

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In The Matter of: The Condemnation :
of the Property of Matthew J. Zeigler :
and Christine G. Zeigler : No. 2013 C.D. 2012
: Argued: December 11, 2013
Appeal of: Matthew J. Zeigler and :
Christine G. Zeigler :

BEFORE: HONORABLE ROBERT SIMPSON, Judge
HONORABLE ANNE E. COVEY, Judge
HONORABLE JAMES GARDNER COLINS, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE SIMPSON**

FILED: January 27, 2014

In this eminent domain proceeding, Matthew J. Zeigler and Christine G. Zeigler (Condemnees) appeal from an order of the Court of Common Pleas of Lycoming County (trial court)¹ that overruled their preliminary objections to a declaration of taking filed by Hepburn Township (Township). The Township condemned a portion of Condemnees' property, located in an area known as Smokey Corners, for the construction and location of public sewage collection line, for approximately eight to ten on-lot stream discharge systems. Condemnees contend the trial court's order should be vacated or reversed, and this case remanded for the taking of discovery or an evidentiary hearing on several factual issues. For the reasons that follow, we affirm.

¹ Because Appellant/Condemnee Matthew J. Zeigler is a practicing attorney in Lycoming County, the entire bench of the Court of Common Pleas of Lycoming County recused. This case was transferred to then-President Judge Robert B. Sacavage of the Court of Common Pleas Northumberland County, who presided over the matter by special designation.

I. Background

In their preliminary objections to the declaration of taking, Condemnees asserted as follows. The Township knew about the sewage problems in the area for at least a decade. Several properties in the area experienced problems with their on-site sewer systems, which malfunctioned and overflowed into a runoff stream, and then into a pond on Condemnees' property. Condemnees further alleged the Township did nothing about this problem until a private contractor and former Township Supervisor, Rand Lepley (Contractor), expressed a desire to develop homes on neighboring properties.

In February 2012, Robert Fesemyer (Supervisor Fesemyer), Chairman of the Township's Board of Supervisors (Supervisors), contacted Condemnee Matthew Zeigler at his law office and asked if they could meet and discuss the issues surrounding the potential condemnation of Condemnees' property. Zeigler agreed, and they scheduled a meeting at the Township's Fire Hall for February 27, 2012 at 7:30 p.m. Condemnees arrived at that time and found the door locked and no one present. Supervisor Fesemyer got out of a nearby car and introduced himself. He informed Condemnees that Supervisors were there to talk to them, but that the others already left.

Supervisor Fesemyer called the other Supervisors back. Condemnees and Supervisors went into the Fire Hall and discussed the condemnation issue. Condemnees asked Supervisor Fesemyer if this violated the Sunshine Act² (Pennsylvania's open meetings law). He responded that he spoke with the

² 65 Pa. C.S. §§701-716.

Township's solicitor, Denise L. Dieter (Solicitor), who advised him it did not. According to Condemnees, Supervisors asked them to draft a settlement agreement reflecting their discussion.

Condemnees drafted a proposed agreement and emailed it to Supervisors. Thereafter, Condemnees received no response. They twice emailed Supervisors to determine the status of the proposed agreement.

Three months later, in June 2012, the Township filed a declaration of taking, and a notice of taking, for 3,841 square feet of Condemnees' property for a permanent utility easement, and 3,927 square feet for a temporary construction easement. See Reproduced Record (R.R.) at 2-16. Paragraph No. 8 of the declaration estimated just compensation for the taking at "no more than \$1,100.00." R.R. at 3.

In response, Condemnees filed preliminary objections alleging: violations of the Sunshine Act; taking for a private purpose or use; failure to conduct an adequate investigation; and, failure to adequately describe the nature of the taking.

The Township filed an answer to Condemnees' preliminary objections denying their material allegations. In particular, the Township averred it spent a lot of time over the years on extensive and expensive planning to resolve the Smokey Corners sewage problems. To that end, the Township, in conjunction with

the Department of Environmental Protection (DEP), addressed these problems in an “Act 537”³ Sewage Facilities Plan Update (Act 537 Plan Update).

