

In Re: Proceeding to Determine Necessity for Extending Private Right of Way

IN RE: PROCEEDING TO DETERMINE NECESSITY FOR EXTENDING PRIVATE RIGHT OF WAY LEADING TO A PUBLIC HIGHWAY ACROSS PREMISES OWNED BY LEWIS B. OTTO, JR. AND DOROTHY J. OTTO, ET AL.

Court of Common Pleas of the 39th Judicial District of Pennsylvania,
Franklin County Branch

Civil Action — Law, No. 2005–3188

Eminent Domain, Proceeding to Take Property and Access Compensation, Appeal, Appellate Jurisdiction; Eminent Domain, Private Road Act, Just Compensation, Measure and Amount, Before and After Rule; Private Roads, Establishment, Declaration of Taking, Date of Taking

1. The Private Road Act, 36 P.S. §2731, et seq., specifically 36 P.S. §2736, requires damages sustained by landowners through whose property any private road is laid be estimated in the manner provided for in the case of a public road.
2. The Superior Court has ruled that damages should be accessed as provided by the Eminent Domain Code.
3. The Eminent Domain Code, 26 Pa. C.S. §701, provides that a condemnee is entitled to just compensation for the taking of his property. Just compensation is defined as the difference between the fair market value of the condemnee's land prior to the taking and as unaffected thereby, and the value remaining immediately after and as affected by the taking.
4. The Comment in the 1964 Report of Section 701 of the Eminent Domain Code explicitly explains that the section is meant to codify existing case law by adopting the "before and after rule."
5. Under the Eminent Domain Code, a condemnation can be effected only by filing a declaration of taking. The Comment to Section 1105 explains just compensation is to be based upon the condition of the property at the time of condemnation, therefore making the clause "essentially a declaration of existing law."
6. The 2006 amendment and codification of the Eminent Domain Code complicates the choice of applicable law in the instant case, as the codified, more recent version applies only to condemnations effected on or after the amendment's effective date of September 1, 2006. 26 Pa. C.S.A. §101 et seq. (2009). Thus, if the Superior Court's method is utilized, as both parties seem to assume, the version of the code that applies to the instant case depends on the determination of the correct date of condemnation.
7. The Commonwealth Court rejects the use of the Eminent Domain Code in private road cases, instead determining damages in the same manner as those for public roads, as provided by the Act itself.
8. According to the Commonwealth Court, the Private Road Act requires damages resulting from public or private road condemnations be accessed using the common law "before and after rule," but without reference to the Eminent Domain Code.
9. The before and after rule mandates damages in condemnation cases be measured by the difference in the value of the land before the exercise of the power of eminent domain, and as unaffected by it, and the market value immediately after the appropriation, as affected by it. Under this rule, the proper compensation is calculated in terms of the depreciation in market value of the entire property, disregarding particular items of damage and viewing the value of the condemned land in aggregate.
10. Although both the Superior Court and the Commonwealth Court recognize exclusive jurisdiction in the Commonwealth Court over condemnation appeals, the Superior Court has nonetheless developed case law addressing the issue where neither party raises the issue of jurisdiction. Both Courts maintain their analyses yield substantially similar results.
11. Although the case law and statutory directives are both nebulous as to the proper date to value a taking, a reading of

the statute, the comments thereto, and the applicable cases reveals the defendant is correct. The proper date on which to value damages is that of the initial filing of the declaration of taking which began the lawsuit. Because the complaint was filed on November 14, 2005, that date becomes the proper date of condemnation.

Appearances:

James M. Stein, Esquire

David C. Wertime, Esquire

OPINION

Van Horn, J., September 22, 2009

Procedural History

On November 14, 2005, a petition was filed with the Court requesting the appointment of a Board of View [hereinafter "Board"] to determine the necessity of, and proper location for, a private road to connect Petitioners' landlocked parcel of real estate to a public road. To reach the public road, the private right of way would extend over the property owned by several others, including Respondent Mouer, who objected to its opening. On November 18, an order was signed appointing a Board, which was filed November 21, 2005.

After the proper parties to the action were ascertained and joined, and a hearing and view were held on May 22, 2008, the Board filed their Report on October 20, 2008. The Board found petitioners had demonstrated a reasonable necessity under all the circumstances to be entitled to a private road. The Board did not determine the proper amount of damages, as respondent Mouer demanded a trial by jury on the issue of compensation. A Decree Nisi was filed by the Court on January 28, 2009, supporting the Board's finding of necessity, granting a jury trial on the issue of damages, and allowing the parties 30 days to file exceptions to the order.

