IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In Re: Condemnation of Private Property in the Borough of Crafton, Allegheny County, Now or formerly of Jack T. Duncan and Phyllis M. Duncan, His Wife, and Jeffrey Duncan	:	
In Re: Condemnation By the Borough of Crafton of Private Property Located In The Borough of Crafton Allegheny County, Pennsylvania	:	
Condemnees: Jack T. Duncan and Phyllis M. Duncan, his wife	:	
Jack T. Duncan and Phyllis M. Duncan, Husband and Wife, and Jeffrey Duncan	:	
	:	No. 2144 C.D. 2011
v.	:	
	:	Argued: November 13, 2012
Borough of Crafton, Appellant	:	

BEFORE: HONORABLE ROBERT SIMPSON, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JAMES GARDNER COLINS, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McCULLOUGH FILED: July 1, 2013

The Borough of Crafton (Borough) appeals from the October 13, 2011 order of the Court of Common Pleas of Allegheny County (trial court), denying the Borough's post-trial motions following an order in favor of Jeffrey Duncan (Duncan),

in which the trial court concluded that the Borough had engaged in a *de facto* taking of Duncan's property, which he co-owned with his parents Jack T. and Phyllis M. Duncan (together, the Duncans), and that the value of his share of the property was $500,000.[1] We affirm.

Background and Procedural History

Duncan and his father were in the business of selling topsoil. Duncan and his parents are the co-owners of a 20-acre piece of property in the Borough (Duncan II). Duncan and his parents purchased this property on April 15, 1999, for $200,000. The property is zoned I-1 Light Industrial and S-Conservancy. The Duncans are also the exclusive owners of a neighboring property (Duncan I). The properties are connected by a third piece of property owned by the Crafton Ingram Thornburg Baseball Association (CIT), over which the Duncans have a right-of-way easement. Since the mid-1970s, the previous landowners of the Duncan I and CIT properties had permitted Duncan and his father, as well as one of their competitors, to remove and sell topsoil from these properties. Duncan and his father continued this practice after the Duncans purchased Duncan I. The Borough had regularly issued permits to the Duncans for this work and the Borough received free topsoil when requested. (Reproduced Record (R.R.) at 29a-32a.)

On July 14, 1999, the Borough filed a declaration of taking with respect to the Duncan II property for the purpose of providing recreation areas and green space. However, the Borough did not serve Duncan with notice of the taking, but only served his parents. Additionally, a plan attached to the declaration incorrectly

[1] The trial court's order further directed the Borough to pay a counsel fee in the amount of 40% of $500,000 to Duncan's counsel and a fee of $13,000 to real estate appraiser Frank Chiappetta.

identified the Duncan I property as the property which the Borough sought to take. On August 28, 2000, Duncan filed a petition for appointment of viewers alleging a *de facto* taking of his interest in the Duncan II property.[2] The following day, the Borough filed a petition for leave of court to amend its declaration of taking to add Duncan as a condemnee and to attach the correct property plan. However, the trial court denied the Borough's petition and thereafter appointed a board of viewers. Duncan's parents then filed their own petition for appointment of viewers. The trial court appointed the same viewers as were previously appointed with respect to Duncan's petition. The viewers conducted a view of the property on February 5, 2001. (R.R. at 4a-26a, 66a-70a.)

The Borough subsequently filed a petition to dismiss Duncan's petition, but the trial court denied the same by order dated March 13, 2001. The Borough also filed a declaratory judgment action in April 2001, which was dismissed by order of the trial court dated September 7, 2001. The Borough further filed a petition raising an issue of lack of jurisdiction, which was denied by order of the trial court dated September 19, 2002. However, in this same order, the trial court *sua sponte* granted the Borough leave to file preliminary objections *nunc pro tunc* to Duncan's petition for appointment of viewers. On September 30, 2002, more than two years after Duncan filed his petition, the Borough filed its preliminary objections. (R.R. at 72a-76a, 93a-108a.)

