

SENT
SEP 12 2017

CONDEMNATION OF FEE SIMPLE TITLE TO 0.069 ACRES OF VACANT LAND AND CERTAIN EASEMENTS OWNED BY BRANDYWINE VILLAGE ASSOCIATES (UPI #30-5-226) AND CONDEMNATION OF FEE SIMPLE TITLE TO 1.93 ACRES AND A TEMPORARY GRADING EASEMENT OVER 0.26 ACRES OF VACANT LAND OWNED BY L&R PARTNERSHIP AND JOHN R CROPPER (UPI #30-2-47) FOR A PUBLIC STREET : IN THE COURT OF COMMON PLEAS
: CHESTER COUNTY, PENNSYLVANIA
: CIVIL ACTION
: NO. 2014-11237

OFFICE OF THE
PROthonotary
CHESTER CO., PA.

SEP -8 PM 3:27

FILED

Attorneys for East Brandywine Township: Stacy L. Fuller, Esq., Patrick M. McKenna, Esq., John E. D. Larkin, Esq.

Attorneys for Condemnees: Paul A. Prince, Esq., Patrick J. Kurtas, Esq., Eugene Orlando, Jr., Esq.

DECISION

L&R Partnership ("L&R"), Brandywine Village Associates ("BVA") and John R. Cropper ("John Cropper") (together, "Condemnees") have interposed preliminary objections in response to East Brandywine Township's ("Township") declaration of taking. Following extensive discovery, a hearing was held over seven days and the parties then submitted proposed findings of fact and conclusions of law and supporting briefs. The matter is ready for decision.

Findings of Fact:

Properties

1. The properties at issue consist of three parcels located in East Brandywine Township.
2. To the north is a roughly triangular, 10.46-acre parcel owned by L&R and John Cropper ("L&R Parcel").
3. The Township has condemned the southeastern edge of the L&R Parcel, through which it plans to install a road connecting North Guthriesville Road and SR322 ("the Connector Road").
4. The condemned portion of the L&R parcel contains a significant amount of wetlands and a pond. (N.T. 3/27/17, 64:4-11)

5. To the southwest of the L&R Parcel is a largely undeveloped tract owned by the Watters family, which Carlino has agreed to purchase ("Carlino Parcel").

6. To the southeast of the L&R Parcel is a 10.89-acre tract owned by BVA, which was developed by BVA as a shopping center sometime in or about 1994 ("BVA Development").

7. Through a cross easement agreement with the Watters family, BVA currently holds an access easement and a superjacent stormwater management easement on the southeastern corner of the Carlino Parcel ("Cross Easement Agreement").

8. BVA previously held an easement on the Carlino Parcel for a sewer treatment facility, but that easement no longer exists. (N.T. 5/5/17 at 9:11-23)

9. More than a decade ago, the Watters family entered into an Agreement of Sale with Gambone Brothers Development Company ("Gambone") for the development of the Carlino Parcel, including the construction of a similar connector road that would have run through the western edge of BVA's easements over the Carlino Parcel.

10. The Gambone development was never constructed.

11. Carlino has developed its own land development plan, which includes a connector road, which, if constructed, will follow the property line between the Carlino Parcel and the BVA Development, i.e., the Connector Road.

12. On or about August 20, 2014, the Township and Carlino entered into a Memorandum of Understanding ("MOU") in which the Township agreed to condemn BVA's easements over the Carlino Parcel to facilitate the construction of the Connector Road. In exchange, Carlino agreed to construct the Connector Road and dedicate it to the Township upon completion. Carlino also agreed to indemnify the Township for all legal costs incurred as a result of that condemnation, including litigation with Condemnees.

13. On November 17, 2014, the Township filed a Declaration of Taking and supporting documents necessary to effect the condemnation of (1) the southeastern corner of the L&R Parcel, (2) BVA's access easement over the Carlino Parcel, (3) BVA's stormwater easement over the Carlino Parcel, and (4) a narrow strip of land on the southern boundary of the BVA Development for use as a deceleration lane.

14. As of the date of the hearings, the most recent Carlino development plan indicated that the condemned land will be principally consumed by the Connector Road itself, the deceleration lane feeding into the Connector Road, a stormwater detention basin located on the condemned portion of the L&R Parcel, and a stormwater pipe that will run along the lower southern boundary of the condemned portion of the L&R Parcel.

15. In addition to these features, Carlino's plan shows eight parking spaces and approximately a third of a bank pad site within the excess area of BVA's access easement.

