

M. BELMONT VERSTANDIG, INC.  
v. MUNICIPAL AUTHORITY OF THE BOROUGH OF CHAMBERSBURG  
AND BOROUGH OF CHAMBERSBURG  
Court of Common Pleas of the 39th Judicial District of Pennsylvania,  
Franklin County Branch  
Civil Action -- In Equity, No. 2004-730

*Federal Preemption; Condemnation; Eminent Domain Code; Preliminary Objections; Equitable Remedies*

1. Federal law impliedly preempts state law when an actual conflict exists between the laws or the federal law thoroughly occupies the field at issue such that it can be inferred that Congress intended that the federal law controls.
2. The FCC has exclusive jurisdiction over claims that, at their core, allege interference with signal transmission.
3. The FCC has exclusive control over matters of radio frequency interference and technical matters of radio broadcasting.
4. Challenges to collateral procedures that must be followed as part of a condemnation process are justiciable only in equity.
5. 26 P.S. § 1-406 specified that within thirty days of notice of condemnation, the condemnee may file preliminary objections to the taking. These objections are limited to challenging: 1) the power or right of the condemnor to appropriate the condemned property; 2) the sufficiency of security; 3) any other procedure followed by the condemnor; or 4) the declaration of taking.
6. A court may only act in equity to compel the authority to go ahead with proper condemnation proceedings but has no jurisdiction to act in equity to prevent a threatened taking.
7. The Supreme Court of Pennsylvania determined that the legislature did not intend that issues relating to condemnation would be heard by equity courts.
8. The Court established that under the code the condemnor must file a declaration of taking, with sufficient security and give notice to the condemnee, at which time the condemnee may file preliminary objections.

Appearances:

William Cramer, Esq., *Co-Counsel for Plaintiff*

Donald Kornfield, Esq., *Co-Counsel for Plaintiff*

Thomas Finucane, Esq., *Counsel for Defendant Borough of Chambersburg*

Eileen Finucane, Esq., *Counsel for Defendant Municipal Authority of Borough of Chambersburg*

OPINION

Van Horn, J., September 15, 2004:

## Statement of Facts[1]

Plaintiff, M. Belmont VerStandig, Inc., brought this action in equity seeking a declaratory judgment and an injunction against the Defendants, Municipal Authority of the Borough of Chambersburg and Borough of Chambersburg, stemming from the intended condemnation by the Defendants of the Plaintiff's property located in Franklin County, Pennsylvania. The property has been used to facilitate the operation of AM radio station WCBG since 1956. Plaintiff purchased the property along with the radio station in 1993. In the same year, the Federal Communications Commission (FCC) issued Plaintiff a license authorizing the operation of the radio station at a frequency of 1590 kHz. Plaintiff utilizes a four tower (antenna) directional array, in place since 1956 and located on his real estate, to transmit the FCC authorized signal. The antennas are approximately 200 feet in height and plainly visible. Plaintiff has continuously owned and operated the radio station since 1993.

Defendants are the owners of land adjacent to the Plaintiff's on which they began construction of a 150 feet tall water tower in June 2002. At its closest point, the water tower is 193 feet from one of the antennas of Plaintiff's directional array. Some time after construction began, Plaintiff noticed interference with its directional antenna pattern. In September 2002, Plaintiff requested a variance from the FCC to offset the interference caused by the water tower construction. The FCC granted Special Temporary Authority (STA) to Plaintiff to broadcast outside of the specifications authorized in the license. Additionally, Plaintiff's representative, Mr. VerStandig, contacted Defendants' legal representative, Attorney Finucane, to inform him of the adverse effects of the construction. In October 2002, Attorney Finucane contacted Mr. VerStandig to inform him that workers at the construction site were experiencing arcing and burns. Following these discoveries, the parties set out to determine the actual cause(s) of the interference disrupting Plaintiff's broadcast and the arcing and burning complicating Defendants' construction.

