of Condemnor/Petitioner, Commonwealth of Pennsylvania, Department of Transportation, in opposition thereto and after hearing thereon, it is hereby **ORDERED and DECREED** that the Preliminary Objections of Bennett Family Properties, LLC to

the Declaration of Taking filed by the Commonwealth of Pennsylvania, Department of Transportation are **OVERRULED**.

BY THE COURT:

  
\_\_\_\_\_  
Joseph J. Matika, J.