[2] In this petition, Duncan alleged that he had been denied the beneficial use and enjoyment of his property as a direct and natural consequence of the actions of the Borough, including notifying the Commonwealth that it was the owner of the property and that permits cannot be issued for topsoil removal at the property; posting cease and desist signs on the premises directing Duncan and his father not to conduct business on the property; and refusing to issue the necessary grading, excavation, or other permits to Duncan and his father. (R.R. at 67a.)

Duncan then filed his own preliminary objections in the nature of a motion to strike the Borough's preliminary objections. The trial court ultimately sustained the Borough's preliminary objections and dismissed Duncan's petition. The trial court concluded that there could be no *de facto* taking because the Duncan II property had already been condemned via the Borough's July, 1999 declaration of taking. Duncan appealed to this Court. By order dated March 3, 2004, this Court reversed the trial court's order, concluding that the Borough's preliminary objections were untimely filed, and remanded the matter for further proceedings.[3] (R.R. at 109a-18a.)

The trial court thereafter appointed a new board of viewers. The Borough filed three motions *in limine*, seeking to preclude: (1) any evidence relating to Duncan's contention of a *de facto* taking; (2) any evidence relating to the separate valuation of any deposit of topsoil; and (3) any evidence claiming damages relating to a December 31, 1999 agreement between the Borough and Duncan's parents.[4] The Borough subsequently withdrew the third motion. On July 29, 2008, the board of viewers issued a report concluding that Duncan and his parents had sustained damages in the amount of $1,100,000 for the condemnation of the Duncan II property, with the Borough receiving a credit for the $80,000 paid to the Duncans

[3] In re Condemnation of Private Property in the Borough of Crafton, (Pa. Cmwlth., No 1541 C.D. 2003, filed March 3, 2004). The Borough filed a petition for allowance of appeal with our Supreme Court, but the same was denied by order dated September 9, 2004.

[4] In this agreement, the Borough agreed to pay the Duncans the sum of $80,000 pending the Duncans' good faith efforts in reaching a final agreement of compensation relating to the Borough's condemnation of Duncan II and the Borough's desire to purchase Duncan I and to permit the Duncans to continue their removal and sale of topsoil from both properties during the pendency of the agreement. The agreement further provided that should the parties be unable to reach final terms on the condemnation and sale, the Duncans would retain the $80,000 payment as liquidated damages.

pursuant to the terms of the December 31, 1999 agreement. The Borough appealed to the trial court. (R.R. at 234a-47a.)

While this appeal was pending, the Borough filed a motion for partial summary judgment with respect to Duncan's claim of a *de facto* taking, which the trial court denied by order dated July 7, 2009. The trial court conducted a *de novo*, non-jury trial in September 2010, which included testimony from Duncan, his father, soil expert Gary Petersen, Ph.D, and valuation experts Frank Chiappetta on behalf of Duncan, Steve Yoder on behalf of the Duncans, and Gary Bodnar on behalf of the Borough. (R.R. at 248a-60a, 776a-1487a.)

On April 26, 2011, the trial court issued an order concluding that a *de facto* taking of Duncan's interest in the property had occurred and that the total value of the Duncan II property was $1,000,000, with Duncan and his parents each maintaining an interest valued at $500,000. The trial court awarded counsel fees to Duncan's counsel in the amount of 40% of the $500,000, as well as a real estate appraisal fee of $13,000 to Frank Chiappetta. (R.R. at 324a-25a.)

The Borough filed a motion for post-trial relief alleging that the trial court erred in finding a *de facto* taking and in its valuation of the property. The trial court denied the Borough's motion in these regards. The trial court did grant the Borough's motion insofar as it requested that a written motion *in limine* submitted at the start of trial be included in the record. The trial court also granted a motion for post-trial relief filed by the Duncans requesting an award of statutory counsel fees of $500. The trial court thereafter issued an amended order dated October 13, 2011. (R.R. at 326a-346a.)

Discussion

On appeal to this Court,[5] the Borough first argues that the trial court erred in failing to conclude that it had no jurisdiction to act because Duncan failed to state a claim upon which relief could be granted given the prior, unchallenged *de jure* condemnation of the entire parcel. We disagree.