16. Although the development plans submitted at trial no longer represent the most recent version of Carlino's development plans, the parties have agreed that the new plans leave the areas condemned by the Township materially unchanged.

Norman Ulrich

17. Norman Ulrich testified on behalf of Condemnees as a licensed professional engineer with a background by education and experience in civil and municipal engineering. (N.T. 3/27/17, 33:6-9, 33:25-34:10) Mr. Ulrich was accepted as an engineering expert. (N.T. 3/27/17, 36:8-9)

18. Mr. Ulrich's firm was retained by Condemnees to review and evaluate plans and submissions regarding the Carlino shopping center development ("Carlino Development") and served as the project manager of that review. (N.T. 3/27/17, 36:13-24)

19. Mr. Ulrich identified a typographical error in the Declaration of Taking, namely, that the heading and body of the text describes the condemned property as 1.93 acres, whereas Exhibit "E" to the Declaration of Taking describes the condemned property as 1.97 acres, and Exhibit "F" to the Declaration of Taking describes the condemned property as 1.972 acres. (N.T. 3/27/17, 40:2-41:20)

20. As a result of the configuration of the parcels, the Carlino Parcel naturally drains stormwater downhill into the BVA Development. (N.T. 3/27/17, 110:8-111:1)

21. Mr. Ulrich disputed Carlino's claim that but for the Connector Road, Carlino would have been able to handle all of the stormwater on the Carlino Parcel and would not have needed to place any of its stormwater on the condemned property (N.T. 3/27/17, 43:4-47:4)

22. Mr. Ulrich opined that for Carlino to develop its site as presently planned, Carlino will need to use a basin on the condemned property to manage its stormwater. (N.T. 3/27/17, 52:19-24)

23. Mr. Ulrich later conceded that it is possible that Carlino could manage its stormwater on its own parcel depending on final design of the Carlino Development. (N.T. 3/27/17, 109:16-23)

24. Mr. Ulrich testified that ARNA, the company that prepared Carlino's plans for submission to the Township, utilized an alternate methodology to determine that Carlino would be able to manage its stormwater runoff in the manner required by the relevant Township Ordinance. Mr. Ulrich testified that he did not agree with ARNA's methodology and, furthermore, that the ARNA analysis was wrong. (N.T. 3/27/17, 51:7-19, 97:14-98:3)

25. The BMP manual is a set of guidelines for stormwater best management practices promulgated by the Pennsylvania Department of Environmental Protection, most recently in 2006. The BMP manual addresses the effect of rain gardens, which are part of the Carlino plan. (N.T. 3/27/17, 94:10-21, 96:18-19)

26. The TR-55 is a book that outlines a design analysis process used as a guideline in evaluating stormwater management plans. The TR-55 manual does not address rain gardens. (N.T. 3/27/17, 95:4-9, 96:16-17)

27. Mr. Ulrich's analysis was conducted using the TR-55 manual and discounted the BMP manual, although he was aware that the Carlino site design included rain gardens. (N.T. 3/27/17, 116:18-20)

28. The Township will be required to manage stormwater that flows onto the Connector Road from the Carlino Parcel under present conditions. (N.T. 3/27/17, 87:16-24)

29. After development, the Township will still be obligated to manage certain of the stormwater that flows onto the Connector Road from the Carlino Parcel. (N.T. 3/27/17, 90:7-10)

30. Mr. Ulrich opined that if only the Connector Road drained to the L&R Property, the size of the drainage basin proposed for that site could be reduced from 53,945 cubic feet to 28,761 cubic feet. However, Mr. Ulrich did not know if the drainage

basin's depth was appropriate for its size as planned, or whether the depth should be increased or decreased. (N.T. 3/27/17, 58:3-13, 100:11-22)

31. Mr. Ulrich suggested that the total size of the drainage basin proposed for the L&R Property could be further reduced, to 13,206 cubic feet, if the Connector Road was revised such that only the rearmost portion of it was dedicated to the Township, and the remainder was retained as Carlino's private property; however, Mr. Ulrich admitted that if the Township only accepted dedication of half the Connector Road, he was "not sure how that works." (N.T. 3/27/17, 60:12-61:11, 106:10-14)

32. Mr. Ulrich testified that he believed it would be "highly possible" for Carlino to redesign its plan to fit both the proposed bank and the necessary access to its center in the absence of a Connector Road. (N.T. 3/27/17, 105:11-15)

33. Mr. Ulrich admitted that it would be impermissible under existing PennDOT regulations to maintain two egress points onto SR322 at the existing access entrance and the proposed connector road. (N.T. 3/27/17, 101:14-21)

