

IN RE: PRIVATE ROAD IN FANNETT TOWNSHIP, C.P.
Franklin County Branch, A.D. 1987-331

Private Road - Board of View - Necessity

1. The determination of necessity for a private road is a factual matter to be determined by a board of view.
2. The sole condition precedent to the appointment of a board of view is the existence of allegations constituting necessity on its face.
3. Petitioner's existing access to a public road does not automatically eliminate the need for appointment of a board of view.
4. Safety problems with an existing access road may establish a prima facie case of necessity.

Stephen E. Lipson, Esq., Attorney for Petitioner
Kenneth F. Lee, Esq., Attorney for Respondent

OPINION AND ORDER

KELLER, P.J., August 5, 1988:

On October 19, 1987, Sheepmore, Ltd., a Pennsylvania corporation, filed its petition for a rule to show cause why a board of View should not be appointed to lay out a private right of way for a tract of its real estate located in Fannett Township, Franklin County, Pennsylvania. On November 4, 1987, Robert E. Mears filed his answer with new matter raising the issue whether this Court had jurisdiction to appoint a Board of View. On November 23, 1987, the respondent, Robert E. Mears, presented a motion for a hearing and an order was entered scheduling a hearing for December 21, 1987 at 9:30 a.m. An answer to the motion for a hearing was filed on December 4, 1987. By agreement of the parties and in lieu of a hearing a stipulation of facts dated April 14, 1988 was filed and presented to the Court. Pursuant to the request of the Court counsel submitted proposed Findings of Fact, Discussion of Applicable Law, and Proposed Conclusions of Law. The matter is now ripe for disposition.

FINDINGS OF FACT

1. Sheepmore, Ltd., the petitioner herein, is a Pennsylvania corporation and the owner of a certain tract of real estate in Fannett Township, Franklin County, Pennsylvania.

2. Robert E. Mears, respondent herein, is the owner of a tract of real estate contiguous to that of the petitioner.

3. The petitioner's real estate is divided by Legislative Route 28060, which is also known as the Amberson Road.

4. The petitioner's real estate located on the southerly side of Amberson Road is improved with a building described as a barn. To the east of the barn and adjacent to the highway is a parking area. South of the parking area is a 20 foot drop. There is a 5 to 10 foot drop west of the barn. Recently the barn was used for commercial purposes and remains available for such use.

5. Petitioner's real estate located on the southerly side of the highway will not be served by the private road sought by petitioners.

6. Petitioner's real estate located on the north side of Amberson Road is opposite the petitioner's tract on the southerly side, and fronts on the public highway approximately 211.1 feet. The easternmost boundary line extends in a northerly direction 196.4 feet, and the westerly boundary line extends in a northerly direction 166.76 feet. The rear lot line is 193.61 feet and the entire tract contains 38,000 square feet of 0.872 acres. For purposes of identification this tract will hereafter be referred to as Tract #1.

7. Tract #1 is improved with a dwelling house which petitioner alleges also contains a public library. Due to a curve in the highway near the center of the road frontage of Tract #1 the highway is within 12 to 20 feet of the front porch of the dwelling. A very narrow berm is located on the north side of Amberson Road and north of that berm is a 4 to 5 feet high bank which appears to be held in place by a stone wall which extends along most of the road frontage of Tract #1. Steps lead from the berm to the building on Tract #1. There are several large trees located just north of the stone wall and in front of or close to the front of the dwelling.

8. Tract #1 is not served by a private driveway.

9. Amberson Road is a two-lane highway with a very narrow berm on each side and with a curve to the right near the center of Tract #1 for traffic proceeding in a westerly direction.

10. The petitioner sought permission from the Department of Transportation for a highway occupancy permit to construct a private driveway from Amberson Road onto Tract #1 at an unknown location.

11. The Department of Transportation by its letter of September 8, 1987, advised petitioner that it could not "grant access at the

requested location because the site distance is inadequate for a driveway to this roadway with the existing speed limit. Considering grades and other conditions, the minimum site distance for your driveway only has 117 feet left and 133 feet right."

12. The Department of Transportation's letter suggests "However, there are options to investigate that may permit you to construct a driveway as follows (. . .)" which inter alia include:

- (1) Relocating the driveway within the boundaries of your property to achieve the minimum required sight distance.
- (2) Acquiring additional right-of-way to relocate driveway or removing vegetation or embankment to obtain minimum required sight distance.
- (3) Constructing one-way in and out driveways at opposite corners of your property.
- (5) Constructing a right turn acceleration lane or deceleration lane.

13. There is no evidence that the petitioner investigated any of the options suggested by the Department of Transportation as a means of securing a permit to install a private driveway.

