

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Eastern Communities Limited Partnership,	:	
	:	
Appellant	:	
	:	
v.	:	No. 2120 C.D. 2012
	:	Submitted: June 17, 2013
Pennsylvania Department of Transportation	:	
	:	

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE BONNIE BRIGANCE LEADBETTER, Judge
HONORABLE JAMES GARDNER COLINS, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION BY
JUDGE LEADBETTER**

FILED: July 5, 2013

Appellant, Eastern Communities Limited Partnership (Eastern), appeals from the order of the Court of Common Pleas of the 17th Judicial District (Snyder County Branch) (common pleas), which determined that Eastern was not entitled to delay damages for the taking of 10.35 acres of land located in Monroe Township, Snyder County, Pennsylvania. We affirm.

The Pennsylvania Department of Transportation (PennDOT) filed a declaration of taking on March 9, 2009, condemning 10.357 acres in fee simple and 0.140 acres in drainage easements from the western edge of a planned residential subdivision totaling 80.902 acres owned by Eastern for the purposes of constructing Central Susquehanna Valley Thruway (CSVt). The land is located in

Phase III of Eastern's planned residential development. Although a drainage swale constructed by Eastern to serve all three Phases of its development was part of the taking, Eastern had not otherwise begun construction on Phase III and the land was being used by a local farmer as a corn field. Eastern filed a petition for a board of viewers, which held a hearing and a site review on August 24, 2010. The board of viewers awarded Eastern \$900,000 in just compensation and determined that PennDOT did not owe Eastern delay compensation under Section 713(b)(2) of the Eminent Domain Code,¹ 26 Pa. C.S. § 713(b)(2), because Eastern remained in possession of the vacant land.

PennDOT appealed the Board's decision asserting that the award of just compensation of \$900,000 was excessive. Eastern cross-appealed, asserting that the denial of delay damages was erroneous. Common pleas held a three-day trial on the matter of just compensation. On August 9, 2012, the jury returned a verdict of \$610,000 just compensation.²

¹ Section 713 provides in relevant part:

(a) General rule. --Compensation for delay in payment shall be paid at an annual rate...from:

- (1) the date of relinquishment of possession of the condemned property by the condemnee; or
- (2) if possession is not required to effectuate condemnation, the date of condemnation.

(b) Exclusion.

* * *

(2) During the period the condemnee remains in possession after the condemnation:

- (i) the condemnee shall not be entitled to compensation for delay in payment....

² On August 17, 2012, Eastern filed a notice of appeal with this Court docketed at 1600 C.D. 2012. PennDOT filed a motion to quash the appeal asserting that Eastern had failed to file post-trial motions to the verdict as mandated by Pa. R.C.P No. 227.1(c)(1) resulting in waiver of Eastern's right to assert those errors on appeal. The Court granted PennDOT's motion to quash.

Subsequently, common pleas held an evidentiary hearing on the issue of delay damages. Eastern argued that it was entitled to delay damages from the date of the filing of the declaration of taking. PennDOT argued that since it had never taken possession of the property, possession had not transferred and it did not owe Eastern any delay damages. The parties further stipulated that common pleas could take judicial notice of and consider all evidence and testimony presented during the trial phase of the case. The parties stipulated that PennDOT has neither started construction on the CSVT nor issued a notice to proceed to any contractor to construct the CSVT on the condemned land. The parties also stipulated that on the date of the site view, August 24, 2010, corn was growing on portions of the taken land. John Kershner, vice president of Fine Line Homes,³ testified that the taking encompassed land for which Eastern had preliminary approval to build 72 townhomes and on which a drainage swale had already been constructed. Kershner testified that Eastern had not begun construction on the utilities, roads or other improvements planned for Phase III. Kershner also testified that Eastern had an oral agreement with a local farmer to use the subject land for growing corn. PennDOT presented evidence that it has never altered or impeded the flow of water through the drainage swale to Eastern's drainage basin, which is not located within the taking. PennDOT also presented testimony that the CSVT would be constructed over the drainage swale and that water flow would not be impeded or altered in the future.