34. Mr. Ulrich admitted that "the Township has to destroy this access easement, has to tear up the pavement there. Otherwise PennDOT won't allow us to pave the road." (N.T. 3/27/17, 101:22-102:2)

35. Mr. Ulrich agreed that, in order to make use of the portion of the stormwater easement that would not be consumed by the road, BVA would require Township permission to construct a system of underground pipes and pumps to cross under the Connector Road. (N.T. 3/27/17, 103:12-16)

36. Mr. Ulrich testified that he believed the new proposed access point to the BVA Development was unsafe for certain types of trucks because it provides an insufficient turning radius, but admitted that trucks could use the other entrances to the BVA Development. (N.T. 5/16/17, 150:23-151:16)

37. Because he did not analyze the existing access point, Mr. Ulrich was unable to testify to whether the new plan was safer, less safe, or the same as the existing conditions. (N.T. 5/16/17, 152:1-9)

Scott Piersol

38. Scott Piersol has been the Township manager and emergency management coordinator for the Township for twenty-two years. (N.T. 3/27/17, 120:6-10)

39. Mr. Piersol testified that there is an advantage to the Township in reaching agreements with developers to construct township roads, like the Connector Road, because it is less expensive for the developer to build a road than the Township because of Pennsylvania's prevailing wage laws. (N.T. 3/28/17, 96:2-17)

40. The Township prepared a transportation impact fee study in October of 2003 that did not include the Connector Road. (N.T. 3/27/17, 134:3-13)

41. Mr. Piersol testified that sometime in 2005-2006 the Township had entertained a plan whereby Gambone proposed constructing a development similar to that of Carlino, including a connector road. (N.T. 3/28/17, 96:22-98:16)

42. The Gambone plan's connector road passed through some, but not all, of the same easements that have been condemned for the Connector Road. (N.T. 3/28/17, 98:4-11)

43. The Gambone plan proposed a stormwater detention basin in approximately the same location and size on the L&R Parcel as is proposed by Carlino. (N.T. 3/28/17, 99:12-100:16)

44. Although the then proposed connector road might have had the effect of subdividing the Gambone parcel and causing it to fall below the minimum tract size for development, the Township granted or was willing to grant Gambone a variance to resolve that issue. (N.T. 3/28/17, 112:17-113:16)

45. If Carlino were to apply for the same variance today, Mr. Piersol is aware of no reason it would not receive such a variance. (N.T. 3/28/17, 114:8-10)

46. When Carlino approached the Township to develop the Carlino Parcel, the Township continued to desire a connector road between North Guthriesville Road and SR322. (N.T. 3/28/17, 114:15-115:10)

47. The reason the Township wishes to construct a connector road is because "it creates a much safer road situation with the intersection of North Guthriesville Road and Route 322 because now an eastbound movement or left turn coming out of that road requires the motorist to turn across three lanes of traffic." (N.T. 3/28/17, 115:6-10)

48. Mr. Piersol testified that he has personally witnessed accidents and near accidents at the intersection of SR322 and North Guthriesville Road several times per year. (N.T. 3/28/17, 115:17-116:6)

49. New development in the area, including the Carlino Development, is anticipated to make the intersection of SR322 and North Guthriesville Road more dangerous. (N.T. 3/28/17, 118:4-20)

50. Mr. Piersol testified that Carlino has the option to build the Connector Road for the Township in exchange for a reduction in its traffic impact fee; if it chooses not to do so, the Township will assess the full impact fee, and the Township itself will construct the Connector Road. (N.T. 3/28/17, 119:5-10)

51. Mr. Piersol participated in drafting the MOU. (N.T. 3/27/17, 128:2-4)

52. In correspondence, Andreas Heinrich, the Township's traffic engineer, informed the Township that an earlier plan for the Connector Road would create queueing issues, and should be amended by adding a second access to the BVA Development. (N.T. 3/27/17, 142:16-143:7)

53. The Carlino plan includes a second entrance, at a point where the existing BVA Development has already created an ingress/egress. (N.T. 3/27/17, 151:9-152:8)

54. Mr. Heinrich suggested to the Township that BVA could further alleviate queueing by altering its own parking lot setup. (N.T. 3/27/17, 147:23-148:4)

