

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Lower Perkiomen Valley	:	
Regional Sewer Authority	:	
	:	
v.	:	No. 2680 C.D. 2010
	:	
Catherine Beyer,	:	
	:	
Appellant	:	
	:	
Lower Perkiomen Valley Regional	:	
Sewer Authority	:	
	:	
v.	:	No. 2681 C.D. 2010
	:	
Frederick J. Kaczor and	:	Argued: October 18, 2011
Mary T. Kaczor,	:	
	:	
Appellants	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge  
HONORABLE P. KEVIN BROBSON, Judge  
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY SENIOR JUDGE KELLEY

FILED: November 21, 2011

In these consolidated appeals,<sup>1</sup> Catherine Beyer and Frederick and Mary Kaczor (hereinafter referred to collectively as “Condemnees”) appeal from two separate orders of the Court of Common Pleas of Montgomery County (trial court) dated November 12, 2010, overruling Condemnees’ preliminary objections to the

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<sup>1</sup> These appeals were consolidated by this Court’s order entered May 11, 2011.

Lower Perkiomen Valley Regional Sewer Authority's (Condemnor) declarations of taking.

On December 17, 2009, Condemnor's Board of Directors passed Resolutions 2009-17 and 2009-18, authorizing the taking of certain real property owned by Beyer<sup>2</sup> and certain real property owned by the Kaczors.<sup>3</sup> On December 23, 2009, Condemnor filed two declarations of taking for the purpose of acquiring temporary construction easements and permanent sanitary sewer easements needed to facilitate the expansion, construction, improvement, maintenance and operation of the Condemnor's Perkiomen Creek Interceptor. The Perkiomen Interceptor is the system through which wastewater flows by gravity from the Condemnor's six member municipalities to the Oaks Wastewater Treatment Plant located in Oaks, Pennsylvania. In response to the declarations, Condemnees timely filed preliminary objections on January 22, 2010, raising the following objections: (1) the declarations contain insufficient recital of the action by which the declarations of taking were authorized, as required by Section 302(b)(3) of the Eminent Domain Code, 26 Pa. C.S. § 302(b)(3);<sup>4</sup> and (2) the declarations contain an insufficient recital of the

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<sup>2</sup> Beyer's property was more specifically identified as 3568 Arcola Road, Lower Providence Township, and Montgomery County, Pennsylvania, Tax Parcel Number 43-00-00547-00-4, as described in Deed Book 5492 Page 00057, recorded in the Montgomery County Recorder of Deeds Office.

<sup>3</sup> The Kaczor's property was more specifically identified as 3572 Arcola Road, Lower Providence Township, Montgomery County, Pennsylvania, Tax Parcel Numbers 43-00-00550-00-1 and 43-00-00553-00-7, as described in Deed Book 5492 Page 00057, recorded in the Montgomery County Recorder of Deeds Office.

<sup>4</sup> Section 302(b) governs the form and content of a declaration of taking and provides as follows:

(b) CONTENTS.-- The declaration of taking shall be in writing and executed by the condemnor and shall be captioned as a proceeding in rem and contain the following:

*(Continued....)*

purpose of the condemnations, as required by Section 302(b)(4) of the Eminent Domain Code, 26 Pa. C.S. § 302(b).<sup>5</sup> Reproduced Record (R.R.) at 95a-101a. Condemnees did not assert in their preliminary objections that Condemnor's declarations were either related to or failed to comport with the participating municipalities' then current or proposed Act 537 Plan.<sup>6</sup> Reference to that issue was

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(1) The name and address of the condemnor.

(2) A specific reference to the statute and section under which the condemnation is authorized.

(3) A specific reference to the action, whether by ordinance, resolution or otherwise, by which the declaration of taking was authorized, including the date when the action was taken and the place where the record may be examined.

(4) A brief description of the purpose of the condemnation.

(5) A description of the property condemned, sufficient for identification, specifying the municipal corporation and the county or counties where the property taken is located, a reference to the place of recording in the office of the recorder of deeds of plans showing the property condemned or a statement that plans showing the property condemned are on the same day being lodged for record or filed in the office of the recorder of deeds in the county in accordance with section 304 (relating to recording notice of condemnation).

(6) A statement of the nature of the title acquired, if any.

(7) A statement specifying where a plan showing the condemned property may be inspected in the county in which the property taken is located.

(8) A statement of how just compensation has been made or secured.

26 Pa. C.S. §302.

<sup>5</sup> The trial court deemed waived issues, previously asserted by Condemnees in their preliminary objections, which were abandoned by counsel for Condemnees at argument.