Although no exceptions were filed to the Decree, Petitioners did file a Motion in Limine, seeking to exclude the report of Respondent's appraiser. Petitioners argue the report should be excluded because it uses methods to value the easement which are not generally accepted in the appraisal community. In part, the validity of the Report turns on the proper date on which to value damages resulting from a private road condemnation. By Order dated April 27, 2009, the Court directed the parties to file briefs regarding the proper date for valuation of damages, which were timely filed. After reviewing the materials provided by counsel, and conducting its own research, the Court is now prepared to issue this Opinion and Order.

Discussion

Both parties, citing the relevant provisions of the Act of June 13, 1836, P.L. 551, as amended, 36 P.S. §2731 et seq. [hereinafter Private Road Act], recognize the value of the property taken should relate to the date of condemnation. The principal dispute, therefore, centers on which action by Petitioners constitutes the "date of taking" in the instant case. Petitioners maintain the date of taking is January 28, 2009, the date of the Decree Nisi. Respondents disagree with the date of taking put forth by the Petitioners, and instead maintain the date of condemnation is the date of the filing of the declaration of taking. Thus, Respondents argue the property should be valued as of November 14, 2005, the date of the filing of the Complaint. In the Respondent's view, this date of taking has the added consequence of requiring the use of the prior version of the Eminent Domain Code, which was repealed, and then amended and codified effective September 1, 2006.

The Private Road Act, 36 P.S. §2731, et seq., specifically 36 P.S. §2736, requires damages sustained by landowners through whose property any private road is laid be estimated in the manner provided for in the case of a public road. The Superior Court and the Commonwealth Court are currently split on what exactly such method should be, a disagreement that in large part seems to have little practical effect. The Superior Court has ruled that damages should be assessed as provided by the Eminent Domain Code. See In re Laying Out and Opening a Private Road, 592 A.2d 343, 347-48 (Pa. Super. 1991). The 2006 amendment and codification of the Eminent Domain Code complicates the choice of applicable law in this case, as the codified, more recent version applies only to condemnations effected on or after the amendment's effective date of September 1, 2006. 26 Pa. C.S.A. §101 et seq. (2009). Thus, if the Superior Court's method is utilized, as both parties seem to assume, the version of the code that applies to the instant case depends on the determination of

the correct date of condemnation. Both versions of the Code, as applied by the Superior Court, provide that a condemnee is entitled to just compensation for the taking of his property. See Benner, 950 A.2d at 994; 26 Pa.C.S. §701; 26 P.S. §1-601 (2005). Just compensation is later defined as the difference between the fair market value^[1] of the condemnees' land prior to the taking and as unaffected thereby, and the value remaining immediately after and as affected by the taking. See 26 Pa.C.S. §702(a) (2006); 26 P.S. §1-602 (a) (2005).

The Comment in the 1964 Report of this section explicitly explains that the section is meant to codify existing case law by adopting the "before and after rule." 26 P.S. §1-602 (2005), Comment. Section 302 of the Code provides a condemnation can be effected only by filing a declaration of taking. See 26 Pa C.S.A. §302 (2009); 26 Pa.C.S. §1-402 (2005). The Comment from the 1964 Report explains the section intends to provide that an actual condemnation may only be effected by first filing a declaration of taking, and that the date of condemnation "shall in all cases be the date of the filing of the declaration of taking." 26 Pa C.S.A. §302 (2009), Comment; 26 P.S. §1-402 (2005), Comment.

The date of filing of the declaration of taking is further explained by the Comment to Section 1105, previously 1-705. The Comment recognizes that a "considerable time" may elapse between the filing of the declaration of taking and the view of the property by either the Board or by a jury considering damages. 26 Pa C.S.A. §1105 (2009), Comment; 26 P.S. §1-705 (2005), Comment. The Comment continues, "just compensation is to be based on the condition of the property at the time of condemnation" making the clause "essentially a declaration of existing law." Id. Thus, although the Superior Court utilizes the Eminent Domain Code, the Code itself mirrors the rules defined by Pennsylvania precedent.

