

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In Re: Interest of Kenneth E. Stake :
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Appeal of: Kenneth E. Stake :
:
: No. 1677 C.D. 2012
: Argued: March 12, 2013
:

BEFORE: HONORABLE DAN PELLEGRINI, President Judge
HONORABLE ROBERT SIMPSON, Judge (P.)
HONORABLE JAMES GARDNER COLINS, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION BY
SENIOR JUDGE COLINS**

FILED: May 14, 2013

Kenneth E. Stake (Appellant) appeals from the August 15, 2012 Order of the Huntingdon County Court of Common Pleas (Trial Court) granting Appellees Marvin M. and Betty J. Myers' (the Myers) motion for summary judgment on the grounds that Appellant failed to establish that the taking of private property for a private road, petitioned for pursuant to the Private Road Act¹ (PRA), was a constitutional taking.

On December 19, 2006, Appellant filed a petition for appointment of a board of viewers (Board), seeking a private road (Route 1) over lands owned by East Broad Top Railroad and Coal Company (East Broad Top), one of the Appellees. See Section 11 of the PRA, 36 P.S. § 2731; (Record Item (R. Item) 1,

¹ Act of June 13, 1836, P.L. 551, *as amended*, 36 P.S. §§ 2731-2891.

Petition for Rule to Show Cause.) On April 2, 2007, following an investigation of Route 1, the petition was amended to seek a private road (Route 2) over the lands of Appellees Nancy Long Pippart (Pippart) and Susan Long Little (Little). (R. Item 6, Amended Petition for Rule to Show Cause.) On June 29, 2007, the petition was amended again to seek a private road (Route 3) over land owned in part by Pippart, Little, and the Myers. (R. Item 15, Second Amended Petition for Rule to Show Cause.)

On December 21, 2007, a view was conducted and Routes 1 and 3 were examined by the Board, as well as an additional route suggested by the Myers known as “Three Mile Road.” (R. Item 23, 12/01/2008 Board Report.) Following an August 8, 2008 hearing, the Board issued its report on December 1, 2008, laying out Route 3 as the proposed private road and designating a width of nineteen (19) feet. (*Id.*) On December 30, 2008, the Myers filed exceptions to the findings of the Board with the Trial Court and suggested an “Alternate Route” for the private road across land owned by East Broad Top. (R. Item 25, Myers’ Exceptions.) On June 25, 2009, the Trial Court issued an order remanding the matter to the Board for a supplemental view to determine whether the “Alternate Route” suggested by the Myers should replace Route 3 as the proposed private road.

On October 6, 2009, the Board conducted a supplemental view of the “Alternate Route.” (R. Item 47, 01/28/2011 Board Supplemental Report.) The Board held hearings on the supplemental view on September 14, 2010 and October 8, 2010. (*Id.*) Prior to the Board’s issuance of its supplemental report, the Myers filed a motion for summary judgment with the Trial Court on January 11, 2011, arguing that the proposed private road, Route 3, was an unconstitutional taking

under our Supreme Court’s September 30, 2010, decision *Opening Private Road for Benefit of O’Reilly*, 607 Pa. 280, 300, 5 A.3d 246, 258 (2010), which clarified that, for a taking of private land for a private road to withstand constitutional challenge, the petitioner seeking a private road must establish that the public is the “primary and paramount beneficiary” of the taking.

On January 28, 2011, the Board issued its supplemental report, in which it re-adopted its initial report supporting Route 3, but suggested that, prior to a hearing for the Board to determine the damages to be paid to Pippart, Little, and the Myers for the taking of their land, the parties address the legal issues presented by the *O’Reilly* decision with the Trial Court. See Section 16 of the PRA, 36 P.S. § 2736; (R. Item 47, 01/28/2011 Board Supplemental Report.) In contrast to the Board’s first report, none of the parties filed exceptions to the Board’s supplemental report within the requisite thirty (30) days.

On June 21, 2011, the Trial Court issued an opinion and order denying the Myers’ motion for summary judgment and, in the alternative, granting an evidentiary hearing. (R. Item 60, 06/21/2012 Opinion and Order.) The Trial Court concluded that in light of our Supreme Court’s decision in *O’Reilly*, “[Appellant] must be given the opportunity to meet his burden of establishing that the public is the primary and paramount beneficiary of his taking.” (*Id.* at 3.)