We begin by noting that eminent domain proceedings are governed exclusively by the Eminent Domain Code (Code). Section 303 of the Code, 26 P.S. §1-303;[6] McGaffic v. Redevelopment Authority, 732 A.2d 663 (Pa. Cmwlth), appeals denied, 560 Pa. 733, 745 A.2d 1226 and 561 Pa. 663, 747 A.2d 903 (1999). Under the Code, preliminary objections are the exclusive method provided for the condemnor to raise legal and factual objections to a petition for appointment of viewers which alleges a *de facto* taking. Section 504 of the Code, 26 P.S. §1-504; In re Condemnation by the DOT, 827 A.2d 544 (Pa. Cmwlth. 2003), appeal denied, 577 Pa. 737, 848 A.2d 930 (2004).

In fact, preliminary objections in eminent domain proceedings serve a broader purpose than ordinary preliminary objections since they are intended as a procedure to expeditiously resolve threshold legal issues. Hill v. City of Bethlehem, 909 A.2d 439 (Pa. Cmwlth. 2006), appeal denied, 592 Pa. 775, 926 A.2d 443 (2007).

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[5] In eminent domain cases, our scope of review is limited to determining whether the trial court committed an error of law or an abuse of discretion. Condemnation of Lands Situate v. Piccolino, 41 A.3d 175 (Pa. Cmwlth. 2012).

[6] This matter was commenced before the consolidation of the Code in 2006. See 26 Pa.C.S. §§101-1106. Therefore, the Act of June 22, 1964, Sp. Sess., P.L. 84, as amended, formerly 26 P.S. §§1-101 – 1-903, repealed by the Act of May 4, 2006, P.L. 112, applies in this case and all citations herein will be to that Act. Gehris v. Department of Transportation, 471 Pa. 210, 215-16, 369 A.2d 1271, 1273 (1977); In re DeFacto Condemnation and Taking of Lands of WBF Associates, L.P., 972 A.2d 576, 580 n.2 (Pa. Cmwlth.), appeal denied, 603 Pa. 677, 982 A.2d 66 (2009).

Moreover, section 504 mandates that preliminary objections to the appointment of viewers must be filed within 20 days after the objector receives notice that viewers have been appointed and not thereafter. Maurizi v. Department of Transportation, 658 A.2d 485 (Pa. Cmwlth. 1995).

In the present case, the Borough's argument that the trial court lacked jurisdiction based on the alleged *de jure* condemnation amounts to nothing more than a collateral attack on this Court's previous determination as well as an impermissible challenge to the law of the case. The fact remains that the Borough failed to timely file preliminary objections to Duncan's petition for appointment of viewers alleging that a *de facto* taking had occurred and the matter properly proceeded before the trial court.

Further, we reject the Borough's contention that such a holding denies it due process and/or equal protection of the laws.[7] The Code clearly sets forth the process for challenging the appointment of viewers and this process applies equally to all condemnors. The failure of the Borough to properly avail itself of the remedies provided in the Code does not equate to a due process deprivation or an equal protection violation. Indeed, we have previously held that an individual is not denied procedural due process if a state provides the means by which he can receive redress for a purported deprivation. Anselma Station, Ltd. v. Pennoni Associates, Inc., 654 A.2d 608 (Pa. Cmwlth. 1995) (holding that the failure of Anselma Station, Ltd. to

[7] The Equal Protection Clause of the 14th Amendment to the United States Constitution commands that no State shall deny to any person within its jurisdiction the equal protection of the laws, which is essentially a direction that all persons similarly situated should be treated alike. Anselma Station, Ltd. v. Pennoni Associates, Inc., 654 A.2d 608 (Pa. Cmwlth. 1995). However, an equal protection claim fails when it amounts, at most, to an allegation that state law was misapplied in an individual case. Id.

allege that the normal statutory land development plan review processes are inadequate to address a township engineer's claims of environmental hazards at a proposed construction site was sufficient to dismiss a cause of action alleging a violation of procedural due process).