<sup>6</sup> The Pennsylvania Sewage Facilities Act (Act 537), Act of January 24, 1966, P.L. (1965) 1535, as amended, 35 P.S. §§ 750.1-750.20a, requires that all Commonwealth municipalities develop and implement comprehensive official plans that provide for the resolution of existing

*(Continued....)*

subsequently raised in Condemnees' supplemental brief filed with the trial court on June 15, 2010. Condemnor did not respond to Condemnees' Act 537 Plan argument. In addition, the subject Act 537 Plan was never made part of the certified record. As a result, the trial court did not consider the issues\arguments regarding the Act 537 Plan in disposing of Condemnees' preliminary objections.

After argument on November 4, 2010 and review of the record presented, the trial court overruled Condemnees' preliminary objections by orders dated November 12, 2010, following which Condemnees appealed to this Court. The trial court ordered Condemnees to file a Concise Statement of Matters Complained of on Appeal (Concise Statement) pursuant to Pa.R.A.P. 1925(b). In their Concise Statement, Condemnees raise two issues for review on appeal: (1) whether the trial court erred in overruling Condemnees' preliminary objections which challenged the power of the Condemnor to condemn land for a permanent sanitary sewer easement in a location that is inconsistent with an approved Act 537 Plan; and (2) whether the Condemnor had the power to condemn land in a location that is inconsistent with the approved Act 537 Plan and therefore conferred no public benefit in violation of Article I, Section 10 of the Pennsylvania Constitution.<sup>7</sup>

In an opinion filed pursuant to Pa.R.A.P. 1925, the trial court acknowledged that Condemnees raised the aforementioned issues in their Concise Statement. However, the trial court opined that, in light of Condemnees' failure to provide the court with any legal authority to support their contentions that the

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sewage disposal problems, provide for the future sewage disposal needs of new land development and provide for the future sewage disposal needs of the municipality.

<sup>7</sup> Article 1, Section 10 of the Pennsylvania Constitution provides, in pertinent part, that "nor shall private property be taken or applied to public use, without authority of law and without just compensation being first made or secured." Pa. Const. art. 1, §10.

declarations must comport with either a current or proposed Act 537 Plan, the court was not persuaded of any adverse impact or effect which such a plan may have upon the validity of Condmenor's declarations.

In support of this appeal, Condemnees contend that if the Condemnor cannot use the condemned property for its project, then the takings serve no legitimate purpose and therefore no public use. Condemnees assert that at the time Condemnees filed their preliminary objections, they had no reasonable way to know that Condemnor could not and would not be able to amend its existing Act 537 Plan to include Condemnees' property. Condemnees contend that Condemnor's approved Act 537 Plan for the Perkiomen Creek Interceptor does not include Condemnees' condemned property and that Condemnor's existing Act 537 Plan places the middle interceptor in the area of question in Upper Providence Township. Condemnees argue that in order to utilize Condemnees' property to expand the Perkiomen Creek Interceptor, Condemnor would need to amend its existing Act 537 Plan and obtain the permission of Lower Providence Township. Condemnees allege that Lower Providence refused to grant Condemnor permission to amend the existing Act 537 Plan. Consequently, there is no public use or purpose and therefore no constitutional reason why Condemnor must take Condemnees' property. Condemnees argue further that Condemnor's actions are not consistent with The Cleans Streams Law<sup>8</sup> because Condemnor failed to obtain approval by the Department of Environmental Protection via a written permit prior to acquiring Condemnees' property.<sup>9</sup>

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<sup>8</sup> Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §§691.1-691.1001.

<sup>9</sup> Condemnees present no argument with respect to the trial court's overruling of their original preliminary objections based on Section 302 of the Eminent Domain Code.

Upon review,<sup>10</sup> we are constrained to conclude that Condemnees have waived any issue with respect to the Act 537 Plan and The Clean Streams Law for two reasons. First, Condemnees failed to raise these objections in their initial preliminary objections.<sup>11</sup> Section 306(b) of the Eminent Domain Code provides that the failure to raise an issue by preliminary objection shall constitute a waiver.<sup>12</sup>

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<sup>10</sup> Where a trial court has either sustained or overruled preliminary objections in an eminent domain proceeding, our review is limited to determining whether the trial court committed an error of law or abused its discretion. In re Condemnation by City of Coatesville, 898 A.2d 1186 (Pa. Cmwlth. 2006). In eminent domain cases, preliminary objections are intended to resolve factual and legal challenges to a taking before the parties proceed to determine damages. Id.

<sup>11</sup> “Preliminary objections in eminent domain proceedings are different than those in other proceedings. Preliminary objections are the sole method by which a condemnee may challenge the declaration of taking.” In re: a Condemnation Proceeding by South Whitehall Township Authority, 940 A.2d 624, 627 n.2 (Pa. Cmwlth. 2008).

