IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In Re: Condemnation of the Property of Ronald L. Repasky, Jr. Located in the City of Greensburg, Westmoreland County, Pennsylvania by Greater Greensburg Sewage Authority	:	
Ronald L. Repasky, Jr., Fee Owner and Blast-Tek, Inc., Tenant	:	
v.	:	
Greater Greensburg Sewage Authority, Appellant	:	No. 1178 C.D. 2014 Argued: April 13, 2015

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY FILED: June 18, 2015

Greater Greensburg Sewage Authority (Authority) appeals from an order of the Court of Common Pleas of Westmoreland County (trial court) that denied the Authority's motion for post-trial relief.

On February 3, 2006, the Authority filed an Amended Declaration of Taking and alleged:

> 2. . . . This taking was approved by the governing Board of the Greater Greensburg Sewage Authority at it's [sic] meeting on the 14th day of July, 2005 . . . .
>
> 3. The purpose of the condemnation is to allow the . . . Authority to construct, place, replace and repair a tank or tanks known as equalization tanks, and related facilities

including pumps and piping together with electrical controls and other related equipment. These tanks are designed to hold excess water in the combined sewer system during the time of and shortly after rain events.

4. The property of the Condemnee [Ronald L. Repasky, Jr.] which is the subject of this Taking was deeded to the Condemnee . . . .

5. The Condemnee . . . is the owner of two other parcels of ground adjacent to the property acquired from Hospital Central Services Cooperative, Inc. mentioned in the previous paragraph which Ronald L. Repasky, Jr. acquired by Deed of R.J. Repco, Inc. . . . .

. . . .

8. The Condemnor, . . . Authority, believes and therefor avers that the property owned by the Condemnee . . . is not in any way affected by this taking.

. . . .

11. The original Declaration of Taking was filed in the office of the Prothonotary of Westmoreland County . . . .

12. This Amendment of Taking is being filed on the 3rd of February in the Office of the Prothonotary of Westmoreland County . . . .

. . . .

14. The Condemnee's property that is subject to this taking is a permanent easement[1] in the portion of the property . . . and a temporary easement[2] during construction 20 feet in width to the North of the permanent easement.

. . . .

16. Estimated just compensation in the amount of One Hundred Dollars ($100.00) has been paid to the Condemnee with the filing of the Declaration of Taking.

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[1] The permanent easement involved the taking of 11,912.08 sq. ft. of property.

[2] The temporary construction easement involved the taking of 7,346.15 sq. ft. of property.

> 17. Just compensation is secured herein by the finances and revenues of the . . . Authority.

Amended Declaration of Taking, February 3, 2006, Paragraphs 2-5, 8, 11-12, 14, and 16-17 at 1-3.[3]

On October 24, 2008, Repasky filed a Petition for the Appointment of View. On May 10, 2012, the Board of View issued its findings of fact:

> 2. Prior to the condemnation, the property was used for commercial purposes.
>
> 3. The highest and best use of the property both before and after condemnation is a warehouse distribution facility.
>
> 4. Although the . . . . Authority has an existing permanent sanitary sewer easement over the Repasky property, it filed a declaration of taking to install an underground combined sewer equalization tank, thus creating an additional servitude.
>
> 5. As a result of the additional servitude, the property owner, Mr. Repasky, has sustained compensable damage.
>
> 6. The Board hereby accepts the elements of damages set forth in Mr. Lizza's appraisal . . . .
>
> 7. The dollar amount of the damages is $55,000.00.
>
> 8. Delay damages shall be payable commencing September 15, 2006.

[3] Ronald L. Repasky, Jr. (Repasky) filed preliminary objections to the Authority's initial Declaration of Taking on procedural grounds and the Authority filed the above-mentioned amended declaration of taking.