In December 2002, Plaintiff's consulting engineer determined that the problems experienced by the parties resulted from re-radiation of the station's radio frequency radiation (RFR). The engineer attributed the re-radiation to the size and proximate location of Defendants' tower to Plaintiff's antenna array. After this determination was made, the parties entertained solutions to the problems that each attributed to the other's activities. The following is a list of attempts made by the parties along with outcomes from December 2002 until December 2003:

1. Defendants offered to provide Plaintiff with a temporary site for its broadcast until construction was complete. Plaintiff rejected this offer because interference to its broadcast signal from re-radiation would still be a problem following construction and de-tuning of the water tower would likely be problematic and expensive.

2. Defendants attempted to incorporate additional copper into the water tower to de-tune the tower and reduce the re-radiation effect. The outcome of this is unclear from the parties' documents or correspondence.

3. Plaintiff offered to donate the radio station and FCC license to Defendants if Defendants would agree to an amicable condemnation of Plaintiff's real estate and pay Plaintiff's associated legal and engineering fees. This agreement would result in favorable tax treatment for Plaintiff and Defendants would be able to resell the property, thereby recouping their acquisition costs. After much discussion this proposal ultimately failed because the parties could not come to agreement on all terms.

4. Plaintiff offered to share the cost of relocating the water tower to a place where the RFR/re-radiation problem would be negated. Subsequent research by Defendants determined that the cost to move the tower would be \$500,000 of which Defendants wanted complete reimbursement. Plaintiff deemed this proposal to be cost prohibitive.

While negotiations took place, the parties engaged in FCC litigation. Plaintiff's STA was due to expire in April 2003. In March 2003, Defendants filed objections to the FCC for extension of the STA claiming that the Plaintiff was not cooperating with Defendants regarding construction of the water tower. In April 2003, Plaintiff filed for an extension of the STA along with a reply to Defendants' objections. In July 2003, Defendants filed a formal complaint to the FCC alleging that the re-radiation emissions exceeded the Maximum Permissible Exposure allowed under FCC regulations. Plaintiff followed with a response denying violations and alleged that Defendants' readings were faulty.

Finally, after negotiations had broken down and the FCC action was pending, Defendants, in February 2004, adopted a resolution authorizing the acquisition of Plaintiff's real estate by eminent domain. The stated purpose for the taking was for developing a public park and recreation grounds, storing Borough utility vehicles and equipment, and leasing to the Borough as an essential supporting site to prevent re-radiation.

In response to Defendants' intention to exercise their power of eminent domain, Plaintiff initiated this lawsuit by filing a complaint in March of 2004. The complaint first asks for Declaratory Judgment based on federal preemption and failure to exhaust administrative remedies. At the time of the lawsuit, the FCC action was pending and Plaintiff argued that the FCC had exclusive and preemptory jurisdiction to resolve issues of radio frequency interference and RFR exposure limits and that these were the only issues disputed between the parties. Therefore, Defendants could not exercise eminent domain until the FCC adjudicated the issues. Secondly, Plaintiff asks for an injunction preventing Defendants from beginning condemnation proceedings against Plaintiff's real estate. Here, Plaintiff asserts that it was not challenging Defendants' authority to condemn or bad faith, but rather that Defendants proceed with the collateral FCC litigation to resolve the disputes between the parties.

On March 30, 2004, Defendants withdrew their complaints to the FCC and on April 1, 2004 the FCC dismissed the case. Defendants now claim that there is no issue of preemption because the dispute between the parties does not involve RFR/re-radiation interference. Instead, the issue is merely one of condemnation by a municipal authority over which the FCC has no exclusive or preemptive jurisdiction. Plaintiff asserts that Defendants' adopted resolution to exercise eminent domain is not for public purposes but entirely related to stopping Plaintiff's broadcast transmission due to the RFR/re-radiation interference which is exclusively within the authority of the FCC.