<sup>12</sup> 26 Pa. C.S. § 306(b). Section 306 governs the filing of preliminary objections and provides as follows:

(a) **FILING AND EXCLUSIVE METHOD OF CHALLENGING CERTAIN MATTERS.—**

(1) Within 30 days after being served with notice of condemnation, the condemnee may file preliminary objections to the declaration of taking.

(2) The court upon cause shown may extend the time for filing preliminary objections.

(3) Preliminary objections shall be limited to and shall be the exclusive method of challenging:

(i) The power or right of the condemnor to appropriate the condemned property unless it has been previously adjudicated.

(ii) The sufficiency of the security.

(iii) The declaration of taking.

(iv) Any other procedure followed by the condemnor.

(b) **WAIVER.--** Failure to raise by preliminary objections the issues listed in subsection (a) shall constitute a waiver. Issues of compensation may not be raised by preliminary objections.

*(Continued....)*

Second, it is clear from the trial court's opinion and the record in this matter that Condemnees could have requested to amend their preliminary objections well before the November 4, 2010 argument thereon and the filing of the trial court's November 12, 2010 orders overruling the preliminary objections. The trial court's docket reveals that Condemnees filed their supplemental brief with the trial court on June 15, 2010, wherein they raised for the first time any objections based upon the Act 537 Plan and The Clean Streams Law. After at least two continuances, the trial

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(c) **GROUND TO BE STATED.**-- Preliminary objections shall state specifically the grounds relied on.

(d) **WHEN RAISED.**-- All preliminary objections shall be raised at one time and in one pleading. They may be inconsistent.

(e) **SERVICE.**-- The condemnee shall serve a copy of the preliminary objections on the condemnor within 72 hours after filing them.

(f) **DISPOSITION.**—

(1) The court shall determine promptly all preliminary objections and make preliminary and final orders and decrees as justice shall require, including the reversion of title.

(2) If an issue of fact is raised, the court shall take evidence by depositions or otherwise.

(3) The court may allow amendment or direct the filing of a more specific declaration of taking.

(g) **COSTS AND EXPENSES.**—

(1) If preliminary objections which have the effect of terminating the condemnation are sustained, the condemnor shall reimburse the condemnee for reasonable appraisal, attorney and engineering fees and other costs and expenses actually incurred because of the condemnation proceedings.

(2) The court shall assess costs and expenses under this subsection.

court finally heard argument on the preliminary objections on November 4, 2010. At no time between June 15, 2010 and November 4, 2010 did Condemnees request permission to amend their preliminary objections to include the aforementioned additional objections. It has long been settled by this Court that a trial court, at its discretion, may permit an amendment to preliminary objections filed pursuant to the Eminent Domain Code in the absence of error or prejudice to the adverse party. See In the Matter of the Condemnation by the Township of Upper St. Clair, 587 A.2d 907, 909 (Pa. Cmwlth. 1991) (citing Department of Transportation v. Schodde, 433 A.2d 143, 145 (Pa. Cmwlth. 1981) (Recognizing that while the filing of preliminary objections is the exclusive procedure for challenging a declaration of taking, such procedural rules are not ends in themselves and that the rules must be construed to promote the administration of justice)).<sup>13</sup> Moreover, due to Condemnees failure to include an objection based on the Act 537 Plan in their original preliminary objections, or to request permission to amend the preliminary objections, the Act 537 Plan and the facts set forth in Condemnees' brief are not in the certified record for review by this Court.

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<sup>13</sup> Although both of these cases were decided under Section 406 of the former Eminent Domain Code, Act of June 2, 1964, Special Sess., P.L. 84, as amended, 26 P.S. §1-406, repealed by the Act of May 4, 2006, P.L. 112, the provisions of Section 406 are now found in Section 306 of the current Eminent Domain Code, which became effective on September 1, 2006.

Accordingly, the trial court's November 12, 2010 orders overruling Condemnees' preliminary objections are affirmed.<sup>14</sup>

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JAMES R. KELLEY, Senior Judge

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<sup>14</sup> We note that “[t]o undo the taking or reduce the scope of the taking, a condemnor may relinquish all or any part of the property condemned by filing a declaration of relinquishment with the court within one year from the filing of the declaration of taking.” In Re: a Condemnation Proceeding by South Whitehall Township Authority, 940 A.2d at 627 n. 3.

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Appellants	:	

**ORDER**

AND NOW, this 21st day of November, 2011, the orders of the Court of Common Pleas of Montgomery County entered in the above-captioned matters are AFFIRMED.

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JAMES R. KELLEY, Senior Judge