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In Re: Mountain Road

IN RE: MOUNTAIN ROAD
Court of Common Pleas of the 39th Judicial District of Pennsylvania,
Franklin County Branch
Civil Action No. 2010-4732

Eminent Domain; Nature, Extent, and Delegation of Power; Public Use; In General. Private Roads; Establishment; Judgment, Order or Decree, and review.

1. The Constitutions of the United States and Pennsylvania mandate that private property can only be taken to serve a public purpose. To satisfy this obligation, the public must be the primary and paramount beneficiary of the taking.
2. In considering whether a primary public purpose was properly invoked, courts have looked for the "real or fundamental purpose" behind a taking.
3. The true purpose of the taking must primarily benefit the public.
4. The primary beneficiary of the opening of a private road, under the Private Road Act (36 P.S. §2731), is the private individual or entity who petitions for such relief. Granted, society as a whole may receive a collateral benefit when landlocked property may be accessed by motorized vehicles, and thus presumably be put to its highest economic use; yet, it cannot seriously be contended that the general population is the primary beneficiary of the opening of a road that is limited to the use of the person who petitioned for it.
5. As the opening of a private road pursuant to the Act does not accomplish a public purpose, it cannot be seen as the exercise of the power of eminent domain
6. Once it's established that Petitioner's primary goal or true purpose in pursuing this litigation is to open the private road to allow for timbering, this still does not conclusively answer the basic question - is the public the primary and paramount beneficiary of the taking of Respondents' property to create a roadway?
7. The public will collaterally benefit from the harvested timber on the property in that otherwise abandoned trees will be used to make valuable products beneficial to the public. However, as noted in In re Forrester, this collateral benefit is not sufficient to demonstrate that the public is the primary and paramount beneficiary of the proposed road.
8. The test for the Private Road Act is not whether there is a public need for the benefit, but rather, whether the public is the primary and paramount beneficiary of the road.
9. Although hunting may legitimately be a public benefit in appropriate circumstances, the Petitioner has presented insufficient evidence to this Court to establish that the public will be the primary and paramount beneficiary of the taking of the Respondents' land through a Private Road Act action. The Petitioner offered no evidence to suggest that any member of the general public, absent family members, has ever or will ever hunt on the land in question. With the exception of a letter dealing with a different tract of land and some materials from the Pennsylvania Game Commission's website, the Petitioner has offered little to suggest that the public will be made aware of their ability to use Petitioner's land for hunting.

Appearances:

Donald L. Kornfield, Esq., *Counsel for Petitioner*

Thomas J. Finucane, Esq., *Counsel for Respondents*

MEMORANDUM OPINION

Krom, J., June 8, 2011

Presently before the Court is Respondents', Lindy C. Lauver as Trustee of the Almira M. Lauver Irrevocable Real Estate Income Only Trust and Almira M. Lauver, life tenant's,^[1] Preliminary Objections to the Amended Petition. For the reasons that follow, the Court overrules sustains one Preliminary Objection, and finds no need to reach a decision as to the second Preliminary Objection.

Facts

Petitioner, Michael M. Marchich^[2] is the personal representative of the Estate of Sara Elizabeth Marchich. Both Petitioner and Respondents own real estate located in Peters Township, Franklin County. Petitioner's property is landlocked, surrounded by Respondents' property on three (3) sides and by properties owned by Samuel Mellott, et al.^[3] and Della Rae Austin^[4] on the northwestern corner. See Petitioner's Exhibit 2. Petitioner, and those using the property in question before him, previously accessed his property by using a right of way on Respondents' property. The right of way connected to Mountain Road, a roadway that is a part of the road system of the Commonwealth of Pennsylvania. However, in recent years Respondents have refused to allow Petitioner to use the right of way. Therefore, Petitioner's property has become landlocked and the closest, most direct access from Petitioner's real estate to Mountain Road is over the existing right of way on Respondents' real estate.

Procedure

Petitioner initiated the action by filing a Petition to Open Private Road on October 26, 2010. On November 24, 2010 Petitioner filed an Amended Petition. Respondents filed Preliminary Objections to Amended Petition on December 13, 2010. On December 30, 2010 Petitioner filed an Answer to Preliminary Objections to Amended Petition. On March 3, 2011 this Court held oral argument. During oral argument in which both parties were represented by counsel, it became evident to the Court that an evidentiary hearing was required to resolve the Preliminary Objections and to determine if there was sufficient evidence to refer the matter to the Board of Viewers. On May 5, 2011 this Court held an evidentiary hearing. Following the hearing both sides submitted written arguments in support of their positions. The matter is now ripe for decision.