Common pleas determined that Eastern remained in possession of the land and was not entitled to delay damages. Common pleas stated that given the nature of the construction project, possession is required to effectuate the

³ Fine Line Homes is Eastern's partner in the residential development.

condemnation of Eastern's land and PennDOT had not entered the land to begin construction of CSVT. Common pleas held that based on the trial testimony, the view of the property and the stipulation of the parties, the declaration of taking did not deprive Eastern of the full, normal, and established use of the land, as established by the use to which the land was used prior to the declaration of taking. Common pleas acknowledged that Eastern had obtained preliminary subdivision approval, but noted that Eastern had not constructed any improvements or infrastructure on the land and that the land was being used to grow corn. This appeal followed.⁴

Eastern asserts that common pleas erred in failing to determine whether it remained in possession of the property prior to the start of the jury trial. Eastern also argues that common pleas erred in determining that it was not entitled to delay damages because the evidence demonstrated that Eastern was deprived of its full and normal use of the property as it was no longer able to develop the property in accordance with the subdivision approval it had obtained prior to the taking. Eastern asserts that the property has transferred to PennDOT and that it is owed delay damages.

“As a general principle, when land is taken under the power of eminent domain, the owner thereof acquires the right to its value immediately upon appropriation.” *Pa. Game Comm’n v. 21.1 Acres of Land in Washington Twp.*,

⁴ Eastern's statement of matters complained of on appeal contained 28 issues. In its opinion in support of its order drafted pursuant to Pa. R.A.P. 1925(a), common pleas opined that Eastern had waived its right to raise 24 of the issues due to its failure to file post-trial motions. Before this Court, PennDOT filed a motion to quash Eastern's appeal with regard to any issues raised relating to the jury trial. The Court granted the motion to quash as to 24 of the issues raised on appeal. The remaining issues relate to common pleas' determination that PennDOT did not owe Eastern delay damages.

Butler County, 433 A.2d 915, 916 (Pa. Cmwlth. 1981). Delay damages constitute separate compensation for an owner's loss of use of the property during the period after he relinquishes possession and before he receives just compensation. *Ridley Twp. v. Forde*, 459 A.2d 449, 451 (Pa. Cmwlth. 1983). However, no delay damages are payable for any portion of such period during which the landowner remains in possession. *Pa. Game Comm'n*, 433 A.2d at 916; 26 Pa. C.S. § 713(b)(2). The Pennsylvania Supreme Court has held that where a declaration of taking deprives a landowner of the full and normal use of the property, as established by the use to which the property was devoted before the declaration, the landowner is no longer in possession. *Hughes v. Dep't of Transp.*, 514 Pa. 300, 309, 523 A.2d 747, 751-52 (1987). The condemnor has the burden to overcome the presumption that the condemnee is entitled to delay damages. *Pa. Game Comm'n*, 433 A.2d at 918.

Eastern asserts that the question of who has possession of a property condemned by eminent domain is a question of law and that Section 518 of the Eminent Domain Code, 26 Pa. C.S. § 518, required that common pleas decide all questions of law prior to the start of the *de novo* jury trial. Section 518(1) provides that “[a]ll objections, other than to the amount of the award, raised by the appeal shall be determined by the court preliminarily.”

Whether a condemnee remains in possession of a property is not a question of law, but rather a question of fact. *Dep't of Transp. v. Hess*, 423 A.2d 434, 437 (Pa. Cmwlth. 1980) (holding that record did not support common pleas court's finding that condemnor took possession of property on date certain and remanding case for further findings). In this case, it was not clear what the established use of the property was at the time of the taking. Testimony was

required to establish whether the land was being used for residential development or for other purposes. In *In re Condemnation by the Commonwealth of Pennsylvania, Department of Transportation, of Right-of-Way for Legislative Route 1005-2*, 342 A.2d 497, 500-01 (Pa. Cmwlth. 1975), this Court stated that:

Section [518] requires that *the court preliminarily* decide questions not involving the amount of an award, but it does not require or authorize a court to resolve factual issues without the benefit of all relevant evidence. Because the statute is silent on the method to be used by the court in resolving factual issues, the procedure for any given case is within the discretion of the trial judge. The judge may resolve factual questions by obtaining stipulations, by reference to a transcript of the evidence presented to the Board of View, by a separate evidentiary hearing prior to trial, or by evidence adduced at trial but not submitted to the jury. As long as the method used is fair to all of the parties, the alternative chosen by the trial judge is solely a matter of discretion. The important thing is that no objections which involve a question of fact be decided without an orderly fact finding process. [(Emphasis original) (footnote omitted)].

Thus, common pleas' decision to determine the question of delay damages following the return of the jury verdict on just compensation was well within its discretion. *Hughes*, 514 Pa. at 304-05, 523 A.2d at 749 (noting that a non-jury trial on delay damages was held following return of a jury verdict on just compensation).

Eastern also argues that common pleas erred in determining that it remained in possession of the property because it lost its full and normal use of the property. Eastern maintains that it is entitled to delay damages from the date of the taking.