The Township also denied Contractor caused any increase in those efforts. To that end, the Township stated in its answer that Contractor did successfully develop 11 residential lots “with no need for a public project.” Township’s Answer at ¶66; R.R. at 40. In short, the Township claimed the purpose of the condemnation is to prevent pollution from several existing residential properties in the Township in accord with the Act 537 Plan Update, not to aid Contractor with undeveloped land.

The Township further denied the proposed sewer system is entirely on Condemnees’ property. Rather, it involved several neighboring properties. Moreover, the system is not limited to serving four residences. To the contrary, it has a capacity for eight to ten users.

In addition, the Township denied it reached a settlement agreement with Condemnees at the February 2012 meeting. Rather, the Township asked Condemnees to draft a proposed settlement agreement. Condemnees proposed that the Township dredge their pond and install a sewage treatment system for them. The Township claimed those costs far exceeded the estimated just compensation for the taking of \$1,100.

³ See Act of January 24, 1966, P.L. (1965) §1535, as amended, 35 P.S. §§750.1-750.20a, commonly referred to as Act 537.

Notably, in the motion sheet attached to Condemnees' preliminary objections, they did not request an evidentiary hearing. See R.R. at 17. Rather, they only requested a "court conference" and "rule to show cause." Id.

After the filing of the Township's answer, the trial court issued a briefing schedule and set a date for oral argument. R.R. at 55. Following oral argument, the trial court overruled Condemnees' objections. Id. at 56. Condemnees timely filed a notice of appeal. Id. at 57.

In an opinion in support of its order, the trial court boiled down Condemnees' preliminary objections into the following four issues:

1. Whether the Township violated the Sunshine Act in violation of Condemnees' pre-condemnation constitutional rights.
2. Whether the Township inaccurately described the land in the declaration of taking.
3. Whether the taking was reasonable in scope in light of the sewage disposal problems cited as the reason for the taking.
4. Whether the Township established a public purpose for the taking.

See Tr. Ct., Slip. Op., 5/29/13, at 2; R.R. at 63.

With regard to the Sunshine Act, the trial court noted the Township adopted a resolution at an April 2012 public meeting authorizing the declaration of taking. Further, a challenge to a condemnor's power and right to condemn

property cannot be based on a violation of the Sunshine Act. In re Condemnation of Real Estate by Borough of Ashland, 851 A.2d 992 (Pa. Cmwlth. 2004).

The trial court also determined the attachments filed with the notice of taking adequately described the condemned permanent easement. The attachments included a description of the permanent utility easement, a description of the temporary construction easement, and a plat indicating the location of the easements on Condemnees' property. See Notice of Declaration of Taking at Exs. A-C; R.R. at 14-16. A written description or plan showing the property condemned is adequate to give Condemnees sufficient notice of that portion of their property to be taken. Milford Traumbauersville Area Sewer Auth. v. Approximately 0.753 Acres of Land (Appeal of McCarthy), 358 A.2d 450 (Pa. Cmwlth. 1976).

Similarly, the court found the Township's taking to be reasonable in scope to abate the pollution problem in the area. The trial court also rejected the argument that the taking benefitted a private use rather than a public use.

II. Discussion

A. Argument

On appeal,⁴ Condemnees contend the trial court's order should be reversed and this case remanded for the taking of discovery or an evidentiary

⁴ Our review of a trial court's order dismissing a landowner's preliminary objections to a declaration of taking is limited to determining whether the trial court erred or abused its discretion. In re Condemnation by Penn Twp., York County, 702 A.2d 614 (Pa. Cmwlth. 1997).