Discussion

Respondents present two (2) preliminary objections. The first preliminary objection is a demurrer pursuant to Pa. R.C.P. 1028(a)(4) and challenges the constitutionality of the Private Road Act.^[5] Specifically, Respondents argue, "[o]nly a public body can exercise eminent domain to make private road part of the road system of the Commonwealth of Pennsylvania," and because Petitioner is not a public body, the PRA violates the Fifth Amendment of the United States Constitution and Article 1, Sections 1 and 10 of the Pennsylvania Constitution.

Preliminary objections in the nature of a demurrer "should be sustained only if, assuming the averments of the complaint to be true, the plaintiff has failed to assert a legally cognizable cause of action." Lerner v. Lerner, 954 A.2d 1229, 1234 (Pa. Super. 2008) (quoting Kramer v. Dunn, 749 A.2d 984, 990 (Pa. Super. 2000)). "Preliminary objections in the nature of a demurrer require the court to resolve the issues solely on the basis of the pleadings; no testimony or other evidence outside of the complaint may be considered to dispose of the legal issues presented by the demurrer. All material facts set forth in the pleading and all inferences reasonably deducible therefrom must be admitted as true." Cooper v. Frankford Health Care System, Inc., 960 A.2d 134, 143 (Pa. Super. 2008) (quoting Brosovic v. Nationwide Mutual Insurance Co., 841 A.2d 1071, 1073 (Pa. Super. 2004)). "Where a doubt exists as to whether a demurrer should be sustained, this doubt should be resolved in favor of overruling it." R.W. v. Manzek, 888 A.2d 740, 749 (Pa. 2005) (quoting Bilt-Rite Contractors, Inc., 866 A.2d 270, 274 (Pa. 2005)).

The Pennsylvania Supreme Court recently held, "[t]he Constitutions of the United States and Pennsylvania mandate that private property can only be taken to serve a public purpose. This Court has maintained that, to satisfy this obligation, the public must be the primary and paramount beneficiary of the taking." In the Matter of: Opening a Private Road for the Benefit of O'Reilly, et al., 5 A.3d 246, 258 (Pa. 2010). In the case, O'Reilly owned property that became landlocked after the Commonwealth exercised its eminent domain powers to build Interstate 79. O'Reilly filed an action seeking to open a private road owned by the Appellant,^[6] Mary Lou Sorbara. Sorbara filed preliminary objections alleging an

unconstitutional taking in violation of 5th Amendment of the United States Constitution and Article I, Sections 1 and 10 of the Pennsylvania Constitution because the PRA authorizes the transfer of property from one private property owner to another private property owner for a private use. The Court did not explicitly rule on Sorbara's argument, instead, the Court focused solely on whether the public is the primary and paramount beneficiary of the taking. O'Reilly argued the PRA involves a reasonable regulation of property usage derived from the Commonwealth's police power. The Court rejected O'Reilly's argument because "irrespective of the police powers rubric, a physical invasion and permanent occupation of private property, such as that which would be accomplished by the creation of a private road under the Act, is a taking." O'Reilly, 5 A.3d at 257. The Pennsylvania Supreme Court remanded the case to the Commonwealth Court to ascertain whether the public is the primary and paramount beneficiary.

On May 5, 2011, on remand, the Commonwealth Court remanded O'Reilly to the court of common pleas for a determination of whether the public can be regarded as the primary and paramount beneficiary of the proposed road. In a footnote, the Commonwealth Court noted, "[i]n fact, our Supreme Court continues to hear and decide cases under the PRA, without addressing its constitutionality." In re O'Reilly, 2011 WL 1709846, f.n. 5 (Pa.Cmwlt. May 5, 2011).

Therefore, based on the Supreme Court's direction in O'Reilly, to resolve the Respondents' preliminary objection, this Court must specifically inquire as to whether the public will be the primary and paramount beneficiary of the road. "In considering whether a primary public purpose was properly invoked, this Court has looked for the 'real or fundamental purpose' behind a taking." In re O'Reilly, 2011 WL 1709846, (Pa.Cmwlt. May 5, 2011), quoting Belovsky v. Redevelopment Authority, 54 A.2d 277, 283 (Pa. 1947). The true purpose of the taking must primarily benefit the public. Id. In further attempting to define primary beneficiary, the Commonwealth Court looked to In re Forrester, 836 A.2d 102 (Pa. 2003), which provides,

The primary beneficiary of the opening of a private road is the private individual or entity who petitions for such relief. Granted, society as a whole may receive a collateral benefit when landlocked property may be accessed by motorized vehicles, and thus presumably be put to its highest economic use; yet, it cannot seriously be contended that the general population is the primary beneficiary of the opening of a road that is limited to the use of the person who petitioned for it. Thus, as the opening of a private road pursuant to the Act does not accomplish a public purpose, it cannot be seen as the exercise of the power of eminent domain.

