IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In Re: Condemnation By The Youngwood Borough Authority and The Borough of Youngwood of Property in the Borough of Youngwood, Westmoreland County, Pennsylvania	:	
Property of	:	
Youngwood Historical and Railroad Association, Inc., Appellant	:	No. 203 C.D. 2014
	:	Submitted: November 13, 2014

BEFORE: HONORABLE DAN PELLEGRINI, President Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE MARY HANNAH LEAVITT, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
PRESIDENT JUDGE PELLEGRINI FILED: December 5, 2014

Youngwood Historical and Railroad Association, Inc. (Association) appeals the order of the Westmoreland County Court of Common Pleas (trial court) sustaining the preliminary objections of the Youngwood Borough Authority (Authority) and The Borough of Youngwood (Borough) and dismissing the Association's Amended Petition for Appointment of Viewers (Petition). We affirm.

The Association, a nonprofit corporation, operates a local railroad museum with a café, the former Youngwood Depot, which it purchased from Conrail in 1987. The property is located next to railroad tracks and lies in a floodplain

adjacent to Jacks Run Creek. Beginning in 2007 and escalating in 2009 and continuing, the Authority's and the Borough's main sewer line became overloaded and the Association's basement and property were contaminated with feces, toilet paper, effluent and blackened water having a strong odor.

The Association filed a Petition for the Appointment of Viewers, later the amended Petition, alleging that the continuing overflowing of its main sewer line interfered with its use and development of the property resulting in a *de facto* condemnation. The Authority and the Borough filed preliminary objections, arguing that the Petition does not allege sufficient facts to support a *de facto* taking and that the Association has a full, complete and adequate remedy at law in the separate civil action that was currently pending before the trial court.

At a hearing on the preliminary objections, the Association's president, Ray Alincic (Alincic), testified that the sewage infiltration from the main sewer line started in 2007 and continues through the present. (Reproduced Record (R.R.) at 107a-108a). He stated that he cleaned out the pumps and the grease traps to remove waste debris and the sewage in the basement went over his knees. (*Id.* at 110a). He testified that sewage occasionally entered the first floor dining room, dirtying the carpeting and the walls. (*Id.* at 117a). Alincic stated that at that time, the manhole covers in the street would blow off from the excess sewage and sewage would flow down the street as well as into the building. (*Id.* at 110a, 121a). He testified that the problem occurred if it rained over a quarter to a half-inch and that they had a major problem if it rained steadily for four or five days. (*Id.*). He stated that people with the Association repaired the damage, cleaned, vacuumed, shampooed and disinfected the carpeting and surfaces, and had to replace rotted decking, an electrical panel and

removed commode lines and replaced pumps. (*Id.* at 122a-124a). He testified that historical artifacts were destroyed by the sewage and effluent and that the museum hours were curtailed and unpredictable depending on the weather. (*Id.* at 126a-127a). He stated that he had conversations with the Authority and the Borough which indicated that they used to be able to dump the sewage off, but that they cannot any longer and that the plant cannot handle the capacity. (*Id.* at 114a-116a). He testified that the sewage people installed a backflow preventer in 2011, and the sewage in the basement decreased from four feet to one foot, but that the odor still interfered with the use of the facilities and sewage began to enter the building through a steam tunnel. (*Id.* at 130a, 134a-135a).

David Roote, a water quality specialist with the Pennsylvania Department of Environmental Protection, testified that he inspected the Association's property in 2011 after Alincic complained about basement flooding because of high water overloading the sewer system. (R.R. at 166a-167a). He stated that the water was mostly pumped out by the time he arrived, but that he saw some solid materials remained in some areas of the basement. (*Id.*). He stated that the Borough is under a corrective action plan because the sewage plant's rated capacity is 500,000 gallons per day, but it was carrying around 900,000 gallons per day on that day. (*Id.* at 169a). He explained that the Borough formerly had a combined sewer system which carried both storm water and sewage; the Borough chose to eliminate the storm water so that the system only carried sewage. (*Id.* at 171a-172a). He testified, however, that some storm water gets into the system through various sources. (*Id.*). He stated that there was no backflow preventer installed at the time of his inspection and that one would theoretically prevent inflow from the pipe back into the basement or into the facility. (*Id.* at 175a-176a, 177a).

