

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

IN RE: JAMES MURPHY, PETITION FOR :
APPOINTMENT OF BOARD OF : No. 90 MD 2006
VIEWERS TO LAYOUT AND OPEN :
A PRIVATE ROAD OVER :
PROPERTY OF TOWAMENSING :
TRAILS PROPERTY OWNERS' :
ASSOCIATION, INC. :

Anthony Roberti, Esquire Counsel for Petitioner
David J. Williamson, Esquire Counsel for the Defendant

Nanovic, P.J. - May 16, 2011

MEMORANDUM OPINION

What is the value of a private road? More precisely, by what amount does that value diminish if one more user is added. That is the issue in this case - one over which the parties are in total disagreement.

PROCEDURAL AND FACTUAL BACKGROUND

Towamensing Trails, a private residential development located in Penn Forest Township, Carbon County, has 4,064 building lots on which more than 2,250 homes have been built. The Towamensing Trails Property Owners' Association, Inc. ("Association") is the owner of more than 52 miles of roadway within the subdivision which the lot owners, by virtue of their property ownership, have the right to use and an obligation to maintain through the payment of annual assessments. Previously,

we determined that James Murphy, the owner of landlocked property which adjoins Towamensing Trails, is entitled under the Private Road Act, 36 P.S. §§ 1781-2891, to a right-of-way over existing development roads as a means of access to his property.¹ The assessment of damages for the use of this right-of-way was remanded to the Board of Viewers for determination.

On remand, the courses and distances of the right-of-way over the Association's roads were stipulated to by the parties. The course starts at the main entrance of Towamensing Trails on Pennsylvania Route 903, traverses over Towamensing Trail to Teddyuscung Trail, then to Whitman Lane, and finally to Lovelace Drive. The distance is 6,229.6 feet. The parties further stipulated that the width of the right-of-way, 25 feet, is to be measured from the center line of the existing cartway, 12 1/2 feet on either side.

In its report filed on August 24, 2009, the Board of Viewers determined the damages to be \$62,296.00. By order dated November 16, 2009, we confirmed *nisi* the Board's report. On November 30, 2009, Murphy appealed the Board's award. This

¹ Our Opinion, dated December 12, 2008, can be found at 17 Carbon Co.L.J. 529 (2008). Since that time, the Pennsylvania Supreme Court in In re Opening a Private Road, 5 A.3d 246 (Pa. 2010), vacated the Commonwealth Court's 2008 decision upholding the constitutionality of the Private Road Act. In doing so, the Court noted that the Commonwealth Court "neither supplied a sufficient rationale to support its theory of a statewide incorporeal burden nor put into application the prevailing standard governing takings." *Id.* at 258. Consequently, Murphy's contention that the Association has no right to further compensation on the basis that six percent of additional land for the use of roads was included free of charge in all original conveyances from the proprietors or the Commonwealth is untenable.

appeal as to damages only was heard *de novo* by us on July 16, 2010. At this trial, Murphy presented evidence which, if believed, calculated the damages to be *de minimis*, less than one cent. In contrast, the Association's evidence, if accepted, computed the damages to be \$401,500.00.

At trial, Murphy presented the testimony of an appraisal expert who opined that the size of the property in dispute is approximately three and a half acres (i.e., 25 feet by 6,229.6 feet), that the property is unbuildable because of its dimensions and dedication as a right-of-way, that property which is unbuildable has a fair market value of a thousand dollars per acre, that the proportionate value of the property taken per lot owner before the take was \$0.8612 (i.e., \$3,500.00 divided by 4,064.00), that the proportionate value of the property taken per lot owner after the take is \$0.8610 (i.e., \$3,500.00 divided by 4,065.00) and that the difference between the before-and-after value per lot owner is less than one cent.

The Association countered that the before-and-after value should be based upon construction costs; that the cost to construct the road at current rates is \$743,000.00; that the Association is one owner and that, after the take, Murphy will be a second owner; and that, therefore, the loss in value to the Association is \$371,500.00. In addition, the Association's real estate expert testified to nuisance damages of \$30,000.00

attributable to increased traffic and loss of privacy due to Murphy's, his invitees', heirs' and assigns' use of the road as a non-member of the Association.

DISCUSSION

The proper measure of damages for the taking of a private access is the same as that for the taking of a public road: the difference in market value of the condemned property before the taking and as unaffected by it, and its market value immediately after the taking, as affected by it, hereafter called the "before-and-after" value. 36 P.S. §§ 1881, 2736; see also In re Brinker, 683 A.2d 966, 969 n.9 (Pa.Cmwlth. 1996) and Brown v. Commonwealth, 159 A.2d 881, 882 (Pa. 1960). Neither party's evidence conforms to this standard.²

Murphy, in effect, valued a joint ownership interest in vacant, unbuildable land. This is contrary to the facts. Murphy is not acquiring an ownership interest, but a right to use; the property is not vacant, but improved with a road and is being used for that purpose to the benefit of thousands of property owners; the incremental difference in value of an

² The parties' failure to properly measure damages is difficult to understand. In our Memorandum Opinion of December 12, 2008, we explicitly noted that the appropriate measure of damages is the difference between the fair market value of the entire property immediately before and immediately after the taking, citing Benner v. Silvis, 950 A.2d 990 (Pa.Super. 2008), and expressly remanding the matter to the Board of Viewers for the computation of damages in accordance with this standard. See Memorandum Opinion, pp. 17-20, including footnote 10.

ownership interest between 4,064 owners and 4,065 owners is not a comparison between the before-and-after value of the existing road.