Statement Of Expert Opinion

> A John Lizza testified as an expert witness for the condemnee and gave the following opinion:
>
> Fair Market Value Before Taking- $1,050,000.00
>
> Fair Market Value After Taking- $ 950,000.00
>
> Damages: $ 100,000.00
>
> Lois Martin testified as an expert witness for the condemnor and rendered the following opinion:
>
> Fair Market Value Before Taking- $1,131,000.00
>
> Fair Market Value After Taking- $1,117,000.00
>
> Damages: $ 14,000.00

Report of Board of Viewers, May 10, 2012, Findings of Fact (F.F.) Nos. 2-8 at 2-3.

Cross-appeals were filed by the Authority and Repasky, and a jury trial was conducted on March 4, 2014, through March 7, 2014.

At trial, Repasky testified regarding the condemnation of his property:

> During the construction phase we lost the ability to store our own equipment, our own trucks on the site. We lost the ability to economically load and unload vehicles, trucks. We lost abrasives by transporting from one end of the building to the other in rain or snow conditions. We lost the extra man hours and labor that we had to put forth to overcome the problems we had.

Trial Transcript, March 5, 2014, (T.T. 3/5/14) at 45; Reproduced Record (R.R.) at 113a. Repasky testified that as a result of the installation of the equalization tank

"[w]e couldn't complete the buildings economically where we could utilize them . . . [w]e have the water problem that could not be corrected . . . [i]t just didn't work out." T.T. 3/5/14 at 53; R.R. at 122a. As a result, Repasky stated "[a]fter the combination of the equalization tank, we made a decision it's a lot better for us to just move out . . . [and to] lease the facility to . . . Allegheny High Lift." T.T. 3/5/14 at 53; R.R. at 122a. Repasky opined that the diminution of the market value of his property was "$150,000 at least." T.T. 3/5/14 at 54; R.R. at 123a.

Joseph R. Dietrick (Dietrick)[4], a licensed professional engineer and land surveyor, testified that "[t]he total area of the permanent easement is 11,912 square feet or 0.273 acres [and] [t]he total area of the temporary easement is 7,346 square feet or 0.169 acres." T.T. 3/5/14 at 88; R.R. at 157a. "I reviewed the property, and based on the survey we had done on the property as well, and topography, and tried to come up with the best solution possible to cure the water problem that was on the site." T.T. 3/5/14 at 94; R.R. at 163a. Dietrick explained:

> Plan A, which is a plan I prepared if there had never been any construction of an equalization tank on the property. Plan B was essentially trying to do Plan A with the equalization tank on the property. And Plan C was another option that we could do with the equalization tank constructed.

T.T. 3/5/14 at 95; R.R. at 164a. In regards to Plan A, "my goal was to keep the grades flat . . . [g]rade the swale and grade everything down toward Jacks Run. Put an inlet where the asphalt ends, just to collect that water so it didn't erode away the gravel area." T.T. 3/5/14 at 96; R.R. at 165a. The cost of this plan would have been "$72,605." T.T. 3/5/14 at 100; R.R. at 169a. As to Plan B, "[t]his plan

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[4] Authority filed a Motion in Limine seeking to prevent Dietrick's testimony. The trial court denied the motion and Dietrick was allowed to testify.

essentially tries to do the same thing that we did in Plan A, you know, creating a drainage away from the building, creating a swale down towards Jacks Run, but now we're limited on what grade we can do because of the presence of the equalization tank . . . ." T.T. 3/5/14 at 101; R.R. at 170a. Dietrick stated that the grade was "approaching 7 percent, which is very problematic for trucks." T.T. 3/5/14 at 101; R.R. at 170a. In regards to Plan C, "I looked at another option where we wouldn't have as steep a grade, basically it leaves the site unchanged and we would put a strip drain in front of those doors." T.T. 3/5/14 at 103-04; R.R. at 172a-73a. In conclusion, Dietrick opined that "[t]he presence of the equalization tank eliminates plan A" and that he would not recommend either plan B or plan C. T.T. 3/5/14 at 105; R.R. at 174a. In other words, Dietrick stated "[h]e's out of luck . . . [e]ither fix the water problem and not have trucks on the site, or live with the water problem and still got [sic] issues with trucks on the site." T.T. 3/5/14 at 106; R.R. at 175a.