### Procedural History

On March 26, 2004, Plaintiff filed this complaint in equity seeking Declaratory Judgment and Injunction. On April 7, 2004, Defendants filed Preliminary Objections in the nature of a Demurrer and Motion to Strike. Plaintiff's Answer to Preliminary Objections to Complaint was filed on May 18, 2004. Defendants filed a stipulation adding the issue of mootness on May 18, 2004. The parties submitted briefs in support of their positions in July and this Court heard Oral Arguments on July 26, 2004. The matter is now ripe for decision.

### Discussion

This Court finds that the Preliminary Objections of the Defendants, Municipal Authority of the Borough of Chambersburg and Borough of Chambersburg, should be sustained. In reaching its decision, the Court reasons that any action by the Plaintiff, either in equity or in law, is premature without Defendants actually having filed an eminent domain action.

The Plaintiff's Complaint asks this Court to declare that the FCC has preemptory and exclusive jurisdiction over all disputes between the parties. Therefore, Plaintiff argues, this Court should issue an injunction preventing Defendants from exercising their power of eminent domain until the FCC has adjudicated all matters between the parties. Plaintiff insists that the equitable relief sought in this matter is appropriate because it deals directly with a collateral procedure to be followed prior to the exercise of eminent domain. Plaintiff denies that this complaint is a direct attack on the Defendants' authority to condemn, which would require the filing of preliminary objections to an eminent domain action. It is important to recognize that at the time this Complaint was filed, Defendants had formal and informal complaints filed with the FCC against the Plaintiff. Defendants subsequently withdrew those complaints, and the FCC dismissed the matters. The following is a discussion of each of the Defendants' Preliminary Objections.

#### **Demurrer**

Defendants claim that the Plaintiff's Complaint does not state a cause of action on which relief can be granted. Specifically, Defendants argue that federal law does not preempt this state law eminent domain action because this action is in no way related to issues of radio signal transmissions. The Plaintiff argues that the sole and exclusive reason for the eminent domain action is to stop the radio transmissions that are interfering with Defendants' construction. Therefore, FCC action would be necessary to resolve the matters of interference before Defendants may proceed with condemnation.

Federal law impliedly preempts state law when an actual conflict exists between the laws or the federal law thoroughly occupies the field at issue such that it can be inferred that Congress intended that the federal law controls. Fetterman v. Green, 689 A.2d 289, 292 (Pa. Super., 1997). "[T]he FCC has exclusive jurisdiction over claims that, at their core, allege interference with signal transmission." Id. at 293. In Fetterman, both parties were granted a license by the FCC to broadcast on the same frequency. Appellant argued that excessive use of the signal by the appellee caused appellant's signal to be disrupted. Appellant filed a complaint and sought relief under the following theories: 1) interference with existing contractual relations; 2) negligence; 3) conversion; 4) civil conspiracy and 5) private nuisance. Appellee filed preliminary objections claiming lack of subject matter jurisdiction to bar appellant's claims due to federal preemption. Appellee argued that the FCC had exclusive jurisdiction concerning claims of radio

frequency interference. The court determined that since the core of the appellant's complaint dealt with technical matters of radio signal interference, the state court would have to defer to the FCC.

The FCC has exclusive control over matters of radio frequency interference and technical matters of radio broadcasting. Freeman v. Burlington Broadcasters, Inc., 204 F.3d 311, 320 (2nd Cir., 2000). In Freeman, local residents asked for enforcement of a zoning board permit condition that required broadcasters to remedy any interference caused in area homes by the broadcasters' signals. The zoning board recognized that it could not enforce the condition because the FCC preempted local government action dealing with radio frequency interference. The court agreed with the zoning board finding that the FCC had exclusive jurisdiction.