The Association's approach is equally invalid. Murphy will not be one of two owners of the road, but one of 4,065 lot owners who have a right to use the road. Further, the price to build a road at current rates does not measure the before-and-after value attributable to one additional user. What the Association has measured is the savings to Murphy of not having to build a new road, not the loss to the Association of having one additional user.

The damages under the Private Road Act for acquiring access across another's property are prescribed as follows:

The 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.

36 P.S. § 2736. Section 2736's reference to public roads is to the provisions for opening a public road found at 36 P.S. § 1781 et seq., including 36 P.S. § 2151, specifically authorizing appeals from the award of damages by the Board of Viewers in public road cases. Mattei v. Huray, 422 A.2d 899, 901 (Pa.Cmwlth. 1980).³ Such damages do not include the recoupment

³ Although a split in authority exists between the Commonwealth and Superior Courts concerning the applicability of the Eminent Domain Code to private road condemnations, both Courts agree that the measure of damages is the before-and-after value. Benner, 950 A.2d at 993 n.1. Further, the Superior

of previously expended monies for construction and engineering costs. Benner v. Silvis, 950 A.2d 990, 995 (Pa.Super. 2008). Nor does the statute provide for the recovery of nuisance value as requested by the Association. See Brown (holding that evidence of particular items of damage, separate from the fair market value of the land, should be excluded).

We are faced then with a case where neither party has presented evidence sufficient to support a claim for damages.⁴ Under such circumstances, the law does not permit a stalemate. One party must prevail; a tie cannot exist.

In the absence of evidence, presumptions and burdens decide the outcome. On appeal before the Court of Common Pleas, as here, the burden of proving damages is upon the condemnee, not the condemnor. Glider v. Commonwealth, Dept. of Highways, 255 A.2d 542, 545 (Pa. 1969); see also Morrissey v. Commonwealth, Dept. of Highways, 225 A.2d 895, 897-98 (Pa.

Court has acknowledged that "cases brought pursuant to the Private Road Act are in the nature of eminent domain proceedings and thus within the exclusive jurisdiction of the Commonwealth Court pursuant to 42 Pa.C.S.A. § 762 (a)(6)." *Id.* at 993. We therefore follow the Commonwealth Court's lead that "the provisions of the Eminent Domain Code . . . are not applicable, except by analogy or perhaps, necessity, to private condemnations." Mandracchia v. Stoney Creek Real Estate Corp., 576 A.2d 1181, 1182 n.1 (Pa.Cmwlth. 1990).

⁴ As a matter of law, where the fact-finder views the property, it may disregard the testimony of experts and arrive at its own fair market value and damage amount. Hughesville-Wolf Township Joint Municipal Authority v. Fry, 669 A.2d 481, 486 (Pa.Cmwlth. 1995) (view by the trial judge); Tedesco v. Municipal Authority of Hazle Township, 799 A.2d 931, 938 (Pa.Cmwlth. 2002) (view by a jury). We have not viewed the property, nor has either party requested that we do so. Accordingly, it would be inappropriate for us to independently value the taking separate from the evidence presented at the time of trial. Borough of Jefferson v. Bracco, 635 A.2d 754, 760 (Pa.Cmwlth. 1993).

1967). Having failed to meet this burden and absent contrary evidence of actual damages, nominal damages will be presumed. Weinberg v. Comcast Cablevision of Philadelphia, L.P., 759 A.2d 395, 403 (Pa.Super. 2000) ("Absent evidence of specific damages bearing on the market value of the property, a nominal damage award in the amount \$1.00 was appropriate.").

CONCLUSION

In a case such as this when an interest in another's property has been condemned, but the evidence fails to establish the actual loss sustained by the condemnee, nominal damages will be awarded. For purposes of our verdict, these damages have been set at \$100.00.⁵

BY THE COURT:

P.J.

⁵ This amount is in addition to the amount of \$1,500.00 for the right-of-way acquired by Murphy over the unopened portion of Lovelace Drive and \$500.00 for attorney and appraisal fees previously stipulated to by the parties. In addition, as also stipulated to by the parties, Murphy is subject to the assessment by the Association of an annual fee, identical to that which it assesses its members each year for the costs associated with the use and maintenance of the development roads. See also Glen Onoko Estates v. Neidert, 17 Carbon Co.L.J. 322 (2006) (allocating the costs for repair, upkeep and maintenance of private development roads equitably among all users of the roads).