In re O'Reilly, 2011 WL 1709846, (Pa.Cmwlt. May 5, 2011), quoting In re Forrester, 836 A.2d at 106-107.

Respondents argue the public is not the primary and paramount beneficiary of the proposed road because the true purpose of the private road is to allow Petitioner to access the land for timbering purposes. Petitioner agrees that he filed his first Petition initiating this action for the purposes of timbering; however filed the Amended Petition upon consideration of O'Reilly. See Defendant's Exhibit 8 and 9, Requests for Admissions ¶9 and Answer of Petitioner to Requests for Admissions. Respondents argue that Petitioner's argument in favor of opening the private road to allow the public to hunt is disingenuous because the real purpose for pursuing the action is to create a roadway to allow timbering on the landlocked property. Petitioner testified that he would not be pursuing this action if the road could not be used for timbering. Certainly, the Petitioner would not be motivated to expend the resources necessary to bring this action, and ultimately open the roadway if there were not some financial benefit to him or to his family. Because this case would not have been filed without the thought of making the property suitable for timbering, the Court is constrained to find that Petitioner's primary goal or true purpose is to create a roadway suitable for timbering the property. The Court's determination is further supported by Petitioner's Exhibit 4 and Defendant's Exhibits 2, 3, and 4,^[7] correspondence between Michael Marchich and Lindy Lauver, in which Mr. Marchich repeatedly references the use of the road for the purpose of timbering. See Defendant's Exhibits 2 and 3. In only one letter, Petitioner's Exhibit 4/Defendant's Exhibit 2, does Mr. Marchich make reference to hunting, stating simply, "We feel that the property should be left open for all to hunt."

Having concluded that Petitioner's primary goal or true purpose in pursuing this litigation is to open the private road to allow for timbering still does not conclusively answer the basic question-is the public the primary and paramount beneficiary of the taking of Respondents' property to create a roadway? Respondents focus solely on the financial gain that Petitioner will inevitably reap from opening the private road but neglects the other benefits the roadway could or may afford to the public. The public will collaterally benefit from the harvested timber on the property in that otherwise abandoned trees will be used to make valuable products beneficial to the public.^[8] However, as noted in In re Forrester, this collateral benefit is not sufficient to demonstrate that the public is the primary and paramount beneficiary of the proposed road.

Petitioners argue that the public will benefit from opening the road because the public will have the ability to use the land for hunting - nearly year round, every year. Petitioner's admitted documentation from the Pennsylvania Game Commission that shows that another tract of Petitioner's land had been previously placed in the Commission's Cooperative Farm Game Project.^[9] See Petitioner's Exhibit 5. The Farm Game Project appears to be a program under which, through the Game Commission, the public is allowed to hunt on private property. The Petitioner testified that he intends to register the tract of land in question with the Farm Game Project. He has not yet done so.

Respondents argue that Petitioner's land is not eligible for the Farm Game Project because Petitioner's property is only 100 acres when the guidelines require 1,000 acres. The Pennsylvania Game Commission's website states, "[t]he Farm-Game Program requires a landowner, or group of landowners, to place under lease a project area comprising at least 1,000 acres for five or more years."^[10] Petitioner introduced into evidence a letter from William A. Capouillez, Director of the Bureau of Wildlife Habitat Management at the Pennsylvania Game Commission. See Plaintiff's Ex. 5. The letter indicates that Petitioner entered into the Farm Game project in November 1976.^[11] The letter also asks Petitioner to renew his property into the Farm Game Project. The top of the letter has identifying information including "project number", "farm number", "county", and, most importantly the number of acres is listed as 100. Therefore, the renewal letter regarding Petitioner's other property was sent with a full recognition that Petitioner's property was only 100 acres instead of 1,000 acres. Therefore, it appears that the 1,000 acre requirement is not an absolute for the Farm Game Project.