hearing. They assert the power of eminent domain is not an unrestrained power. Rather, the United States and Pennsylvania Constitutions provide that private property may only be taken for public use subject to payment of just compensation. A taking will have a public purpose only when the public is to be the primary and paramount beneficiary of the exercise of eminent domain power. In re Forrester, 575 Pa. 365, 836 A.2d 102 (2003). In addition, a condemnor's decision to condemn cannot be arbitrary or capricious, or an abuse of discretion. Middletown Twp. v. Lands of Stone, 595 Pa. 607, 939 A.2d 331 (2007). Further, without a suitable investigation leading to an intelligent, informed judgment by the condemnor, the condemnation is invalid. Downingtown Area Sch. Dist. v. DiFancesco, 557 A.2d 819 (Pa. Cmwlth. 1989). Municipal entities stand in a fiduciary relationship to the public which they were created to serve and their conduct must be guided by good faith and sound judgment. Price v. Phila. Parking Auth., 422 Pa. 317, 221 A.2d 138 (1966).

Condemnees note that preliminary objections are the exclusive method to challenge a declaration of taking. Section 306(a)(3) of the Eminent Domain Code, relating to preliminary objections, provides:

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.

26 Pa. C.S. §306(a)(3). Further, Section 306(f)(1) of the Eminent Domain Code provides: “the court shall determine promptly all preliminary objections” 26 Pa. C.S. §306(f)(1). However, “[i]f an issue of fact is raised, the court shall take evidence by depositions or otherwise.” 26 Pa. C.S. §306(f)(2). Here, Condemnees assert, extensive issues of fact exist in the following areas.

1. Sunshine Act

Condemnees first contend a violation of the Sunshine Act voids the Township’s action (declaration of taking). In paragraphs 6 through 16 of their preliminary objections, Condemnees averred the Supervisors engaged in unadvertised, closed meetings related to the taking in violation of the Sunshine Act. Given that preliminary objections are the exclusive means of challenging a taking, Condemnees argue the trial court erred in failing to permit discovery or schedule an evidentiary hearing regarding the alleged Sunshine Act violations.

2. Private Use and Insufficient Investigation

In paragraphs 17-31 and 58-68 of their preliminary objections, Condemnees averred the Supervisors failed to conduct a sufficient investigation into the taking because they merely intended the taking to help Contractor develop neighboring parcels. Condemnees argue they made specific allegations of fact asserting the taking was meant to benefit Contractor’s development, not the Township’s landowners.

However, Condemnees assert they were unable to present facts in support of their allegations because the trial court did not permit discovery or

schedule an evidentiary hearing. Rather, the trial court held oral argument and accepted the verbal representations of Township's counsel. As such, Condemnees again claim the trial court erred in failing to permit discovery or schedule an evidentiary hearing on these issues.

3. Scope of Sewer Problems

In a similar argument, Condemnees contend that, although the sewer project will accommodate eight to ten residential lots, the Township clearly intended the project to service only four residences in the area. This is so because the Township focused on Contractor's development issues, not the needs of existing residents in the Smokey Corners area, including Condemnees, who were experiencing problems. To that end, Condemnees assert the Township failed to sufficiently investigate the scope of the sewer problem.

On appeal, Condemnees argue the trial court never addressed the sufficiency of the Township's investigation of the sewer problem. Therefore, Condemnees claim a remand is necessary to address this issue.

B. Analysis

Initially, we note, preliminary objections in eminent domain proceedings serve a different purpose than preliminary objections filed in other civil actions. In re Condemnation Proceeding by S. Whitehall Twp., 822 A.2d 142 (Pa. Cmwlth. 2003). In eminent domain cases, preliminary objections are intended as a procedure to resolve expeditiously the factual and legal challenges to a declaration of taking before the parties proceed to determine damages. Id.

Further, a finding by the trial court that a condemnor acted in good faith precludes this Court from scrutinizing the wisdom of the condemnor's exercise of its power. Id.

Moreover, this Court consistently recognizes there is a strong presumption that the condemnor acted properly. Id. (citing Appeal of Waite, 641 A.2d 25 (Pa. Cmwlth. 1994)). In eminent domain proceedings, municipal officers are presumed to act in the public interest. Ashland. As such, there is a heavy burden upon a condemnee attempting to show the condemnor acted with fraud, collusion, bad faith or an abuse of discretion. Ashland; S. Whitehall Twp.