Emil Bove, a consulting engineer with Bove Engineering Company, testified that his is the engineering firm for the Authority and the Borough. (R.R. at 186a). He explained that the system is a closed sanitary sewer system so it does not have any connected catch basins or storm sewers and that it is only intended to collect sewage from residential and commercial structures. (*Id.* at 187a-188a). He stated that infiltration occurs when the groundwater goes into the old terracotta clay pipes, but that the clay pipes have been replaced in the area of the Association's property. (*Id.* at 188a-189a). He identified the property on a flood map and explained that the property is in a low-lying area by Jacks Run Creek. (*Id.* at 189a-190a). He stated that a tightly closed backflow preventer in high water conditions would allow a small amount of outflow from the building, but that a storage tank or a grinder pump system would allow uninterrupted sanitary sewer service from the building into the system. (*Id.* at 190a-192a). He testified that he has no prior knowledge of sewage seeping in through a steam pipe and that he was not aware of any cracks or pipe failures occurring at that location. (*Id.* at 192a-194a, 195a). He explained that the corrective action plan was to reduce infiltration and inflow into the sanitary sewage system resulting in discharge into the stream and does not relate to the Association's property. (*Id.* at 195a-196a).

After conducting a site inspection of the premises, the trial court sustained the preliminary objections and dismissed the Association's Petition because the Association should proceed under the trespass action for damages and affirmed its order upon reconsideration. The trial court explained, "*De facto* takings do not involve the intentional taking of property, but if the 'taking' occurs as a result of an intentional act engaged in by the 'taker,' then the 'taker' will be held liable under a condemnation theory of recovery." (Trial Court 1/22/14 Opinion at 4; R.R. at 87a).

The court determined that under the facts of this case, it did not find that the Authority or the Borough acted intentionally regarding the system overloads following prolonged rainfall and that "'the acts complained of cannot be considered the equivalent of a purposeful and deliberate drainage plan.'" (*Id.*) (citation omitted). The court concluded that "because the acts complained of were not intentional, the injuries occurred as a result of negligence, and no recovery may be maintained through eminent domain proceedings." (*Id.*).

In this appeal,[1] the Association claims that the trial court erred or abused its discretion by applying the incorrect law in determining whether a *de facto* taking occurred in this case and that the Association's related trespass action was the appropriate action to obtain relief. We do not agree.

Section 502 of the Eminent Domain Code, 26 Pa. C.S. §502, provides that an individual may petition for the appointment of viewers seeking compensation for an injury to property where no declaration of taking has been filed. A property owner in these cases bears a heavy burden of proof. *Genter v. Blair County Convention & Sports Facilities Authority*, 805 A.2d 51, 56 (Pa. Cmwlth. 2002), *appeal denied*, 825 A.2d 1263 (Pa. 2003). Although there is no bright-line test to determine whether governmental action has resulted in a *de facto* taking, "[a] *'de*

[1] In an eminent domain case disposed of on preliminary objections to a claim for a *de facto* taking, our scope of review is limited to determining whether the trial court's findings of fact are supported by competent evidence and whether an error of law or an abuse of discretion was committed. *Nolen v. Newtown Township*, 854 A.2d 705, 708 n.5 (Pa. Cmwlth. 2004). The trial court, as fact finder, must resolve evidentiary conflicts, and its findings will not be disturbed if supported by substantial evidence. *In re Condemnation by Department of Transportation*, 827 A.2d 544, 547 n.4 (Pa. Cmwlth. 2003), *appeal denied*, 848 A.2d 930 (Pa. 2004).

facto taking' occurs when an entity clothed with the power of eminent domain has, by even a non-appropriative act or activity, substantially deprive[d] an owner of the beneficial use and enjoyment of his property." *Genter*, 805 A.2d at 55, 56.

In *Appeal of Jacobs*, 423 A.2d 442, 443 (Pa. Cmwlth. 1980), we defined the elements that a property owner must allege and prove to establish a *de facto* taking: (1) condemnor has the power to condemn the land under eminent domain procedures; (2) exceptional circumstances have substantially deprived him of the use and enjoyment of his property; and (3) the damages sustained were the immediate, necessary and unavoidable consequences of the exercise of the eminent domain power. Additionally, we noted that when determining whether a *de facto* taking has occurred, one must focus on the governmental action in question. *Id*. Finally, we observed that where injuries result from the negligence of a condemning body's agents, there is no *de facto* taking. *Id*. at 443-44.

In *Jacobs*, the property owners experienced serious and excessive drainage problems attributable to a change in natural topography caused by the upstream erection of a high school, a retirement home and several single residential homes. The Jacobs alleged a *de facto* taking, maintaining that the township unlawfully issued the building permits, improperly approved the subdivision and wrongfully contributed to the design of the drainage plans for the high school. We agreed that there was no *de facto* taking, concluding that the township's actions were insufficient to demonstrate an actionable exercise of its power of eminent domain. *Id.* at 443. We observed that courts were more likely to find a taking where the government's action complained of was purposeful and deliberate, *id.* at 443-44, such as the drainage plans at issue in the cases cited by the Association, *Central Bucks*

Joint School Building Authority v. Rawls, 303 A.2d 863 (Pa. Cmwlth. 1973) and *Hereda v. Lower Burrell Township*, 48 A.2d 83 (Pa. Super. 1946).