The Commonwealth Court, on the other hand, rejects the use of the Eminent Domain Code in private road cases, instead determining damages in the same manner as those for public roads, as provided by the Act itself. See In re Brinker, 683 A.2d 966, 969 n.9 (Pa. Commw. 1996); Mattei v. Huray, 422 A.2d 899, 901 (Pa. Commw. 1980) ("[T]he Legislature has provided a statute governing public and private roads that is wholly independent of the Eminent Domain Code."). As interpreted by the Commonwealth Court, the Private Road Act requires that damages be accessed under the common law rule. See 36 P.S. §2151 (2009) (right to appeal to Court of Common Pleas for jury determination of damages question "according to the course of common law"). Thus, according to the Commonwealth Court, damages resulting from public or private road condemnations should be accessed using the common law "before and after rule," but without reference to the Eminent Domain Code. See Benner v. Silvis, 950 A.2d 990, 993 n.1 (Pa. Super. 2008); Dougherty v. Allegheny County, 88 A.2d 73, 74 (Pa. 1952) ("[T]his Court has consistently held that the measure of damages in condemnation proceedings is the difference in value of the property before and after the taking."). Thus, damages in condemnation cases are measured by the difference in the value of the land before the exercise of the power of eminent domain, and as unaffected by it, and the market value immediately after the appropriation, as affected by it. See Brown v. Commonwealth, 159 A.2d 881, 882 (Pa. 1960). Under this rule, the proper compensation is calculated in terms of the depreciation in market value of the entire property, disregarding particular items of damage and viewing the value of the condemned land in aggregate. Id. at 882-83.

Both the Superior Court and the Commonwealth Court recognize exclusive jurisdiction in the Commonwealth Court over condemnation appeals.^[2] See In re Laying Out and Opening a Private Road, 592 A.2d 343, 346 (Pa. Super. 1991). However, the Superior Court has nonetheless developed a line of cases dealing with the issue, in matters where neither party raised the issue of jurisdiction, citing 42 Pa.C.S.A. §704 and Pa.R.A.P. 741. In any case, although the two courts utilize two different methods of analysis in private road cases, each maintains their analyses yield substantially similar results. See Benner v. Silvis, 950 A.2d 990, 993 n. 1 (Pa. Super. 2008). Similarly, Comments to the Code itself in reference to the date of taking provide that it is "essentially a declaration of existing law." 26 P.S. §1-705 (2005).

Thus, whether the Court utilizes the method of the Superior Court or the Commonwealth Court, the proper date on which to value damages relates to the date of the filing of the declaration of taking. Further, the proper measure of damages under either rule is the aggregate value of the property before the taking, and as unaffected thereby, reduced by the aggregate value of the property after the taking, and as affected by it. In this case, the declaration of taking was filed November 14, 2005. Thus, the measure of damages will be the difference in the value of the land immediately before that date, and the value of the land immediately after that date, as affected by the taking.

Conclusion

Although the caselaw, and statutory directives, are both nebulous as to the proper date to value a taking, a reading of the statute, the comments thereto, and the applicable cases, reveals the defendant is correct. The proper date on which to value damages is that of the initial filing of the declaration of taking which began the lawsuit. Because the complaint was filed on November 14, 2005, that date becomes the proper date of condemnation. The damages to which defendant is entitled are therefore the difference between the value of his property immediately prior to November 14, 2005, and the

value immediately after the taking on that date. As a result, if the Eminent Domain Code applies, it is the prior version which controls, as the initial filing in this case, in November of 2005, was before the most recent amendment.^[3]

ORDER OF COURT

September 22, 2009, with the parties having filed briefs in support of their respective positions as to the proper date on which to value damages, the Court, having read the briefs, conducted its own research, and made its findings in the attached Opinion, it is hereby ordered that the proper date on which to value damages is that of the initial filing of the declaration of taking which in this case is November 14, 2005. Any expert reports used in this matter shall be based on the difference between the value of defendant's property immediately prior to the taking on November 14, 2005, and the value immediately after the taking on that date.

[1] Fair Market Value is defined in Section 1-603 as the "price which would be agreed to by a willing and informed seller and buyer" considering such factors as present use of the property, the best reasonable use of the property, and the values for such uses. 26 P.S. §1-603 (2005).

[2] Cases brought pursuant to the Private Road Act are in the nature of eminent domain proceedings, giving the Commonwealth Court jurisdiction under 42 Pa.C.S.A. §762(a)(6).

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