John H. Lizza (Lizza), a certified general appraiser, testified that "the buildings located on the property [are] a two-story metal building . . . which has the . . . area of 21,814 feet." Trial Transcript, March 6, 2014, (T.T. 3/6/14) at 36; R.R. at 214a. "There's a second building, which is a one-story metal building . . . 8,000 square feet." T.T. 3/6/14 at 36; R.R. at 214a. "There's a third building on the property, which is a concrete block one-story industrial type of building, and it is 7,488 square feet." T.T. 3/6/14 at 36; R.R. at 214a. Lizza opined that "[t]he highest and best use [of the property] was . . . for, industrial warehouse type facilities." T.T. 3/6/14 at 36; R.R. at 214a. Lizza stated that the method of appraisal he used was "called comparable sales approach . . . [i]t's also known as market approach to value, that's where you find comparable sales to the subject property and adjust for the different amenities." T.T. 3/6/14 at 37; R.R. at 215a.

Lizza stated that "[t]he before value of the subject property is . . . $1,050,000." T.T. 3/6/14 at 38; R.R. at 216a. As to the fair market value of the subject property after condemnation, Lizza stated "I used the same method . . . the comparable sales method." T.T. 3/6/14 at 38; R.R. at 216a. Lizza opined that the fair market value after condemnation was "$950,000 . . . [n]et damages of $100,000." T.T. 3/6/14 at 39; R.R. at 217a.

Steven Greenberg (Greenberg), a principal at KLH engineers, testified and described an "equalization tank":

> There are – on one end there are two sets of pumps, one to pump water in and one to send the pump water out. And on the opposite end of the tank there are some vacuum valves that are used to hold water in a flushing chamber so that when the tank is empty, it can be flushed out, if that water was held in there. That's truly what's in that tank.

T.T. 3/6/14 at 115; R.R. at 293a. Greenberg stated that in order to mitigate the impact on Repasky's property, "we agreed to rotate the tank 180 degrees and eliminate the control building and put the control panels with all the electrical equipment in a panel that was off his property on the railroad right-of-way." T.T. 3/6/14 at 116; R.R. at 294a.

Gino Rizzi (Rizzi), manager of the Authority, was asked, "[i]s the right-of-way that was condemned in this case for the equalization tank, the same right-of-way that was given by agreement for the sewer relocation project?" T.T. 3/6/14 at 178; R.R. at 357a. Rizzi responded "[y]es it was." T.T. 3/6/14 at 178; R.R. at 357a. Rizzi testified that it cost the Authority $40,000 to rotate the equalization tank 180 degrees at the request of Repasky. T.T. 3/6/14 at 179; R.R.

at 357a. Rizzi testified that the relocation of the electronic controls for the equalization tank on the railroad property came at a price. "We had to sign a contract with the railroad and we're paying them [sic] $500 a year for the privilege of keeping it there. They [sic] can request it be removed at any time if they [sic] have to do work on the rails." T.T. 3/6/14 at 180; R.R. at 358a.

At the conclusion of the trial, the jury found that "we, the jury, do hereby find in favor of the condemne, Ronald L. Repasky, Jr., in the amount of $115,000." T.T. 3/7/14 at 55; R.R. at 429a. The trial court molded the verdict as follows:

> 1. The Motion to Mold the Verdict is hereby Granted;
>
> 2. The verdict in the amount of $115,000 is molded to the sum of $165,265.00, representing the verdict in the amount of $115,000.00, delay compensation in the amount of $49,765 (calculated from September 15, 2006) and reimbursement of attorney's fees in the amount of $500.00 . . . .