55. The existing Carlino plan addresses all of the issues raised by Mr. Heinrich. (N.T. 3/28/17, 104:4-24)

56. Mr. Piersol attended a series of meetings between Township officials and Carlino employees and officers to discuss the Carlino development, including the effect the development might have on the BVA Development. During the April 10, 2010 meeting, two members of the Board of Supervisors attended as well as Mr. Piersol and voiced support for the proposed Carlino development. (N.T. 3/27/17, 177:9-23)

57. The April 10, 2010 meeting was not advertised. (N.T. 3/27/17, 183:9-10)

58. Another meeting took place on June 23, 2010, which three members of the Board of Supervisors attended as well as Mr. Piersol. (N.T.) The subject of that meeting was, again, the Carlino development. (N.T. 3/27/17, 185:2-15, 3/28/17, 23:13-15)

59. At the June 23, 2010 meeting, Carlino's representatives presented a plan for the development of the Carlino Parcel that did not include the Connector Road. (N.T. 3/28/17, 11:1-25)

60. At the June 23, 2010 meeting, one of the Township Supervisors, Jay Fischer, suggested that one of the parcels could be condemned more cheaply than if purchased from the owner, leaving more "money available to go to the project." (N.T. 3/28/17, 16:3-16)

61. Mr. Fischer and Mr. Voltz indicated that they "would be willing to condemn" certain portions of the BVA Development and the L&R parcel because "the Township was interested in the Connector Road." (N.T. 3/28/17, 22:16-18)

62. The June 23, 2010 meeting was not advertised. (N.T. 3/27/17, 188:10-12)

63. Mr. Piersol advised the Board that it could not send a quorum of the Board to unadvertised meetings. (N.T. 3/28/17, 13:23-25)

64. Stacey Fuller, Esq., the Township Solicitor, gave the Board of Supervisors the same advice. (N.T. 3/28/17, 55:19-22)

65. Thereafter, meetings were conducted with Carlino representatives with no quorum of the Board of Supervisors present. (N.T. 3/28/17, 57:9-15)

66. On March 18, 2013, Mr. Piersol received email from Attorney Fuller in which she offered to allow Carlino to choose whether to proceed with or without the Connector Road. (N.T. 3/28/17, 33:17-34:4)

67. In internal follow-up emails, Attorney Fuller described the no road plan as a "threat" by Carlino against the Township. (N.T. 3/28/17, 34:15-22)

68. In 2006, Attorney Fuller suggested that the Township would be willing to favorably consider a variance request from a similar plan to allow development within the normal set-back requirements in order to construct a Connector Road. (N.T. 3/28/17, 37:14-38:7)

69. On August 2, 2010, Mr. Piersol wrote to Carlino's representatives on the subject of the Connector Road. In that letter, he indicated that the Township was agreeable to accepting dedication and maintenance responsibilities for the Connector Road. He also indicated that the entrance to the Connector Road should be shifted 120-foot east, to the location depicted on the most current Carlino plans. (N.T. 3/28/17, 46:6-47:3)

70. One reason for shifting the egress of the Connector Road was to align with a proposed road across the street; however, that development was later abandoned. (N.T. 3/28/17, 47:11-24)

71. Another reason for shifting the egress of the Connector Road was to straighten the road alignment. (N.T. 3/28/17, 47:21-24)

72. Another reason was that the Mr. Heinrich had requested that the Connector Road be straightened for reasons having to do with sound traffic engineering. (N.T. 3/28/17, 102:2-23)

73. After discussing potential development strategies with Carlino, the Township began to insist that Carlino agree to indemnify it against litigation related to the development. (N.T. 3/28/17, 85:8-24)

74. Once the Carlino Development was ready for formal action by the Board of Supervisors, the Board initially did not give notice of its intention to vote on Carlino issues to BVA. This is consistent with the Township's policy, which is that interested parties' "burden to be aware of the submission through the legal notice." (N.T. 3/28/17, 67:21-68:2)

75. In spite of that policy, the Board ultimately did give special notice to Paul Prince, Esq., counsel for BVA, of its intention to vote on the MOU. (N.T. 3/28/17, 90:4-11)

76. On March 15, 2012, Mr. Piersol wrote a letter in which he described the road as being "definitely a public purpose[.]" He described the BVA/Carlino sewer dispute, which is not a subject of the condemnation, as "a bit less of a public purpose." (N.T. 3/28/17, 69:9-14)

77. Mr. Piersol believes that Carlino's final plan continues to require resolution of an effluent disposal issue. (N.T. 5/4/17, 85:19-14)