A hearing before the Trial Court was held on July 3, 2012. At the hearing, Appellant’s expert Joseph W. Elhajj, a certified real estate appraiser and licensed broker, testified that the public would benefit from the private road, because without the private road, it was difficult to sell, tax, and remove natural resources from Appellant’s property. (R. Item 65, Hearing Transcript (H.T.) at 5-8, 11, 13, 15.) Mr. Elhajj also testified that the property, in its landlocked

condition, was a burden to the public, because without greater use, the property was a draw for criminal activity, such as marijuana cultivation, and because the property used state and local government services, such as police and fire, without contributing to the tax base. (R. Item 65, H.T. at 11, 17-18, 23.)

On August 15, 2012, the Trial Court issued the opinion and order on appeal here, granting the Myers' motion for summary judgment pursuant to our Supreme Court's decision in *O'Reilly*. (R. Item 67, 08/12/2012 Opinion and Order.) The Trial Court concluded that "we do not believe the sincere opinions of Mr. Elhajj are sufficient for this Court to conclude that the public and not Mr. Stake is the primary and paramount beneficiary of the road Mr. Stake seeks." (*Id.* at 7.) In reaching its conclusion, the Trial Court found that the benefit to the public described by Mr. Elhajj was akin to the indirect benefit to the public that our Supreme Court rejected in *O'Reilly* as insufficient to support the taking of private land for use as a private road. (*Id.* at 6.)

Appellant appealed to this Court and has raised two issues for our review.² First, Appellant contends that the Trial Court erred in allowing a motion

² Our standard of review of a grant of summary judgment is *de novo* and our scope of review is plenary. *Pyeritz v. Commonwealth*, 613 Pa. 80, 88, 32 A.3d 687, 692 (2011); *See also* Pa. R.C.P. No. 1035.2(1). A motion for summary judgment is properly made where "there is no issue of any material fact as to a necessary element of a cause of action." Pa. R.C.P. No. 1035.2(1). In reviewing a motion for summary judgment, the record must be examined in the light most favorable to the non-moving party, with all doubt as to the existence of a genuine issue of material fact resolved in favor of the non-moving party, and judgment may only be entered where it is clear that the moving party is entitled to judgment as a matter of law. *Pyeritz*, 613 Pa. at 88, 32 A.2d at 692. Appellate review of a board of view's decision is limited to ascertaining the validity of the board's jurisdiction, the regularity of the proceedings, questions of law, and whether the board abused its discretion. *In re Packard*, 926 A.2d 557, 559 n.2 (Pa. Cmwlth. 2007). Under the PRA, the board is charged with making findings of fact to determine whether the taking of private property for a private road is strictly necessary. *Graff v. Scanlan*, 673 A.2d 1028, 1031 (Pa. Cmwlth. 1996).

for summary judgment to be used in a matter brought under the PRA. Second, Appellant argues that the Trial Court erred in concluding that Appellant failed to establish that the public would be the primary and paramount beneficiary of the taking of land owned by Pippart, Long, and the Myers to open the private road.³

Appellant makes several arguments in support of his contention that a motion for summary judgment was the incorrect procedural vehicle by which to raise and decide the constitutional challenge that followed upon our Supreme Court's decision in *O'Reilly*. However, Appellant failed to raise these arguments before the Trial Court in his opposition to the Myers' motion for summary judgment. In addition, Appellant filed a petition for a hearing on the motion for summary judgment and when given the opportunity to object to the procedure employed by the Trial Court at the subsequent summary judgment hearing, Appellant failed to do so. (R. Item 65, H.T. at 28-30.) Accordingly, we will not address Appellant's procedural arguments. See Pa. R.A.P. No. 302(a).