Next, the Borough argues that the trial court erred in admitting and considering inadmissible evidence and in awarding an excessive value of the property condemned. Specifically, the Borough argues that the trial court disregarded our Supreme Court's decision in Werner v. Department of Highways, 432 Pa. 280, 247 A.2d 444 (1968), and improperly relied on testimony which placed separate values on the topsoil and timber found on the property. Again, we disagree.

In eminent domain proceedings, the "proper measure of damages . . . is the difference between the market value of the land before the exercise of the power and as unaffected by it and the market value immediately after the appropriation and as affected by it." Werner, 432 Pa. at 283, 247 A.2d at 446.[8] A condemnee may

[8] In Werner, the Commonwealth condemned approximately 21.1308 acres of a 266.32 acre tract of land for road construction purposes. The land was owned by Harry A. and Astrid M. Werner (the Werners). At the time of condemnation, the Werners were utilizing the property for farming, subject to a lease with Mahoning Valley Sand Company (Mahoning) providing the latter with the right to remove underlying sand and gravel. The parties stipulated that the lease made Mahoning the fee owner of the minerals.

A board of viewers awarded the Werners and Mahoning $130,000. The Commonwealth appealed. At a hearing before the common pleas court, the Werners and Mahoning presented the expert testimony of a civil engineer, who testified that 1,292,846 tons of sand and gravel would be lost by reason of the condemnation. A jury awarded the Werners and Mahoning $200,000, plus detention damages in excess of $112,000.

On appeal, the Commonwealth alleged that the common pleas court erred in allowing the civil engineer to testify regarding the amount of sand and gravel lost by reason of the condemnation. Our Supreme Court rejected this argument and noted that the common pleas court properly instructed the jury "not to place a separate value on the minerals in place" and "to compute one value for the entire tract." Werner, 432 Pa. at 287, 247 A.2d at 448. The court also noted that the common pleas court properly instructed the jury that "they were not to use information gathered from the lease in order to value the minerals lost." Id.

testify as to just compensation without being qualified as an expert and he may enumerate the elements he considered in arriving at his valuation. Section 704 of the Code, 26 P.S. §1-704; Cohen v. Redevelopment Authority of Philadelphia, 315 A.2d 372 (Pa. Cmwlth. 1974). Additionally, in determining the fair market value of a condemned property, the court is permitted to utilize the valuation which may be placed upon the property not only by the condemnee but also by any experts. Wolfe v. Redevelopment Authority of the City of Johnstown, 273 A.2d 923 (Pa. Cmwlth. 1971).

Moreover, the courts have long recognized that a grant or reservation of minerals and the right to mine them constitute property rights, which the law recognizes, and which may not be taken for public use without compensation. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922); Belden & Blake Corp. v. Department of Conservation and Natural Resources, 600 Pa. 559, 969 A.2d 528 (2009). Nevertheless, as far as mineral deposits are concerned, the condemnee may not introduce evidence of the number of tons of minerals lost and then multiply that number by some dollar figure such as the market price or the royalty payment. Werner. However, the court in Werner specifically rejected the Commonwealth's attempt to preclude any testimony relating to the number of tons of minerals on the condemned property. The court explained that "[i]f the jury was to make an educated determination of the value of the land, it must know what is below the ground as well as what is on the surface." 432 Pa. at 286, 247 A.2d at 448. In other words, the presence of such mineral deposits, as well as the quantity and quality of the same, may be considered in arriving at the total overall value of the condemned land, Whitenight v. Commonwealth, 273 A.2d 752 (Pa. Cmwlth. 1971), but the minerals

cannot be valued separately apart from the remainder of the tract as a whole, Boring v. Metropolitan Edison Co., 435 Pa. 513, 257 A.2d 565 (1969).[9]

In the present case, the Borough argues that the trial court disregarded Werner and improperly relied on testimony which placed separate values on the topsoil and timber found on the property.[10] The Borough asserts that the only admissible evidence as to value is the $200,000 purchase price paid by Duncan and his parents for the property and the testimony of its own expert, Bodnar. We do not agree.