Here, when Condemnees filed their preliminary objections and requested a court conference and rule to show cause, they did not request an evidentiary hearing. See R.R. at 17. Nonetheless, Condemnees contend the trial court erred or abused its discretion by failing to permit discovery or hold an evidentiary hearing on the issues raised in their preliminary objections.

In response, the Township asserts, where a condemnee files preliminary objections to a declaration of taking and does not request a hearing, a trial court may properly overrule his preliminary objections without taking testimony. See Appeal of McCarthy (trial court did not deprive condemnee of right to present testimony where condemnee made no request for a hearing and indicated he intended to rely solely on his brief).

The Township further contends that evidentiary hearings are only required where there are disputed issues of fact. See Miller v. Dep't of Transp., 498 A.2d 1370 (Pa. Cmwlth. 1985) (where there are no disputed material facts in eminent domain cases, the trial court may rule on the preliminary objections without a hearing).

In accord with the applicable law cited above, we review Condemnees' contention that a remand is necessary for discovery or an evidentiary hearing on the issues of: whether the Township's pre-condemnation actions violated the Sunshine Act; whether the Township intended the taking for a private use rather than a public purpose; and, whether the taking was reasonable in scope in light of the sewage problems cited as the reason for the taking.

1. Sunshine Act

First, the Sunshine Act, Pennsylvania's open meetings statute, requires that official actions and deliberations by a quorum of the members of state or local government agencies take place at a meeting open to the public. 65 Pa. C.S. §704; Belitskus v. Hamlin Twp., 764 A.2d 669 (Pa. Cmwlth. 2000). Here, the trial court noted the Township adopted a resolution at an April 2012 public meeting that authorized the declaration of taking. See Notice of Declaration of Taking at ¶5; R.R. at 9. Condemnees do not dispute this fact.

Nonetheless, Condemnees alleged, "upon information and belief," that Supervisors "engaged in unadvertised and closed meetings with one another and other persons ... related to this taking" in violation of the Sunshine Act. Prelim.

Obj. at ¶12; R.R. at 21. However, Condemnees alleged no specific facts to substantiate this claim. They did not allege when the meetings occurred,⁵ what “other persons” were involved, what action was taken or how they were prejudiced. To the contrary, Condemnees claimed *they were present* at “a closed door, non-advertised meeting” with Supervisors regarding resolution of the sewage problems. See Prelim. Obj. at ¶14; R.R. at 21.

Previously, this Court ruled that a municipality’s alleged violation of the Sunshine Act did not constitute a proper ground for appellants to challenge the municipality’s condemnation. Ashland. Regardless, in the present case, the Township approved the declaration of taking by a resolution at a regular public meeting held in April 2012. As such, we reject Condemnees’ contention that a remand is necessary for discovery or an evidentiary hearing on the issue of the Township’s compliance with the Sunshine Act with regard to declaration of taking. Ashland.

⁵ A Sunshine Act claim alleging improper activity at a closed meeting must be brought within 30 days of discovery of the alleged improprieties. 65 Pa. C.S. §713; Belitskus v. Hamlin Twp., 764 A.2d 669 (Pa. Cmwlth. 2000). Here, Condemnees make no specific allegations of any closed meeting regarding the condemnation other than the February 27, 2012 meeting between themselves and Supervisors at the Township’s Fire Hall. Condemnees filed their preliminary objections on July 9, 2012. As such, Condemnees’ allegations lack the specificity to establish either a timely or otherwise valid Sunshine Act claim.

Moreover, our Supreme Court recently held that closed-door gatherings did not violate the Sunshine Act where they were held for informational purposes only and did not involve deliberations. Smith v. Twp. of Richmond, ___ Pa. ___, ___ A.3d ___ (Pa., No. 34 MAP 2013, filed December 16, 2013).