Order of the Court, June 19, 2014, at 1; R.R. at 471a.

The Authority filed a post-trial motion and asserted that "the jury's verdict was grossly excessive", that "the burden of proving the elements of damage and the amounts of damage should have been placed squarely on the Condemne/Plaintiff," and that "[t]he Court was in error when it allowed the testimony of Mr. Dietrick to speculate on what the cost of his Plans A, B and C would have been prior to the installation of the equalization tank." Post-Trial Motion, March 14, 2014, Paragraphs 1, 3, and 4 at 1; R.R. at 435a. The trial court denied the Authority's post-trial motion.

The Authority appealed and upon direction by the trial court, it filed a Concise Statement of Errors Complained of on Appeal pursuant to Pa. R.A.P 1925(b). In its Rule 1925(a) opinion, the trial court addressed the Authority's arguments:

> . . . It appears that the allegations of error that form the basis of the appeal . . . are the same or are substantially similar to those contained in the post-trial motion filed on behalf of . . . [the] Authority on March 14, 2014. This Court has previously set forth in writing the reasons for denying said Motion in this Court's Opinion and Order dated June 11, 2014 . . . .

Opinion and Order of Court, July 31, 2014, at 1-2; R.R. at 478a-79a.

Before this Court, the Authority contends[5]: 1) "Did the Trial Court err in allowing the testimony of Mr. Joseph Dietrick?"; 2) "Did the Trial Court err when it found that Mr. Dietrick's testimony was relevant to the highest and best use of the property?"; and 3) "Did the Trial Court err in failing to place the burden of proof of damages squarely on the Condemne, Ronald L. Repasky, Jr.?" Brief of Appellant, Statement of Questions Involved at 9.

These issues were raised and argued before the trial court and ably disposed of in the opinion of the Honorable Christopher A. Feliciani. Therefore, this Court shall affirm on the basis of that opinion. In Re: Condemnation of the Property of Ronald L. Repasky, Jr., Located in the City of Greensburg,

[5] "In eminent domain cases, this Court's review is limited to a determination of whether the trial court committed an abuse of discretion or an error of law." York City Redevelopment Authority v. Ohio Blenders, Inc., 956 A.2d 1052, 1057 n.4 (Pa. Cmwlth. 2008).

Westmoreland County, Pennsylvania by Greater Greensburg Sewage Authority, (No. 7947 of 2005), filed June 12, 2014.

Accordingly, this Court affirms.

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BERNARD L. McGINLEY, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In Re: Condemnation of the Property of Ronald L. Repasky, Jr. Located in the City of Greensburg, Westmoreland County, Pennsylvania by Greater Greensburg Sewage Authority	:	
Ronald L. Repasky, Jr., Fee Owner and Blast-Tek, Inc., Tenant	:	
v.	:	
Greater Greensburg Sewage Authority, Appellant	:	No. 1178 C.D. 2014

ORDER

AND NOW, this 18th day of June, 2015, the order of the Court of Common Pleas of Westmoreland County in the above-captioned case is affirmed.

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BERNARD L. McGINLEY, Judge

IN THE COURT OF COMMON PLEAS OF WESTMORELAND COUNTY,
COMMONWEALTH OF PENNSYLVANIA
CIVIL DIVISION

IN RE: CONDEMNATION OF THE PROPERTY OF RONALD L. REPASKY, JR., LOCATED IN THE CITY OF GREENSBURG, WESTMORELAND COUNTY, PENNSYLVANIA BY GREATER GREENSBURG SEWAGE AUTHORITY

RONALD L. REPASKY, JR., Fee Owner and BLAST-TEK, INC., Tenant
together Condemness/Plaintiffs

v.

GREATER GREENSBURG SEWAGE AUTHORITY,
Condemnor/Defendant

No. 7947 of 2005

2014 JUN 12 AM 10:41
CHRISTINA O'BRIEN
PROTHONOTARY
WESTMORELAND COUNTY

OPINION AND ORDER OF COURT

The instant case is before the Court on the Condemnor/Defendant's Post-Trial Motion, seeking a new trial. The post-trial motion is denied for the reasons set forth below.