14. There appears to be ample parking space for vehicles at the rear of the dwelling on Tract #1.

15. The respondent's real estate adjoins the petitioner's Tract #1 on the west.

16. The real estate of the respondent is subject to an easement of right-of-way known as Community Center Road. For the benefit of Amberson Valley Athletic Association, access to Community Center Road is from the north side of Amberson Road. The Community Center Road proceeds from Amberson Road around a shed belonging to respondent and then a short distance from Tract #1 makes a left turn away from Tract #1.

17. The respondent permitted petitioner to use a private right-of-way across respondent's real estate to enter upon Tract #1 at the northwest corner of the tract. It is unclear whether petitioner's officers, employees, agents and invitees used the Community Center Road or the road marked "Private Drive Mears" on stipulation Exhibit 2 to gain access to Tract #1.

18. Respondent terminated the permissive user by placing boulders on his real estate. Respondent alleges that the permissive use was terminated because it was abused and because it involved a portion of his real estate upon which he intends to erect a garage.

FIRST NATIONAL BANK AND TRUST CO.



13 West Main Street P.O. Box 391
Waynesboro, Pennsylvania 17268

(717) 762-8161

**TRUST SERVICES
COMPETENT AND COMPLETE**



Member F. D. I. C.



Citizens

NATIONAL BANK OF SOUTHERN PENNSYLVANIA

(717) 597-2191
(717) 762-3121
(717) 263-8788

**Located in
Greencastle - Waynesboro - State Line - Chambersburg**
Member FDIC

LEGAL NOTICES, cont.

FICTITIOUS NAME NOTICE

NOTICE IS HEREBY GIVEN, pursuant to the provisions of the Fictitious Name Act, Act No. 1982-295, of the filing, with the Department of State of the Commonwealth of Pennsylvania, on March 10, 1989, an application for a certificate for the conducting of a business under the assumed or fictitious name of COUNTRYSIDE MANOR, with its principal place of business at 9471 Heshshire Hill Court, Waynesboro, PA 17268. The names and addresses of the persons owning or interested in said business are Darwyn W. Benedict, 9471 Heshshire Hill Court, Waynesboro, PA 17268; Krissandra M. Benedict, 9471 Heshshire Hill Court, Waynesboro, PA 17268; J. Bradley Martin, 9298 Meadowbrook Circle, Waynesboro, PA 17268.

Martin and Kornfield
17 North Church Street
Waynesboro, PA 17268

4/21/89

FICTITIOUS NAME NOTICE

NOTICE IS HEREBY GIVEN, pursuant to the provisions of the Fictitious Name Act, Act No. 1982-295, of the filing with the Department of State of the Commonwealth of Pennsylvania on March 8, 1989, an application for the conducting of a business under the assumed or fictitious name of GUTLER GOOSE SCREEN PRINTING, with its principal place of business at 431 Miracle Lane, Chambersburg, Pennsylvania. The name and address of the persons owning or interested in said business are Richard W. Burkett, Jr., 431 Miracle Lane, Chambersburg, Pennsylvania and Thomas J. Oliver, 1323 Hade Road, Chambersburg, Pennsylvania.

DILORETO AND COSENTINO
326 Trust Company Building
Chambersburg, PA 17201

4/21/89

NOTICE IS HEREBY GIVEN - Pursuant to the provisions of the Act of Assembly of December 16, 1982, P.L. 1309 and its amendments and supplements, there was filed with the Secretary of the Commonwealth of Pennsylvania at Harrisburg, Pennsylvania, on March 13, 1989, an application for registration for the conducting of a business under the fictitious name of AMERICAN HEATING AND AIR CONDITIONING, with its principal place of business at 11931 Buchanan Trail East, P.O. Box 218, Rouzerville, Pennsylvania 17250. The name and address of the entity interested in said business is: McLaugh-

LEGAL NOTICES, cont.

lin's Home Heating Service, Inc., 11931 Buchanan Trail East, P.O. Box 218, Rouzerville, Pennsylvania 17250.

ULLMAN, PAINTER AND MISNER
Timothy W. Misner
10 East Main Street
Waynesboro, PA 17268

4/21/89

FICTITIOUS NAME NOTICE

NOTICE IS HEREBY GIVEN, pursuant to the provisions of the Fictitious Name Act, Act No. 1982-295, of the filing, with the Department of State of the Commonwealth of Pennsylvania, on April 21, 1989, an application for a certificate for the conducting of a business under the assumed or fictitious name of SESCO, with its principal place of business at 6524 Buchanan Trail East, Waynesboro, PA 17268. The name and address of the person owning or interested in said business is Souders Industries, Inc., 6524 Buchanan Trail East, Waynesboro, PA 17268.