Mark Kocsi

78. Mark Kocsi has been the Township Chief of Police since 2002. (N.T. 3/28/17, 130:24-131:2)

79. In this capacity, Chief Kocsi is familiar with the roadways and traffic control devices in the Township. (N.T. 3/28/17, 131:10-12)

80. Chief Kocsi is not a traffic engineer. (N.T. 3/28/17, 144:20-22)

81. Chief Kocsi did not participate in the formal design process for the Connector Road, but made comments to an early draft of the design for the Connector Road. (N.T. 3/28/17, 144:1-16)

82. In response to an early version of the Connector Road design, Chief Kocsi was concerned with the possibility of traffic backup from the signalized intersection at SR322 into the shopping center and, also, the lack of speed control devices like stop signs and speed humps. (N.T. 3/28/17, 137:7-139:13)

83. The current Carlino plan for the Connector Road includes crosswalks and stop signs. (N.T. 3/28/17, 151:10-25)

84. Chief Kocsi also suggested that the Connector Road might be moved to the western side of the Carlino development, rather than the eastern border with the BVA Development. Chief Kocsi's proposal, however, was made without reference to PennDOT's regulations governing the distance between two signals or the distance between egresses onto a state highway. (N.T. 3/28/17, 142:1-11, 152:20-153:8)

85. Chief Kocsi testified that accidents regularly occur at the intersection of SR322 and North Guthriesville Road, the most recent occurring "a couple of weeks" prior to his testimony. Chief Kocsi's knowledge is limited to reportable accidents. (N.T. 3/28/17, 154:2-16)

86. The intersection is dangerous because traffic turning left from North Guthriesville onto SR322 must cross two lanes of SR322 at the site of a blind hill. (N.T. 3/28/17, 156:1-10)

87. PennDOT has designated the section of SR322 at the intersection of North Guthriesville Road as an "aggressive driving area" and provides grant funds for additional policing. (N.T. 3/28/17, 157:22-158:10)

88. Chief Kocsi testified that he believes the proposed Connector Road will have a "huge effect" on the traffic flow of the area, ameliorating the danger of the intersection. (N.T. 3/28/17, 159:1-9)

89. Chief Kocsi also testified that he believes drivers are already taking advantage of the BVA Development as a pass-through, which creates a dangerous situation within the parking lot when drivers disregard stop signs. (N.T. 3/28/17, 159:10-160:13)

Arnold Kring

90. Arnold Kring has been a Township Supervisor since January of 2012. (N.T. 5/3/17, 4:23-5:3)

91. Mr. Kring is one of the Supervisors who signed the MOU. (N.T. 5/3/17, 5:21-24)

92. Mr. Kring testified that, in determining the details of the property to be condemned, including the size of the condemnation, he relied on Township personnel, including the Township's engineers. (N.T. 5/3/17, 8:17-9:1)

93. Mr. Kring also testified that the condemnation in general, and the Connector Road in particular, was intended by the Township for a public purpose, namely its use by the general public. (N.T. 5/3/17, 12:9-16)

94. Mr. Kring further testified that the Township had exercised its independent judgment in determining that construction of the Connector Road was in the public interest. (N.T. 5/3/17, 12:9-16)

Francis Hanney

95. Francis Hanney is the traffic services manager of PennDOT's District 6, which district encompasses the properties at issue. (N.T. 5/3/17, 13:19-25)

96. Mr. Hanney testified that he reviewed Carlino's Highway Occupancy Permit for the Connector Road sometime before August 22, 2016 and that no Highway Occupancy Permit had been issued for construction of the Connector Road as of that date. (N.T. 5/3/17, 16:14-24, 17:3-12)

97. In correspondence dated August 22, 2016, Mr. Hanney informed BVA that the Township was required by the PA Highway Act to obtain approval from the Secretary of Transportation to condemn property for the Connector Road; however, Mr. Hanney testified that this was not necessarily a statutory requirement, but internal PennDOT policy. (N.T. 5/3/17, 18:14-20, 22:6-9, 26:2-13)

98. On April 6, 2011, PennDOT issued a preliminary review letter of an earlier draft of Carlino's land development plan that references a requirement to provide notice to adjacent landowners, but is silent with respect to any requirement that the Secretary's approval be obtained. (N.T. 5/3/17, 27:3-23)

99. In a February 29, 2012 review letter, PennDOT specifically instructed that "East Brandywine Township will acquire the right-of-way from Brandywine Village Associates to accommodate the proposed deceleration lanes associated with the modified access intersection," again, without reference to any requirement that the Secretary's approval be obtained. (N.T. 5/3/17, 29:13-20:6)