Condemnor alleges that it was error to allow testimony of Condemnee's expert Mr. Dietrick to testify, particularly with regard to costs of plans to resolve water drainage problem on the property at issue. Specifically, Condemnor argues that testimony with regard to the plans to remediate the drainage was speculative, because the plans "were things that Mr. Repasky did not do." *See* Condemnor Brief at p. 1. Condemnor believes that testimony of Mr. Dietrick does not bear on the value of property prior to the taking, the value of property after the taking, or the damages sustained by Condemnor.

Condemnor therefore argues that the testimony was irrelevant and should have been excluded.

This Court stands by the decision to permit testimony of Mr. Dietrick, because such testimony was relevant to the highest and best use of the property. To prove highest and best use, the condemnee must show that the property is physically adaptable to such use and that there is a need for such use of the property at the time of the condemnation. County of Luzerne v. Ceccoli, 75 Pa. Cmwlth. Ct. 486, 487-488, 462 A.2d 354, 355 (1983). It is true that recovery based upon highest and best use may not be based upon remote chances or future possibilities. Id. In this case, however, recovery was not based upon remote chances. In fact, Condemnee Ronald Repasky, Jr. testified at trial that he had done some construction work to correct the drainage problem in 2004, and that he planned to proceed with construction on the easterly and southerly sides of the building in 2005. He testified that hearing that his property would be taken made it impossible for him to proceed with his intended construction. Mr. Dietrick's testimony regarding the feasibility of correcting the drainage problem was relevant to Mr. Repasky's plan to put the property in such a position as to avoid water damage to the interior of the building (i.e., the highest and best use of the property as a drainage-free structure.) The fact that the entire plan of construction had not yet been carried out, however, did not render testimony too speculative for admission, as such testimony was not based on a remote possibility of such use. Mr. Dietrick's report, including the costs of bringing the property to its highest and best use as intended by Mr. Repasky's plan to correct a drainage problem, is relevant to the damages to be awarded. Therefore, the Court denies the post-

trial motion as it relates to alleged error based upon the alleged speculative nature of Mr. Dietrick's testimony and report.

Condemnor also alleges error in that the jury's verdict was excessive or grossly excessive. The allegation is that the jury must have improperly focused on the cost of Mr. Dietrick's plans (as set forth in his report) in arriving at their verdict in the amount of $115,000.00 because that amount is grossly excessive for the "slight" amount of damage Mr. Repasky sustained. Condemnor notes that the figure of $115,000.00 was not specifically suggested in testimony.

The issue of whether or not a jury's verdict is so excessive as to warrant the grant of a new trial is within the discretion of the trial court. Botek v. Mine Safety Appliance Corp., 531 Pa. 160, 611 A.2d 1174 (1992). The Court does not find the verdict to be excessive. Condemnee himself testified that he believed that he was entitled to damages of $150,000.00. The jurors participated in a view of the property at issue. As aptly noted by counsel for the Condemnor in his brief, there is no requirement that the jury arrive at a figure suggested in testimony at trial. On the contrary, where the jury views the property in a condemnation case, the jury may base its verdict on its own judgment, and "may disregard the expert testimony entirely." Tamaqua v. Knepper, 54 Pa. Cmwlth. 630, 633, 422 A.2d 1199, 1201 (1980). Simply put, there is no basis for the Court to disturb the jury's verdict.