In *Rawls*, we affirmed the determination that there had been a *de facto* taking, noting the trial court's finding that the flooding of the Rawls' property was the direct and necessary consequence of the authority's drainage plans. Specifically, the authority installed a 27" outfall line that emptied into a stream flowing onto Rawls' property that increased the flow of effluent greater than the normal flow of surface water and caused a number of negative results. *Id.* at 864.

In *Hereda*, the Superior Court affirmed the viewers' award, noting that the flooding on the Heredas' property was the direct and necessary consequence of the township's drainage plans. Specifically, the township increased the size of the drainage pipe from 10" to 18" and closed a ditch that had diverted the flow from the pipe along the side of a street, replacing it with a ditch that ended on the Heredas' property. *Id.* at 864.

The decisions in *Rawls* and *Hereda* are distinguishable from this case and, as the trial court properly found, *Jacobs* is more analogous because the actions of the Authority and the Borough similarly were not purposeful and deliberate because they have made good faith efforts to correct the storm water and sanitary sewage overload problem. The Association's harm was merely the unintended consequence of the Authority's and the Borough's inability to adequately separate the storm water from the sanitary sewer system despite their efforts to do so, and is not part of a purposeful and deliberate drainage plan nor related to or incidental to their condemnation powers as in *Rawls* and *Hereda*.

As a result, the trial court properly sustained the preliminary objections because no *de facto* taking occurred in this case and the Association's related trespass action was the appropriate action to obtain relief. *See, e.g., Ewalt v. Pennsylvania Turnpike Commission*, 115 A.2d 729, 732 (Pa. 1955) ("This is not a case of injury due to an exercise of the Commission's power of eminent domain. The injury here pleaded is a continuing trespass arising out of the Commission's construction, operation and maintenance of the turnpike."); *Appeal of Kehler*, 442 A.2d 409, 410 (Pa. Cmwlth. 1982) ("The incursion of sewage into the appellants' dwelling was not the necessary and unavoidable consequence of the presence of the township's sanitary sewer main in the street abutting the appellants' dwelling; rather, … it was the result of the blockage in the main by foreign material. The appellants' remedy is by a delictual action for improper construction or maintenance of the public sewers.").[2]

[2] We note that the trial court initially found "that although the landowner has suffered specific damage to its property as a result of the acts of a party with the power of eminent domain, the proper civil action lies in trespass, as the evidence does not establish that the [Borough] *intended* to take the property." (Trial Court 12/20/13 Order at 1-2; R.R. at 75a-76a) (emphasis added). However, a *de facto* taking has no "intent to take" requirement. *See McGaffic v. City of New Castle*, 74 A.3d 306, 315 (Pa. Cmwlth. 2013), *appeal denied*, 85 A.3d 485 (Pa. 2014) (reasoning that "in a *de facto* condemnation, there is no intention to acquire a property"). Instead, a *de facto* taking requires that the injury complained of "is a *direct result of intentional action* by an entity clothed with the power of eminent domain." *Id.* (emphasis added). The Association filed a Motion for Reconsideration of the above order alleging that the trial court had erred in its understanding of the law. The trial court corrected its misstatement of the law in its January 22, 2014 opinion and order denying the Association's motion, although it did so without acknowledging the earlier mistake while nonetheless affirming its December 20, 2013 order. As outlined above, the trial court correctly concluded in its January 22, 2014 opinion that "*because the acts complained of* were not intentional [and] the injuries occurred as a result of negligence … no recovery may be maintained through eminent domain proceedings." (Trial Court 1/22/14 Opinion at 4; R.R. at 87a.) (emphasis added). As a result, the trial court ultimately focused on the intent to act and not the intent to take, and any error in its prior order is harmless because we conclude that the Association failed to present evidence that showed that a *de facto* taking had occurred.

Accordingly, the trial court's order is affirmed.

DAN PELLEGRINI, President Judge

Judge McCullough did not participate in the decision of this case.

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O R D E R

AND NOW, this 5th day of December, 2014, the order of the Westmoreland County Court of Common Pleas dated January 22, 2014, at No. 846 of 2012 is affirmed.

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DAN PELLEGRINI, President Judge