2. Private Use and Insufficient Investigation

Similarly, Condemnees' allegations, that Supervisors failed to conduct a sufficient investigation into the taking because they merely intended to help Contractor, a former Supervisor, develop neighboring parcels, are unsupported by sufficient factual allegations to warrant a remand for discovery or an evidentiary hearing. Paragraph No. 6 of the Notice of Declaration of Taking provides:

The purpose of the condemnation is for land for the construction and location of a sewage collection public sewer line, for a system of approximately 8-10 on-lot small flow stream discharge systems in the Smokey Corner[s] Area.

R.R. at 9.

Condemnees argue they made specific allegations of fact asserting the Township intended the taking to benefit Contractor's development, not the Township's landowners. However, in addition to the fact that Condemnees did not request an evidentiary hearing, the Township points out Condemnees offered no witnesses or depositions at their court date for oral argument. Given these circumstances, we believe the trial court acted properly in overruling Condemnees' preliminary objections without an evidentiary hearing. Appeal of McCarthy.

Nevertheless, the Township further notes Condemnees, in their brief, stated (with emphasis added):

Had the court bothered to allow discovery and the presentations of fact, perhaps something might have borne out during a factual hearing. As such, the case should be remanded.

Appellants' Br. at 11.

As discussed above, there is a strong presumption in eminent domain cases that municipal officers acted properly in the public's interest. Ashland. Thus, given the information provided in the declaration of taking, Condemnees' mere assertion that if the trial court allowed discovery, perhaps something might have been discovered is clearly insufficient to establish a cognizable factual issue. Id.

In sum, there is no legitimate factual dispute that the Township intended the condemnation for a public sewer line to remedy a history of sewage problems in the Smokey Corners area of the Township. The record reflects that the Township and DEP worked together for years to develop an Act 537 Sewage Plan Update for that area. See Township's Answer, Exs. D, E (correspondence from DEP noting the malfunctioning on-lot sewage systems in Smokey Corners and ultimately approving the Township's Act 537 update for correcting the problems); R.R. at 50-53. Consequently, there are no material issues of fact regarding the propriety of the taking of a portion of Condemnees' property to install a public sewer line to remedy the pollution problem in that area. See Downingtown (a reviewing court has no power to substitute its discretion for that of the condemnor).

As such, we discern no abuse of discretion by the trial court in not requiring “fishing expedition” type discovery or an unrequested evidentiary hearing on the issues of whether the Township condemned a portion of Condemnees’ property for a public purpose, or whether the Township conducted a sufficient investigation into the taking. Miller.

3. Scope of Sewer Problems

In a similar argument, Condemnees contend that although the sewer project will accommodate eight to ten residences, the Township clearly intended the project to service only four residences in the area. Condemnees again argue the Township focused on Contractor’s development issues, not the needs of area residents, including Condemnees, who were experiencing problems. Therefore, Condemnees assert the taking is arbitrary and invalid because the Township failed to sufficiently investigate the scope of the sewer problem.

We disagree. As discussed above, the Township worked closely with DEP for years to remedy the sewage problem in the Smokey Corners area. Condemnees do not dispute the existence of the Township’s Act 537 Plan Update, which DEP approved. The Township decided to take a portion of Condemnees’ property in order install a public sewer line in accord with the Act 537 Plan Update. Even unwise plans, if for public benefit, will not warrant a conclusion that the condemnor abused its discretion in its selection of a site. Downingtown. A court has no power to substitute its discretion for that of the condemnor. Id.

Moreover, Condemnees' threadbare allegations of collusion between the Township and Contractor, a former Supervisor, are not substantiated by any specific factual allegations. Therefore a remand for discovery or an evidentiary hearing as to whether the Township sufficiently investigated the scope of the sewer problem is not warranted. Ashland; Downingtown; Miller.

III. Conclusion

For the above reasons, we discern no error or abuse of discretion in the trial court's order overruling Condemnees' preliminary objections to the Township's declaration of taking. Accordingly, we affirm.

ROBERT SIMPSON, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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ORDER

AND NOW, this 27th day of January, 2014, for the reasons stated in the foregoing opinion, the order of the Court of Common Pleas of Lycoming County is **AFFIRMED**.

ROBERT SIMPSON, Judge