100. In an April 24, 2017 review letter, PennDOT provided specific instructions on how the affected property owners should be notified, but made no reference to any requirement that the Secretary's approval be obtained. (N.T. 5/3/17, 1:4-22)

Joseph LaCagnina

101. Joseph LaCagnina is Giant Food Store's director of real estate. (N.T. 5/3/17, 38:1-8)

102. On behalf of Giant, Mr. LaCagnina worked with Carlino to develop their land use plans and to facilitate the construction of a Giant Supermarket in the Carlino Development. (N.T. 5/3/17, 39:2-8)

103. Mr. LaCagnina either did not know or could not recall the particulars of why the present layout was chosen. (N.T. 5/3/17, 43:3-11)

104. Giant's executive committee approved Carlino's 2010 site plan. (N.T. 5/3/17, 44:2-4)

105. Under the terms of Carlino's lease agreement with Giant, Carlino needed Giant's approval to abandon the Connector Road altogether. (N.T. 5/3/17, 67:13-18; 79:6-18)

106. At one point, representatives of Carlino sent an email proposing to discuss abandoning the Connector Road and Mr. LaCagnina communicated to others inside Giant's real estate division that possibility. (N.T. 5/3/17, 67:13-18, 69:4-16)

107. No alternative site plan without the Connector Road was ever communicated to Giant's executive committee for review and approval, and Giant never approved or rejected such an alternate plan. (N.T. 5/3/17, 80:20-22)

Marc Jonas, Esq.

108. Marc Jonas is a Pennsylvania land use and real estate attorney who testified on behalf of Condemnees. (N.T. 5/4/17, 11:22-12:1)

109. Attorney Jonas testified that BVA's 1994 land development plan, which was approved by Township resolution, had incorporated the Cross Easement Agreement. (N.T. 5/4/17, 22:1-24)

110. Attorney Jonas opined that the Cross Easement Agreement now ran with the land as a result of its inclusion in the approved plan. (N.T. 5/4/17, 23:3-13; 25:3-9)

111. Attorney Jonas opined that the Township had discretion to enforce the Cross Easement Agreement. (N.T. 5/4/17, 26:19-24)

112. Attorney Jonas observed that the inclusion of BVA's access easement in the Township made that easement "essentially, official." He distinguished this from a dedication, however, which he admitted required both an offer from the landowner and acceptance by the Township, neither of which had occurred here. (N.T. 5/4/17, 31:3-21)

113. Attorney Jonas did not review any of the condemnation documents, condemnation pleadings, pleadings in other actions between the parties or decisions entered in other actions between these parties. (N.T. 5/4/17, 34:17-35:20)

114. Attorney Jonas conceded that he is not an eminent domain expert. (N.T. 5/4/17, 33:21)

115. Attorney Jonas testified that whether a Township could condemn eased property was outside the scope of his testimony, but that it was his opinion that it could. (N.T. 5/4/17, 33:13-17)

116. Attorney Jonas testified that as long as the Township did not exceed the scope of its articulated public purpose, it essentially had plenary power to acquire property by eminent domain. (N.T. 5/4/17, 33:22-25)

117. Specifically, Attorney Jonas testified that Carlino was bound by the Cross Easement Agreement "absent some extraordinary intervening power, and the Township has the power to condemn." (N.T. 5/4/17, 37:10-13)

Peter Miller

118. Peter Miller is the president of Carlino Commercial Development. (N.T. 5/4/17, 23-24)

119. Mr. Miller testified that the Township required that the egress onto SR322 be moved to the eastern edge of the Carlino Development. (N.T. 5/4/17, 49:12-18)

120. Mr. Miller testified that in August of 2013, Carlino developed a plan without the Connector Road, which it referred to as the Alt-1 plan. (N.T. 5/4/17, 51:6-11)

121. On or about August 2, 2013, Mr. Miller received email from the Township, forwarding email from Attorney Fuller that suggested Carlino could proceed without the Connector Road at its option. (N.T. 5/4/17, 52:5-15)

122. In Mr. Miller's opinion, reimagining development without the Connector Road was likely to result in further delays caused by anti-competitive litigation from BVA. (N.T. 5/4/17, 53:19-21)

123. Mr. Miller testified that Carlino had been informed by the Township that it was "adamant" about the construction of the Connector Road, and that he believed there had been a fatality as a result of its absence. (N.T. 5/4/17, 62:16-29)