Richard J. Walsh, Esq.
Maxwell, Maxwell, Dick & Walsh
Wayne Building
92 West Main Street
Waynesboro, PA 17268

4/21/89

NOTICE IS HEREBY GIVEN - Pursuant to the provisions of the Act of Assembly of December 16, 1982, P.L. 1309 and its amendments and supplements, there was filed with the Secretary of the Commonwealth of Pennsylvania at Harrisburg, Pennsylvania, on March 15, 1989, an application for registration for the conducting of a business under the fictitious name of WAYNESBORO AUTO PARTS with its principal place of business at 614 South Potomac Street, Waynesboro, Pennsylvania 17268. The name and address of the entity interested in said business is: Franklin County Automotive, Inc., 614 South Potomac Street, Waynesboro, Pennsylvania 17268.

ULLMAN, PAINTER AND MISNER
Timothy W. Misner
10 East Main Street
Waynesboro, PA 17268

4/21/89

19. Petitioner alleges Tract #1 is landlocked by reason of the topography of the tract and Amberson Road, the refusal of the highway occupancy permit due to the curve restricting the sight distance, the absence of safe and adequate walkways on either side of the public road, and the 55 mph speed limit in effect.

20. The petitioner seeks the laying out of a private road for its benefit from Amberson Road over Community Center Road, and then in an easterly direction across other lands of the respondent to Tract #1 at the northwest corner of said tract. Petitioner alleges this proposed private road is the closest path and the only feasible path from Amberson Road to Tract #1.

21. The respondent alleges the closest route from Tract #1 to Amberson Road is from the porch of the dwelling on Tract #1 down the steps and onto the public road.

22. The lands of the petitioner located south of Amberson Road could be used for a parking area to serve as Tract #1.

23. The petitioner concedes Tract #1 is not land-locked in the sense that it does not adjoin the public road but alleges that the private road is necessary to permit individuals making deliveries to the dwelling and for the safety of all visitors and business invitees.

24. The petitioner alleges that visitors and business invitees not making deliveries must park on the opposite (south) side of the road and walk across the road at a blind curve which is extremely dangerous due to the speed limit on the road, and lack of sight distance.

DISCUSSION

The applicable statute regarding the appointment of a Board of View is 36 P.S. Section 2731 which provides:

The several courts of quarter sessions shall, in open court as aforesaid, upon the petition of one or more persons, associations, partnerships, stock companies, or corporations, for a road from their respective lands or leaseholds to a highway or place of necessary public resort, or to any private way leading to a highway, or upon the petition of the chief executive officer of any executive or administrative department of the State Government for a road from any public highway across any lands of any person, association, or corporation to the boundary line of any lands owned, controlled or administered by the Commonwealth, direct a view to be had of the place where such a road is requested, and a report thereof to be made, in the same manner as is directed by the said act of thirteenth

June, one thousand eight hundred and thirty-six. 1836, June 13, P.L. 551 Section 11, 1901, April 4, P.L. 65, No. 32, Section 1; 1927, April 28, P.L. 485 Section 1.

This is followed by 36 P.S. Section 2732 which provides for the proceedings on reports of viewers. It states:

If it shall appear by the report of viewers to the court directing the view, that such road is necessary, the said court shall direct what breadth the road so reported shall be opened, and the proceedings in such cases shall be entered on record, as before directed, and thenceforth such road shall be deemed and taken to be a lawful private road. 1836, June 13, P.L. 551, Section 12.

In light of these statutes and relevant cases

“the singular issue on a rule to show cause why a Board of Viewers should not be appointed is *whether the petition contains the requisite information so as to require that a Board be appointed.*” (emphasis added) *In Re Private Road in Nescopeck Township*, 281 Pa. Super. 341, 422 A.2d 199 (1980) citing *Little Private Road, Peters Township*, 35 Wash. Co. 75 (1956) (hereinafter cited as *Little Private Road*).

Therefore, if the pleadings and stipulation of facts presently before this court contain the requisite information, this court by statute has no choice but to appoint a Board to view the site and subsequently file a report of its findings. If the Board determines a private road is necessary, appellate review by the Trial court remains limited to reviewing jurisdictional issues, i.e. the regularity of the proceedings, questions of law and whether there has been an abuse of discretion. *In Re Private Road in Greene Township*, 343 Pa. Super. 304, 494 A.2d 859 (1985).

The requisite information required for this court to appoint a Board of View does not include a preliminary judicial determination on the question of necessity. Rather, the determination of necessity is a factual matter to be determined by the Board of View. *Pope v. Muth*, 332 Pa. Super. 264, 481 A.2d 355 (1984) citing *Mattei v. Huray*, 54 Pa. Smwlth. 561, 566, 422 A.2d 899, 901 (1980).

“The question of necessity does not arise until after the viewers have viewed the premises and made their report to the Court.” *Little Private Road*, 35 Wash. Co. at 78.