Appellant next contends that the Trial Court erred in concluding that the taking of Appellees' property was unconstitutional, because Appellant, rather than the public, was the "primary and paramount" beneficiary of the private road he petitioned to open across Appellees' land. Appellees contend that the Trial

³ Appellant also argues that if his rights were balanced against the rights of Appellees, the infringement of his rights caused by the failure to take Appellees' property would be greater, making summary judgment improper. Appellant further argues that the original warrants granting land in Pennsylvania contained an incorporeal burden of six percent for use as future roads and that by failing to lay out these roads to benefit all landowners, equal protection of the law was denied to those landowners that do not have access to their lands. However, our Supreme Court quite clearly rejected both of these arguments in *O'Reilly*, where it found no support for the incorporeal burden theory and required petitions under the PRA to be analyzed under the principles of eminent domain, which do not allow courts to weigh one private use or right against another, but are concerned solely with whether the public is the primary and paramount beneficiary of the taking. 607 Pa. at 298-299, 5 A.3d at 257-258.

Court was correct in its conclusion that the evidence offered by Appellant amounted to no more than an indirect benefit to the public, which our Supreme Court rejected in *O'Reilly* as insufficient to meet the burden necessary to render a taking constitutional.

In *O'Reilly*, a property owner petitioned for the appointment of a board of viewers in order to open up a private road from his property to a road within a neighboring residential development. 607 Pa. at 284, 5 A.3d at 249. The affected property owners within the development and the home owners' association filed preliminary objections, arguing that the PRA is unconstitutional because it transfers property from one private owner to another for private use. *Id.* at 290, 5 A.3d at 252. Our Supreme Court concluded that while the PRA is not facially unconstitutional, the creation of a private road under the PRA is a taking and eminent domain principles apply. *Id.* at 299, 5 A.3d at 257. The Court stated that:

The Constitutions of the United States and Pennsylvania mandate that private property can only be taken to serve a public purpose. This Court has maintained that to satisfy this obligation, the public must be the primary and paramount beneficiary of the taking.

Id. at 299, 5 A.3d at 258 (internal citations omitted).⁴ In discussing the application of the “primary and paramount” standard on remand, the Court cited the following

⁴ The Fifth Amendment to the Constitution of the United States provides, in relevant part, “[N]or shall private property be taken for public use, without just compensation.” U.S. Const. amend. V.

Article I, Section 1 of the Constitution of Pennsylvania reads, “All men ... have certain inherent and indefeasible rights, among which are those ... of acquiring, possessing and protecting property[.]” Pa. Const. art. I, § 1.

(Footnote continued on next page...)

passage from this Court’s opinion below, *In re Opening of Private Road ex. rel. O’Reilly*, 954 A.2d 57, 72 (Pa. Cmwlth. 2008), as speaking “merely to the presence of some public benefit,” and failing to “confirm that the public is the primary and paramount beneficiary”:

Although the private property owner who petitioned for the private road certainly gains from the opening of the road, the public gains because otherwise inaccessible swaths of land in Pennsylvania would remain fallow and unproductive, whether to farm, timber, or log for residences, making that land virtually worthless and not contributing to commerce or the tax base of this Commonwealth. All of this, plus the fact that private roads are considered part of the road system of Pennsylvania, equate with the conclusion that a public purpose is served by the Private Road Act provisions that allow for the taking of property of another for a private road to give access to landlocked property.

607 Pa. at 300, 5 A.3d at 258.⁵ As a result of our Supreme Court’s explicit rejection in *O’Reilly* of factors that speak to an indirect benefit to the public as sufficient to support the standard necessary for taking under the PRA, our analysis must focus on whether a petitioner under the PRA has established with specific concrete evidence that the proposed private road in question has the public of this Commonwealth as its primary and paramount beneficiary.

(continued...)

Article I, Section 10 of the Constitution of Pennsylvania provides, in relevant part, “[N]or shall private property be taken or applied to public use, without authority of law and without just compensation being first made or secured.” Pa. Const. art. I, § 10.

⁵ The Court also identified the fact that the property had become landlocked due to the Commonwealth’s exercise of eminent domain as potentially relevant to the “primary and paramount” analysis on remand. *O’Reilly*, 607 Pa. at 300, 5 A.3d at 258. This factor is not relevant to the analysis here, as Appellant’s property did not become landlocked due to the Commonwealth’s exercise of eminent domain.