124. In any event, if Carlino proceeded with a plan that did not include the Connector Road, it would incur a traffic impact fee of between \$1.5-1.9 million dollars. (N.T. 5/4/17, 63:18-23)

125. By constructing the Connector Road, Carlino will receive a credit against that impact fee of all but "some residual amount." (N.T. 5/4/17, 64:1-5)

126. Mr. Miller testified that he engaged in negotiations with Leonard and Richard Blair, representing BVA, regarding development of the proposed Carlino development, but that, early on, Leonard Blair promised to oppose any Carlino plan that included a grocery store. Among Mr. Miller's efforts was an attempt to purchase the property and rights being condemned. (N.T. 5/4/17, 65:18-67:6)

Richard Blair

127. Richard Blair asserted that he was the "designated and authorized representative" of BVA, a general partnership between John Cropper and L&R Partnership. (N.T. 5/5/17, 4:16-24)

128. Mr. Blair testified that, following BVA's purchase of the land on which it would develop a shopping center, BVA constructed a sewer treatment facility on the Watters' parcel. (N.T. 5/5/17, 7:16-8:9)

129. BVA use of this sewer treatment facility ended when it connected to the public system. (N.T. 5/5/17, 9:11-23)

130. BVA has never used the stormwater easement it holds on the Watters' parcel to drain stormwater runoff from its development, but rather manages its stormwater using underground tanks. (N.T. 5/5/17, 10:23-11:6)

131. Mr. Blair testified, contrary to Mr. Miller, that no one from Carlino had ever approached him to acquire the condemned property. (N.T. 5/5/17, 14:10-25, 39:21-40:16)

132. Mr. Blair testified that he met with Mr. Miller and Peter Carlino, III, in Reading, and that at this meeting, Mr. Miller raised the issue of purchasing the BVA Development. (N.T. 5/5/17, 19:5-23, 39:6-10)

133. Mr. Blair disputed Mr. Miller's claim that BVA's real objection to the Carlino development is the installation of a competing grocery store, but maintained, to the contrary, that he did not care whether Giant constructed a grocery store on the neighboring property. Nonetheless, Mr. Blair is a party to a pending federal lawsuit in which he accuses Giant of behaving in an anticompetitive fashion. (N.T. 5/5/17, 20:24-21:7, 47:9-22)

134. BVA considered purchasing the L&R tract in 2004 with the hope of building approximately 40 town homes on it, but ultimately chose not to do so because of the issues surrounding the adequacy of water and sewer access. (N.T. 5/5/17, 25:1-11)

135. L&R later purchased the L&R Parcel, and approached the Township about building a townhome development on it after the Declaration of Taking had been filed, but the Township declined to discuss the possibility with L&R. (N.T. 5/5/17, 25:17-26:9)

136. Mr. Blair suggested that he would be amenable to the Carlino Development if he were allowed to unilaterally impose conditions on its approval, including that the Connector Road not interfere with the future development of BVA's properties, permission from the Township to construct a residential development on the L&R Parcel, and future access to the BVA Development (N.T. 5/5/17, 32:1-15, 45:14-46:15)

137. Mr. Blair admitted that drivers use the existing BVA Development as a cut through to avoid the intersection between SR322 and North Guthriesville Road. (N.T. 5/5/17, 33:14-24)

138. Mr. Blair admitted that delivery trucks use the rear access point to enter the BVA Development (N.T. 5/5/17, 43:1-7)

139. Mr. Blair testified that, in exchange for the condemnation, he expected "some sort of Township help with us." (N.T. 5/5/17, 46:11-14)

Leonard Blair

140. Leonard Blair testified that he met with Peter Miller regarding the Carlino Development on three occasions, but felt that Mr. Miller's negotiation style was "his way or the highway" and they made no headway in resolving their differences. (N.T. 5/10/17, 49:16-51:3)

John Cropper

141. John Cropper is the 50% owner in the L&R Parcel and the BVA Development. (N.T. 5/10/17, 48:22-49:1, 5/16/17, 11:6-12)

142. Mr. Cropper and his father owned Croppers Market, which formerly operated in the BVA Development. Mr. Cropper hopes to reopen a grocery market in the BVA Development. (N.T. 5/16/17, 7:23-8:3, 25:10-12)

Andreas Heinrich

143. Andreas Heinrich is a traffic engineer and transportation planner working as the consulting traffic engineer for the Township. (N.T. 5/10/17, 5:2-10)

144. Mr. Heinrich urged realigning the Connector Road as it was originally proposed in the Gambone plan to its present alignment, running entirely parallel to the Carlino/BVA boundary. (N.T. 5/10/17, 10:17-22)