Plaintiff cites to both of these cases, and others, to make their argument that the FCC must first be involved to settle the disputes between the parties. Like the appellees in Fetterman, Plaintiff argues that the issues at the core of Plaintiff's complaint are related directly to the radio frequency interference. In his brief, Plaintiff states that the facts in the Complaint specifically provide that Defendants' only reason for condemnation is to eliminate Plaintiff's broadcast.[2]

There is little doubt based on the authorities cited that the FCC does have preemptory authority over radio signal interference. However, the eminent domain action, which Plaintiff alleges is motivated by the interference, has not yet begun. There is no direct indication from the Defendants that they intend to proceed with condemnation at this time or in the future. In fact, Defendants informed Plaintiffs that they would attempt to continue the construction without the use of eminent domain. There is simply no issue of radio frequency interference before the Court such that this Court would have to determine that FCC involvement would be necessary.

Plaintiff cites to Redevelopment Authority of the City of Erie v. Owners or Parties in Interest, 274 A.2d 244 (1971), to further his contention that this Court must find that the true reason for the threatened condemnation is to eliminate Plaintiff's broadcast. In Erie, the Commonwealth Court reversed the Trial Court's dismissal of preliminary objections filed by homeowners challenging the Redevelopment Authority's condemnation action. The court found that the Authority exercised bad faith in bringing on the condemnation action against the homeowners. Erie is distinct from this case because it deals with a party's challenge of a Declaration of Taking through law rather than equity, and the condemnation proceeding had already begun. It may be that Defendants' reasons for threatening the condemnation of Plaintiff's real estate are dubious. It may be that the true reason for an eminent domain action is to eliminate the Plaintiff's broadcast. However, until the Defendants act these issues need not be explored. Additionally, if the Defendants do act, the proper action on the part of Plaintiff would be like that taken in Erie: the filing of preliminary objections to seek an adequate legal remedy rather than seeking equitable relief.

Plaintiff further attacks Defendants' demurrer by claiming that an equitable action is appropriate when it concerns a collateral procedure rather than the Defendant's actual authority to exercise eminent domain. Challenges to collateral procedures that must be followed as part of a condemnation process are justiciable only in equity. White v. Pennsylvania Department of Transportation, 738 A.2d 27, 30 (Pa. Cmwlth Ct., 1999). In White, Plaintiff argued that PennDOT failed to follow condemnation procedures that required it to submit its proposal to an agricultural lands approval board before condemnation proceedings could begin. In this case, unlike in White, there is no statutory prerequisite for FCC approval before the Defendants may exercise their authority of eminent domain. Defendants argue that the taking, if there is a taking, applies only to Plaintiff's real estate and not his FCC license. Therefore, there is no requirement for FCC involvement. Plaintiff may argue that the exercise of eminent domain would effectively be a taking of his FCC license since the real estate and the license may not be mutually exclusive. However, this argument can be brought in preliminary objections should Defendants begin condemnation proceedings.

## **Motion to Strike**

Defendant argues that Plaintiff has an adequate remedy at law under the Eminent Domain Code, 26 P.S. § 1-406. This section specifies that within thirty days of notice of condemnation, the condemnee may file preliminary objections to the taking. These objections are limited to challenging: 1) the power or right of the condemnor to appropriate the condemned property; 2) the sufficiency of security; 3) any other procedure followed by the condemnor; or 4) the declaration of taking. Defendant points to Vartan v. Reed, 514 A.2d 646 (Pa. Cmwlth., 1986), which supports the notion that the statute provides the only method for a condemnee to seek relief in an eminent domain action. In Vartan, appellee was notified by the Harrisburg Redevelopment Authority of its intention to condemn his property. Appellee brought an action in equity to enjoin the threatened condemnation. The Trial Court found that the Eminent Domain Code afforded no relief for threatened takings and so equity would be the remedy where bad faith is alleged. The Commonwealth Court found that the Trial Court could only act in equity to compel the Authority to go ahead with proper condemnation proceedings but had no jurisdiction to act in equity to prevent a threatened taking. Therefore, it rendered the Trial Court's decision void. Here, as in Vartan, Plaintiff is

asking this Court to prevent rather than compel a threatened taking by invoking the Court's equity jurisdiction. However, this cannot be done because it is clear from the Eminent Domain Code that only preliminary objections will suffice to challenge Defendants' exercise of eminent domain.