Condemnor further alleges error in that Mr. Repasky testified that "he lost a minimum of $150,000.00" when such testimony was without any basis in fact. It is undisputed that Mr. Repasky, as the owner of the property, may testify as to just compensation. Mr. Repasky testified as to how the loading docks and traffic flow on his

property were affected by Condemnor's actions. He testified as to the loss of parking and the hiring of an additional employee to assist in loading and unloading trailers. He testified as to his plans to cure the water drainage problems on the property and how those plans were affected by actions of the Condemnor. These elements are elements that bore on the value of the property before and after the exercise of the right of eminent domain. Accordingly, these elements were a proper basis in fact for Mr. Repasky's testimony as to just compensation and facts upon which the jury could base its decision. *See* Columbia Gas Transmission Corporation v. Piper, 615 A.2d 979 (Pa. Cmwlth. 1992).

Condemnor also alleges error in that the Court's instruction to the jury regarding the burden of proof was "watered down," and an "old fashioned" burden of proof. Condemnor argues that the burden of proving the elements of damage and the amounts of damage should have been "placed squarely on the Condemnee/Plaintiff." Moreover, Condemnor suggests that the jury should have been instructed that the Condemnee bears the burden of proving the elements of damage and amount of damage by a preponderance of the evidence. Condemnor's Brief at 4. Condemnor cites to no case that supports the proposition that the Condemnee has a burden of proving compensation by a preponderance of the evidence. Rather, Condemnor cites to Morissey v. Department of Highways, 225 A.2d 895 (1967) for the idea that it is error for the trial court to instruct the jury that the burden on proof is on the condemnee to prove damages in excess of damages testified to by experts for the Commonwealth. Condemnor suggests that Morissey and a later case, Glider v. Commonwealth, Department of Highways, 435 Pa. 140; 255 A.2d 542 (1969) indicate that it is actually the condemnee's burden of proof as to damages.

Without addressing any issues of waiver as to whether the charge was proper, this Court disagrees. In Morissey, the Court improperly suggested that damages testified to by experts for the Commonwealth were a baseline, and that Condemnee had the burden to prove damages beyond those testified to by Commonwealth's expert. No such charge was given in the instant case. In Glider, the instruction at issue dealt with whether the jury was properly instructed as to deducting the value of fixtures to the property. In the case now before the Court, no such similar instruction was given. In the absence of any clear mandate indicating that Condemnee must prove damages by a preponderance of the evidence, the Court must abide by existing law.

Thus, for the reasons as set forth above, the Court denies Condemnor/Defendant's Post Trial Motion seeking grant of a new trial, and enters the following Order:

IN THE COURT OF COMMON PLEAS OF WESTMORELAND COUNTY,
COMMONWEALTH OF PENNSYLVANIA
CIVIL DIVISION

IN RE: CONDEMNATION OF THE PROPERTY OF RONALD L. REPASKY, JR., LOCATED IN THE CITY OF GREENSBURG, WESTMORELAND COUNTY, PENNSYLVANIA BY GREATER GREENSBURG SEWAGE AUTHORITY	)	No. 7947 of 2005
RONALD L. REPASKY, JR., Fee Owner and BLAST-TEK, INC., Tenant together Condemness/Plaintiffs	)	
v.	)	
GREATER GREENSBURG SEWAGE AUTHORITY, Condemnor/Defendant	)	

ORDER OF COURT

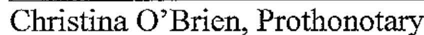
AND NOW, to wit, this 11th day of June, 2014, upon consideration of the Post Trial Motion and Brief filed on behalf of the Condemnor and the Brief in Opposition filed on behalf of the Condemnee, it is **ORDERED and DECREED that** Condemnor's Post Trial Motion is hereby DENIED.

FURTHER, in accord with Pa.R.C.P. No. 236(a)(2)(b), the Prothonotary is **DIRECTED** to note in the docket that the individual(s) listed below have been given notice of this Order.

BY THE COURT:

JUDGE CHRISTOPHER A. FELICIANI

ATTEST:



Christina O'Brien, Prothonotary

cc: Robert P. Lightcap, Esq., for Condemnee
John M. O'Connell, Jr., Esq., for Condemnor
Law Clerk