Both Duncan and his father offered testimony as to the total value of the property, including the topsoil and timber; Duncan valued the property at $70,000 per acre or $1,400,000, and his father valued the property at $2,000,000. (R.R. at 938a, 1083a.) Duncan agreed with his father's estimate of approximately 175,000 cubic yards of topsoil being present at the site. (R.R. at 899a, 1081a.) However, neither testified that he used the mathematical calculation prohibited in Werner in arriving at this valuation. Furthermore, we note that a condemnee may testify as to value without supporting facts and data. Redevelopment Authority of Harrisburg v. Young Women's Christian Association, 403 A.2d 1343 (Pa. Cmwlth. 1979) (holding that the common pleas court properly overruled an objection challenging the testimony of the YWCA vice president as to reports she reviewed concerning the construction costs of

[9] As the Supreme Court stated in Werner, the jury in a condemnation case must place itself in the position of a potential purchaser of the tract of land at issue and "a purchaser would certainly consider the existence of mineral deposits beneath the surface in arriving at a purchase price." 432 Pa. at 286, 247 A.2d at 448.

[10] The same rules that apply to minerals apply to timber. Brown v. Commonwealth, 399 Pa. 156, 159 A.2d 881 (1960) (noting that we have refused to allow evidence of particular items of damage in condemnation proceedings, including the value of coal deposits, limestone deposits, standing timber, and sand and gravel deposits).

other YWCA buildings on the basis that the witness was not qualified to interpret this type of data).

Duncan's expert, Chiappetta, testified that the Duncan II was "split zoned," with part of the property zoned light industrial and another part zoned conservancy. (R.R. at 1141a.) Chiappetta opined that development for an industrial use, following the removal of the timber and topsoil, would be the highest and best use of the property. (R.R. at 1179a-80a.) Chiappetta further stated that he used the comparable sales approach in valuing the property and that he considered many factors in making this valuation, including the location of the property, the access to the property because it was landlocked, its size, its shape, and the presence of marketable timber and topsoil on the property. (R.R. at 1141a-48a.) Chiappetta explained that he made adjustments to each one of the comparable sales he found for the physical differences that existed between them, and that one of these adjustments related to the presence of the topsoil on the Duncan II property. (R.R. at 1168a.) Chiappetta ultimately valued the property at $1,100,000. (R.R. at 1158a.)

On cross-examination, Chiappetta specifically denied estimating an independent value for the topsoil itself to reach a final valuation for the property. Id. Chiappetta acknowledged that he considered the quantity of topsoil and timber on the property as well as a royalty rate for the topsoil of $4.50/cubic yard,[11] but he explained that there is no royalty relating to this property since Duncan and his parents owned the property and that he simply used these figures to make adjustments to the comparable sales he considered. (R.R. at 1162a, 1166a-68a, 1652a.) On re-

[11] Chiappetta noted that the royalty rate was "the amount per unit basis that an operator would pay for the right to remove a particular product." (R.R. at 1145a.) Chiappetta further noted that he generally uses a royalty rate analysis in estimating the fair market value of a property. (R.R. at 1146a.)

direct examination, Chiappetta reiterated that he did not simply multiply the number of cubic yards of topsoil or timber by a predetermined royalty rate to arrive at a total value for the property. (R.R. at 1177a.) This fact is supported by Chiappetta's report. If Chiappetta had simply multiplied the number of cubic yards of topsoil, estimated to be 164,721 cubic yards, by the royalty rate of $4.50, the topsoil would be valued at $741,245. (R.R. at 1652a.) However, Chiappetta valued the same at $438,587 in his report for purposes of making adjustments to the comparable sales. Id.

The Duncans' expert, Yoder, similarly testified that he utilized the comparable sales approach in valuing the property. (R.R. at 1222a.) Yoder indicated that he made adjustments for what he described as "measurable dollar dissimilarities in the market," which means "something that people would pay for or not pay for," in this case, the topsoil and timber. (R.R. at 1231a, 1234a-35a.) Yoder estimated that the property contained 64,533 cubic yards of topsoil and that landscapers would pay $4.00/cubic yard, thereby making an adjustment of approximately $258,000 when comparing the property to similar sales in the area. (R.R. at 1235a.) Yoder also opined that an industrial use, following the removal of the timber and topsoil, would be the highest and best use of the property. (R.R. at 1223a.) Yoder ultimately valued the property at $1,050,000. (R.R. at 1236a.)