Another case on point, not cited by Defendants, is Valley Forge Golf Club v. Upper Merion Township, 221 A.2d 292 (Pa. 1966). In Valley Forge, Plaintiff attempted to enjoin a threatened taking by the township. Plaintiff alleged that the Eminent Domain Code provided an inadequate remedy at law because to lose his property would be the end of his business because the business could not be relocated. The Supreme Court of Pennsylvania determined that the legislature did not intend that issues relating to condemnation would be heard by equity courts. Id. at 293. The Court established that under the code the condemnor must file a declaration of taking, with sufficient security and give notice to the condemnee, at which time the condemnee may file preliminary objections. Id. The following quote by Justice Roberts in a concurring opinion illustrates the strikingly similar circumstances between Valley Forge and the case at bar and is clearly expressive of the law in this matter:

"... the instant case discloses that no declaration of taking has been filed by the [] township. All that has occurred ... have been negotiations between the parties respecting the sale of the property ... to the [] township and a public expression by the [township] of an intention to resort to condemnation ... no present injury has been sustained by plaintiff and he may not anticipate the township and seek to litigate the validity of a taking which has not yet taken place. Therefore, the present suit is premature and plaintiff has no ground for invoking the jurisdiction of equity at this juncture." Id. at 294.

It is clear from both Vartan and Valley Forge that Plaintiff's only remedy to Defendants' exercise of eminent domain would come from preliminary objections filed after a declaration of taking has been made by Defendants. In the case at bar, Plaintiff's actions are clearly premature because Defendants have made no such declaration and may never do so. Plaintiff's attempt to invoke the Court's equity jurisdiction is misplaced. The Court in Vartan states that equity may only be used to compel an authority to proceed with proper condemnation proceedings. The Court in White, supra, states that equity may be used to challenge a procedure that is collateral to, but necessary before a condemnation may begin. Here, Plaintiff does not wish to force Defendants to go forward with the threatened condemnation, nor does Plaintiff cite to any authority that indicates FCC involvement is necessary before a governmental authority may exercise eminent domain.

### **Mootness**

Defendants' last preliminary objection suggests that since Defendants withdrew their complaints to the FCC there is no longer any reason for FCC preemption. Plaintiff argues that the same circumstances exist now as prior to Defendants' decision to withdraw their complaints, i.e. Defendants still intend to condemn Plaintiff's real estate for the purpose of eliminating the RFR/re-radiation interference and allow for construction of the water tower. Therefore, the controversy has not been rendered moot. Plaintiff suggests that ripeness may be Defendants' more appropriate claim because condemnation proceedings have not begun. Plaintiff counters this suggested argument by citing White, supra, where the Court adjudicated a declaratory judgment action prior to a condemnation proceeding beginning.

Again, it is necessary to distinguish White from this case. In White, the condemning authority did not follow a valid statutory procedure, necessary before condemnation could begin, thereby allowing the Court to exercise its equity jurisdiction. Here, we know of no such necessary procedure required by the FCC before Defendants may exercise condemnation. If, as the Plaintiff suggests, the same issues still apply, they may be resolved through the use of preliminary objections after a formal declaration of condemnation as provided by the Eminent Domain Code and substantiated by the authorities in Vartan and Valley Forge.

### Conclusion

Based on the authorities cited above and the facts pertaining to this case, this Court finds that the Plaintiff's request for relief in this matter is premature since no formal condemnation proceedings have begun. Additionally, Plaintiff's request for this Court to exercise its equity jurisdiction to challenge a threatened eminent domain action does not fall within any exception to the statutory requirement that preliminary objections are the only means to challenge an exercise of eminent domain.

### ORDER OF COURT

And now this 15th day of September, 2004, it is hereby ordered that Defendants' Preliminary Objection in the nature of a Demurrer is granted.

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[1] The facts are derived from documents submitted to the court including the pleadings and exhibits of both the Plaintiff and Defendants.

[2] Brief of Plaintiff, p. 17.