Here, Appellant relies heavily on the testimony of his expert Mr. Elhajj to argue that summary judgment was granted in error and that, when all of the benefits of the private road that Mr. Elhajj identified are examined together, the public is clearly the primary and paramount beneficiary of the petitioned for private road.

First, Appellant refers to testimony by Mr. Elhajj that landlocked property cannot be marketed or sold and that by opening a private road to access the property, the burden on the property's transferability would be removed. Appellant contends that freeing the property from a burden on its transferability is in line with longstanding public policy concerns and would benefit the public.

Second, Appellant contends that Mr. Elhajj's testimony establishes that landlocked property creates a burden on the public, because landlocked property uses state and local government services, but fails to contribute taxes in support of these services. Mr. Elhajj's testimony concerning the burden caused by inaccessible property was based on his belief that even if such property is taxed, a tax appeal could bring the valuation down to zero. Appellant distinguishes the removal of this burden from the general failure to produce taxable income, which was found to be an indirect benefit in *O'Reilly*, by arguing that removing an existing drain on the public purse directly benefits the public.

Next, Appellant argues that Mr. Elhajj's testimony establishes that the public would benefit, because vacant properties draw criminal activity, such as vandalism and drug production, and the private road would allow the property to become occupied.

Although these three factors might together establish that opening the private road could provide some benefits to the public, none of the benefits

identified above are specific to the private road proposed here, but instead represent the type of indirect benefit to the public that accrues from private roads generally. These indirect benefits are exactly what the Supreme Court found to be insufficient to support a taking in *O'Reilly*. Moreover, the specific facts present here serve to undermine the purported benefits. Appellant's property was purchased landlocked and Appellant does pay taxes on the property; whether Appellant faces difficulty transferring the property in the future or is able to challenge the tax value of the property is merely speculative.

In contrast to the other factors that Appellant argues support the conclusion that the public is the primary and paramount beneficiary of the private road he has petitioned for, Appellant's final purported benefit is specific to the property here. Mr. Elhajj testified that the property contained natural gas and coal and that access to the property from the private road would allow for the extraction of these natural resources, which would benefit all Pennsylvanians by adding to the energy economy and creating new jobs. Although our Supreme Court identified the ability to timber, farm, and log previously unproductive property as indirect benefits to the public, Appellant argues that coal and natural gas are different in kind and create a direct benefit to the public. In support of this contention, Appellant relies upon *Hughes v. Consol-Pennsylvania Coal Co.*, 945 F.2d 594 (3d Cir. 1991) for persuasive authority.

In *Hughes*, the Third Circuit Court of Appeals examined early twentieth century Pennsylvania law and concluded that a railway company's condemnation for a proposed spur was for public use, despite the fact that it served a private company. 945 F.2d at 613. The Court of Appeals based this conclusion on the District Court's factual findings that once the mine was at full capacity, the

mine would employ three hundred fifty (350) people and produce three million (3,000,000) tons per year of coal that averaged a low and desirable sulfur content, which would benefit the economy and the environment of the Commonwealth. *Id.*

While the presence of coal and natural gas is specific to the property, unlike the facts found by the District Court in *Hughes*, Appellant has offered no evidence concerning the actual economic benefit that would be created by access to these resources. Instead, the evidence produced is in line with that rejected by our Supreme Court as too indirect to support a taking, namely that a private road would allow land currently unproductive to become economically productive. Therefore, even if *Hughes* is viable as persuasive authority following *O'Reilly*, Appellant has still failed to meet the evidentiary burden carried in *Hughes*.

Accordingly, we must reject Appellant's contention that the evidence establishes a direct benefit to the public and instead conclude that Appellant failed to establish that the public was the primary and paramount beneficiary of the private road petitioned for by Appellant.

The Trial Court's order granting the Myers' motion for summary judgment is affirmed.

JAMES GARDNER COLINS, Senior Judge

President Judge Pellegrini concurs in the result only.

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ORDER

AND NOW, this 14th day of May, 2013, the order of Huntingdon County Court of Common Pleas granting Appellees Marvin M. and Betty J. Myers' motion for summary judgment in the above-captioned matter is AFFIRMED.

JAMES GARDNER COLINS, Senior Judge