If this court was to determine the absolute issue of necessity at this stage in the proceedings, we would exceed our jurisdiction.

FIRST NATIONAL BANK AND TRUST CO.



13 West Main Street P.O. Box 391
Waynesboro, Pennsylvania 17268

(717) 762-8161

**TRUST SERVICES
COMPETENT AND COMPLETE**



Member F. D. I. C.



Citizens

NATIONAL BANK OF SOUTHERN PENNSYLVANIA

(717) 597-2191
(717) 762-3121
(717) 263-8788

**Located in
Greencastle - Waynesboro - State Line - Chambersburg**
Member FDIC

LEGAL NOTICES, cont.

THIS NOTICE TO A LAWYER AT ONCE.
IF YOU DO NOT HAVE A LAWYER OR
CANNOT AFFORD ONE, GO TO OR TEL-
EPHONE THE FOLLOWING OFFICE TO
FIND OUT WHERE YOU CAN GET LEGAL
HELP.

Legal Reference Service of
Franklin-Fulton Counties
Court House
Chambersburg, Pennsylvania 17201
Telephone No. - Chambersburg
264-4125, Ext. 213
DAVID C. CLEAVER, P.C.
By Lynn Y. MacBride, Esq.
1035 Wayne Avenue
Chambersburg, PA 17201

4/28/89

LEGAL NOTICES, cont.

"The Act of 1836, in providing for the appointment of viewers in a petition for a private road, creates a tribunal for a special purpose and endows it with an authority that no court has the right to destroy . . ." *Little Private Road*, 35 Wash. Co. at 78.

At this stage of the proceedings the sole condition precedent to the appointment of a Board of View is the existence of allegations constituting "necessity on its face". *Little Private Road*, 35 Wash. Co. at 78. On the basis of our finding of facts, we conclude a prima facie case of necessity which warrants further inquiry by a Board of View has been alleged.

First, petitioner's existing access to a public road from both its tracts of real estate does not automatically eliminate the need for the appointment of a Board of View to determine the necessity of an alternative access to Tract #1. This factual scenario has not in other cases hindered a court's initial appointment of a Board of View. See: *Little Appeal*, 180 Pa. Super. 555, 119 A.2d 587 (1955) (hereinafter cited as *Little*). However, the necessity of the second access is a factual matter to be determined by the Board from viewing the premises and if necessary by holding hearings. *Little*, 180 Pa. Super. at 558, 119 A.2d at 589.

Second, as evidenced by Stipulate Exhibit #4, the "house" is located on a curve of Amberson Road making construction of a private way with adequate visibility from the petitioner's property to the Road very difficult. Although the Department of Transportation has suggested various options that *may* permit the construction of a driveway, we are satisfied that the feasibility of such options is not a matter for this court to decide preliminarily but a factual determination for the Board of View to explore, determine and report.

Third, as evidenced by Stipulation Exhibit #5, photographs 1, 2, 3 and 5, the existing curve may pose a threat to pedestrians who would have to utilize the only existing parking area available diagonally across Amberson Road from the Petitioner's "house" if other means of access to the home property proved unacceptable to the Department of Transportation.

Fourth, Exhibit #5's photographs also shows narrow shoulders or road berm along Amberson Road upon which pedestrians would have to walk. To reach the "house", pedestrians would apparently have to walk approximately 150 feet along a road with

virtually no shoulder, from the parking area located diagonally across from the house, on a curve with traffic travelling at a lawful speed of up to 55 mph to reach the steps located near the home. The four to five foot sloping banks in front of the "house" would appear to render safe entry to the petitioner's property other than by those steps impractical.

These evident safety problems lead us to conclude that Sheepmore, Ltd.'s petition does not contain the requisite information to establish a prima facie case of necessity. Whether an on site investigation will lead to a finding that a private road is necessary must be determined by a Board of View and not by this Court.

ORDER OF COURT

NOW, this 5th day of August, 1988, the rule of the Petitioner, Sheepmore, Ltd. is made absolute.

George S. Glen, Esq., Frank C. Rhodes and M. Lee Hartzok are appointed as a Board of Viewers to further investigate whether a private road for the benefit of the Petitioner is necessary; and if determined to be necessary lay out and open a private road from Petitioner's real estate on the north side of Legislative Route 28060 to said Legislative Route.

FIRST NATIONAL BANK AND TRUST CO.



13 West Main Street P.O. Box 391
Waynesboro, Pennsylvania 17268

(717) 762-8161

TRUST SERVICES
COMPETENT AND COMPLETE



Member F. D. I. C.



Citizens

NATIONAL BANK OF SOUTHERN PENNSYLVANIA

(717) 597-2191
(717) 762-3121
(717) 263-8788

Located in

Greencastle - Waynesboro - State Line - Chambersburg
Member FDIC