On cross-examination, Yoder acknowledged the manner in which he arrived at the adjustment for the topsoil on the property, i.e., multiplying the amount of estimated cubic yards by a figure of $4.00. (R.R. at 1248a.) However, on re-direct examination, Yoder explained that he valued the entire fee simple interest in the land, "including all the bundle of rights" associated with the property. (R.R. at 1250a.)

Section 705 of the Code specifically permits a qualified valuation expert to testify as to "**any or all facts and data which he considered in arriving at his opinion**, whether or not he has personal knowledge thereof, and his statement of such

facts and data and the sources of his information shall be subject to impeachment and rebuttal." 26 P.S. §1-705. (Emphasis added.) The trial court credited the testimony of Chiappetta and Yoder and concluded that their valuations did not violate the Werner rule. We agree with the trial court in this regard. Further, we note that said testimony was consistent with section 705 of the Code.

Next, the Borough asserts that the trial court improperly admitted grossly prejudicial settlement discussions between members of Borough Council and the Duncan family. We disagree.

The general rule is that questions concerning the admission or exclusion of evidence are within the sound discretion of the trial court and will be reversed on appeal only where a clear abuse of discretion exists. Labrador v. City of Philadelphia, 578 A.2d 634 (Pa. Cmwlth. 1990). An abuse of discretion is not merely an error of judgment but rather a judgment which is manifestly unreasonable, or the result of partiality, prejudice, bias, or ill will, as shown by the record. Id.

While Pa.R.E. 408 declares that evidence of offers to compromise or attempts to compromise a claim are not admissible, it was the Borough itself that raised issues related to these discussions before the trial court. For example, the Borough maintained that the $80,000 payment to the Duncans constituted payment in full or estimated just compensation for the property in question. Additionally, the Borough asserted that the current zoning of the property prohibited the Duncans from removing any topsoil. The testimony of which the Borough now complains relates directly to these allegations by the Borough. Thus, the trial court did not err in admitting this testimony.

The Borough next contends that the use of the property by Duncan and his father for excavating topsoil was prohibited by the Borough's zoning ordinance. To support this contention, the Borough introduced a copy of a 1984 zoning

ordinance before the trial court. However, the Borough could not present any witnesses to authenticate this copy as the validly adopted ordinance in effect at the time of the taking. Moreover, this purported 1984 zoning ordinance permits major excavating and grading as conditional uses in an industrial zoning district. (R.R. at 1769a.) Yoder estimated that the property contained 64,533 cubic yards of topsoil and that landscapers would pay $4.00/cubic yard, thereby making an adjustment of approximately $258,000 when comparing the property to similar sales in the area. (R.R. at 1235a.). As the trial court noted in its original order, the record reveals a history of topsoil removal at the Duncan I property, which is also zoned light industrial. The Borough even collected fees and issued grading permits for this removal. Further, the record reveals that the neighboring property owned by CIT required removal of topsoil for the development of that site as a baseball field. Thus, the record belies the Borough's contention that the excavation of topsoil is prohibited by a Borough ordinance.

Finally, the Borough avers that the trial court erred in failing to determine that it was entitled to a credit of $80,000, as this finding by the board of viewers was not appealed by either Duncan or his parents. Once more, we disagree.

The Borough relies on our decision in Jennings v. Department of Transportation, 395 A.2d 582 (Pa. Cmwlth. 1978), for support. In Jennings, Charles and Mary Ann Jennings petitioned the Allegheny County common pleas court for the appointment of viewers alleging a *de facto* taking by the Department of Transportation (DOT) as a result of highway construction to the rear of their property. Specifically, the Jennings alleged that the construction activity caused water damage, wall cracks, and structural shifting such that their home was rendered unsafe for occupancy. DOT filed preliminary objections to the Jennings' petition, but the common pleas court dismissed them and concluded that a *de facto* taking had in fact

occurred. The common pleas court referred the matter to a board of viewers for a determination of the amount of just compensation due to the Jennings.