Eastern relies upon *Panther Hollow Corp. v. Pittsburgh*, 741 A.2d 234 (Pa. Cmwlth. 1999). In *Panther Hollow*, Panther Hollow purchased land in the City of Pittsburgh in February 1989 and thereafter obtained various permits from the City. The permits were revoked in November 1989 and on December 1, the City placed concrete jersey barriers around the property, rendering it unusable and inaccessible. Panther Hollow requested appointment of a board of viewers asserting that the City's actions had resulted in a *de facto* taking. Following numerous years of litigation in both federal and state courts, Panther Hollow was awarded just compensation and delay damages from the date of the taking. On appeal, the City argued that it was entitled to an offset or a suspension of delay damages because during the course of the litigation Panther Hollow gained access to the property and operated a parking lot for a few years. This Court rejected the City's argument because there was no evidence in the record which indicated that operation of a parking lot was the full and normal use of the property such that Panther Hollow had not been deprived of possession. 741 A.2d at 244.

PennDOT relies upon *Pittsburgh North, Inc. v. Department of Transportation*, 514 Pa. 316, 523 A.2d 755 (1987). In *Pittsburgh North*, PennDOT acquired vacant land to build a limited access highway. The condemnee argued that the condemnation prevented it from going forward with its contemplated development plans. The Pennsylvania Supreme Court rejected this argument, determining that the established use of the land was as a vacant parcel. 514 Pa. at 320, 523 A.2d at 757.

PennDOT also relies upon *In Re Condemnation of 23.015 Acres (Appeal of Showalter)*, 895 A.2d 76 (Pa. Cmwlth. 2006). In *Appeal of Showalter*, the condemnees purchased a vacant parcel of land for investment purposes. In

June 1998, the condemnees prepared and submitted preliminary subdivision plans to the township. In July 1998, condemnees engaged in discussions with the school district regarding sale of the property to the school district. When negotiations broke down in the spring of 2000, the condemnees resumed their subdivision plans. The school district filed a declaration of taking on November 3, 2000. The condemnees were awarded delay damages from the date they tendered the property to the school district. Condemnees appealed arguing that delay damages should have been awarded from the date of the filing of the declaration of taking because as of that date they were no longer able to pursue their subdivision plans. This Court rejected the condemnees' argument, holding that the established use of the parcel was as vacant land and that condemnees remained in possession of the land following the filing of the declaration of taking. 895 A.2d at 86.

The instant case is more akin to *Appeal of Showalter* than to *Panther Hollow*. *Panther Hollow* is distinguishable in that it was a *de facto* taking, which cannot occur unless the property owner has been deprived of possession of the property. The record in this case reflects that at the time of the taking, the land was being used as a corn field and Eastern had not begun construction of Phase III of the development. Richard Drzewiecki, a real estate appraiser, testified on behalf of PennDOT regarding the real estate market in the region and the progress of the development. Drzewiecki noted that Phase III is zoned R-3, which permits the construction of duplexes and townhomes, but not single-family homes, and that the taking encompassed 72 townhouse lots. He noted that Phase I of the development contained 23 unsold townhome lots, that single-family homes were the preferred housing stock in the region, and that townhouses did not sell as well as single-family homes. Drzewiecki's appraisal report stated that only two townhouse lots

in Phase I had been sold in three years. The appraisal report stated that given market conditions and the lack of completed infrastructure, the land in Phase III was excess land, *i.e.*, land that should be held in its current state for future development. The report also noted that the development was a planned community and the community documents only applied to Phase I of the development, while reserving the option to amend the community documents to add the land in Phases II and III.

Although Eastern had obtained preliminary subdivision approval for the land taken in Phase III, Phase III is merely a contemplated use of the land as opposed to an established use of the land. In fact, Eastern could hold the land in its current undeveloped condition for an indefinite period of time or even ultimately abandon its development plans. The test for delay damages is whether a taking deprived a landowner of the full and normal use of the property, as established by the use to which the property was devoted before the declaration of taking. The record establishes that the land was being used as corn field at the time of the taking. Eastern's contemplated use as a residential development does not factor into the equation. Common pleas properly denied an award of delay damages.

For all of the foregoing reasons, we affirm.

BONNIE BRIGANCE LEADBETTER,
Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Eastern Communities Limited	:	
Partnership,	:	
Appellant	:	
	:	
v.	:	No. 2120 C.D. 2012
	:	
Pennsylvania Department of	:	
Transportation	:	

ORDER

AND NOW, this 5th day of July, 2013, the order of the Court of Common Pleas of the 17th Judicial District (Snyder County Branch) is hereby AFFIRMED.

BONNIE BRIGANCE LEADBETTER,
Judge