Additionally, Respondents argue, "there was no evidence of a public need for the proposed hunting access across Lauver['s] land." See Letter dated May 20, 2011 to the Honorable Angela R. Krom. However, Respondents' argument misconstrues the test - the test is not whether there is a public need for the benefit, but rather, whether the public is the primary and paramount beneficiary of the road. Further, even if this was the test, a determination of need or necessity would be made by the Board of Viewers with this Court acting in a reviewing capacity.^[12]

The Petitioner argues that the record reflects that timber is harvested only once every forty (40) years; the public will be the primary and paramount beneficiary of the land at all other times. Petitioner argues that access to the property would enable the public to hunt nearly year round, every year.

Although the Court finds that hunting may legitimately be a public benefit in appropriate circumstances, the Petitioner has presented insufficient evidence to this Court to establish that the public will be the primary and paramount beneficiary of the taking of the Respondent's land through a Private Road Act action. The Petitioner offered no evidence to suggest that any member of the general public, absent family members, has ever or will ever hunt on the land in question. With the exception of a letter dealing with a different tract of land and some materials from the Pennsylvania Game Commission's website, the Petitioner has offered little to suggest that the public will be made aware of their ability to use Petitioner's land for hunting. Therefore, the Court is constrained to find that insufficient evidence exists for this Court to find that the public will be the primary and paramount beneficiary of the taking.

The second preliminary objection seeks to strike Paragraph 7,^[13] 12(A)^[14] and 12(D)^[15] of the Amended Petition. Respondents argue that O'Reilly does not specifically refer to deer hunting, therefore, the activity cannot be considered as a factor in determining whether the public is the primary and paramount beneficiary. The Court need not address this preliminary objection, given the Court's finding above.

ORDER OF COURT

June 8, 2011, upon consideration of the Respondents' Preliminary Objections to the Amended Petition, the responses thereto, the briefs, the arguments, the evidence of record, and the law, it is hereby ordered the Respondent's Preliminary Objection is sustained. The Amended Petition to Open Private Road filed November 24, 2010 is dismissed.

^[1]Hereinafter "Respondents."

^[2]Hereinafter "Petitioner."

^[3]Ann Mellott Cushwa and Dale R. Mellott are also listed as the owners.

[4]Neither Mellott nor Austin are parties to the action.

[5]36 P.S. §2731. Hereinafter "PRA."

[6]A home owners association (Hickory on the Green) was also a party to the action.

[7]Petitioner's Exhibit 4, a July 12, 2009 letter from Michael M. Marchich to Lindy Lauver, was also admitted as Defendant's Exhibit 2.

[8]See Mazzante v. McClintock, 976 A.2d 648, 652 (Pa.Cmwith. 2009) ("A public policy reason for construing the Act to permit opening of a private road to a property that already has access is that with many large tracts of forest and mountain land in Pennsylvania, it may be prohibitively expensive to build a road all the way across when access to the far side could be achieved inexpensively by opening a short private road. The Act serves the public interest by opening up otherwise inaccessible land for development.").

[9]Hereinafter "Farm Game Project"

[10]See <http://www.portal.state.pa.us/portal/server.pt?open=514&objID=620379&mode=2>

[11]Petitioner testified that the land currently entered in the Farm Game Project is a farm, not the tract of land that is the subject of these proceedings.

[12]The standard for opening a private road under the Private Road Act is when the "Board of View finds 'such a road is necessary.'" In re Private Road in Speers Boro, II, 11 A.3d 902, 906 (Pa. 2011) (quoting 36 P.S. §2732)). The word "necessary" has been construed as meaning "strictest necessity." Speers, 11 A.3d at 906; ("the bottom line remains a finding of necessity."). A Board of View may consider any factor relevant to determining whether opening a private road is necessary. Id.

[13] Paragraph 7 states, "Deer hunting and other seasonal game hunting is an integral part of controlling and managing the deer and game populations in the Commonwealth of Pennsylvania, for which the public is the primary and paramount beneficiary pursuant to the recent Pennsylvania Supreme Court case of In the Matter of: Opening a Private Road for the Benefit of O'Reilly, et al., 2010 WL 3810005 (Pa. September 30, 2010)."

[14]Paragraph 12(a) states, "The public is and will also be the primary and paramount beneficiary of the opened private road for the following reasons: Petitioner's otherwise landlocked property will be accessible for deer hunting and other game hunting free of charge according to law, and will be open for recreation according to law."

[15]Paragraph 12(D) states, "The public is and will also be the primary and paramount beneficiary of the opened private road for the following reasons: The opened private road will become a part of the road system of the Commonwealth of Pennsylvania."