Following hearings, the board of viewers concluded that the Jennings' entire property had been subjected to a *de facto* taking and awarded the Jennings $20,750 as just compensation. DOT appealed and sought to produce evidence of the cost to cure any damage to the property. The Jennings filed a motion for a protective order *in limine* asking that DOT be prohibited from introducing any evidence which would conflict with the determination that the entire property had been taken. The common pleas court granted the Jennings' motion. This Court permitted an interlocutory appeal by DOT.

On appeal, we affirmed the common pleas court's order granting the protective order because DOT took no specific objections to the report of the board of viewers, "which *explicitly* found that there had been a total *de facto* taking." Jennings, 395 A.2d at 584. (Emphasis in original.) We noted that section 515 of the Code provided:

> Any party aggrieved by the decision of the viewers may appeal to the court of common pleas within thirty days from the filing of the report. The appeal shall raise all objections of law or fact to the viewers' report.

26 P.S. §1-515. Additionally, we cited section 516 of the Code, which provided, further, that the appeal shall set forth "[o]bjections, if any, to the viewers' report, other than to the amount of the award." 26 P.S. §1-516. Relying on these sections, we held that DOT "did not properly present the issue for the lower court's preliminary disposition, and the lower court may properly proceed on the Board's conclusion that there was a total *de facto* taking." Jennings, 395 A.2d at 584.

The Borough also relied on Jennings before the trial court. However, the trial court concluded that Jennings was not controlling. The trial court noted that

our decision in Jennings focused on the scope of the property taken, and not on the issue of estimated just compensation. The trial court concluded that estimated just compensation was an essential element of damages, subject to its *de novo* review, and specifically rejected the Borough's contention that the $80,000 payment represented estimated just compensation in this case.[12] In support of this conclusion, the trial court cites the 1964 comments to section 516 of the Code, which stated that "[u]nder existing law, an appeal on the merits as to damages is considered a trial *de novo* and neither the viewers' report nor any of their findings nor the amount of the award are admitted for the appeal, nor can they be introduced into evidence." We agree with this reasoning by the trial court.[13] Thus, the trial court properly concluded that the Borough was not entitled to a credit of $80,000.

Accordingly, the order of the trial court is affirmed.

PATRICIA A. McCULLOUGH, Judge

[12] We note that the December 31, 1999 agreement between the Borough and the Duncans only required that the Duncans "negotiate and bargain in good faith" with respect to the terms and conditions relative to the condemnation of the Duncan II property and the Borough's desire to purchase the Duncan I property. (R.R. at 240a.) In exchange, the Duncans received a payment of $80,000 and, in the event that the parties could not reach a final understanding, the agreement permitted the Duncans to retain this $80,000 payment as liquidated damages. (R.R. at 242a.)

[13] The Borough notes that we followed Jennings in Department of Transportation v. Yudacufski, 479 A.2d 635 (Pa. Cmwlth. 1984), appeal dismissed, 517 Pa. 333, 536 A.2d 1322 (1985). However, Yudacufski similarly involved findings by a board of viewers relating to the area of the property owned by the condemnee, the extent of the taking, and the date of the taking, but not relating to the issue of damages. Hence, the same reasoning of the trial court would apply to conclude that Yudacufski is not controlling.

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Condemnees: Jack T. Duncan and Phyllis M. Duncan, his wife	:	
Jack T. Duncan and Phyllis M. Duncan, Husband and Wife, and Jeffrey Duncan	:	
	:	No. 2144 C.D. 2011
v.	:	
Borough of Crafton, Appellant	:	

ORDER

AND NOW, this 1st day of July, 2013, the order of the Court of Common Pleas of Allegheny County, dated October 13, 2011, is hereby affirmed.

PATRICIA A. McCULLOUGH, Judge