145. Mr. Heinrich explained that one reason for the change was to align the Connector Road intersection with a then proposed road on the other side of the street. (N.T. 5/10/17, 11:1-20)

146. Mr. Heinrich also explained that it was important to shift the Connector Road east in order to maximize the distance between signals along SR322. (N.T. 5/10/17, 11:17-20, 13:3-15)

147. Mr. Heinrich testified that PennDOT has no written rule regarding the distance between signals, but the "general rule of thumb is to try to achieve a minimum of a thousand foot spacing centerline to centerline between successive signals." (N.T. 5/10/17, 13:19-22)

148. Mr. Heinrich believed that the distance between the existing access easement's egress onto SR322 and the signal at Bollinger Road, located to the west of

the access easement, was approximately 900 feet; however, regardless of the exact distance, Mr. Heinrich testified that he would prefer to place the Connector Road's egress onto SR322 as far to the east as possible, in order to maximize the distance between signals "up to a quarter mile." (N.T. 5/10/17, 36:10-11, 37:1-7)

149. For the same reason, Mr. Heinrich testified that the Connector Road could not be located on the western side of the Carlino property. (N.T. 5/10/17, 43:4-44:1)

150. Mr. Heinrich also requested that the Connector Road run straight in order to avoid placement of the bank on the far western side of the Carlino property, which he believed would result in unsafe driving conditions. (N.T. 5/10/17, 14:16-24)

151. Mr. Heinrich testified that it was a best engineering practice to align roads with property boundaries. (N.T. 5/10/17, 16:4-10)

152. There is no ability to place a light at the intersection between SR322 and North Guthriesville Road, because there are insufficient warrants to allow such a signalization. (N.T. 5/10/17, 17:1-18:23)

153. Mr. Heinrich testified that once the Connector Road is constructed with access to SR322 at the southeastern corner of the Carlino parcel, the remainder of the access easement must be destroyed per PennDOT regulations. (N.T. 5/10/17, 19:13-20:4)

154. Mr. Heinrich testified that he is satisfied with the traffic flow and safety of the Connector Road's layout. (N.T. 5/10/17, 45:2-12)

Stacey Fuller, Esq.

155. Stacey Fuller is the Township Solicitor for the Township, and has been since 2004. (N.T. 5/10/17, 74:7-10)

156. Attorney Fuller, as Solicitor, was initially skeptical of the condemnation for the Connector Road. (N.T. 5/10/17, 101:8-102:2)

157. Attorney Fuller specifically pushed back against Carlino's counsel and urged Carlino to work together with BVA to resolve whatever issues were created by virtue of the Cross Easement Agreement. (N.T. 5/10/17, 129:16-130:12)

158. Attorney Fuller also urged Carlino to act conservatively and obtain variances and other zoning relief from the Zoning Hearing Board, which zoning relief had

previously been available with Township support in similar development plans for the parcel. (N.T. 5/10/17, 102:13-103:4)

159. Attorney Fuller echoed the testimony of Mr. Piersol and Attorney Miller that, while Carlino was free to pursue a development plan without the Connector Road, doing so would have increased the effective cost of their traffic impact fee by "something close to \$2 million to the Township." (N.T. 5/10/17, 134:1)

160. Attorney Fuller also echoed Mr. Piersol's testimony that had the Township collected the two million dollar (\$2,000,000) traffic impact fee, it would have used those funds to construct the Connector Road on its own, first using its eminent domain power to condemn the entire length of the necessary construction. (N.T. 5/10/17, 134:16-135:1)

161. Attorney Fuller agreed that the Township has not filed a petition with the Orphans Court regarding the present condemnation action under the Donated and Dedicated Property Act, 53 P.S. § 3381, *et seq.* (N.T. 5/16/17, 5:11-6:10)

Mark Padula

162. Mark Padula has been a civil engineer for twenty-three years. Mr. Padula testified as a fact and expert witness, with engineering expertise in stormwater management. (N.T. 5/16/17, 37:23-24, 39:21-40:12)

163. Mr. Padula was hired as a consultant by the Township and participated in the development and review of the Carlino land development application, with a particular emphasis on the Connector Road's stormwater management facilities. (N.T. 5/16/17, 39:1-12, 44:16-45:4)

164. Contrary to Mr. Ulrich, Mr. Padula testified that he understood ARNA's stormwater calculations to be based on best management practices that incorporated the rain gardens to be installed on the Carlino site, which will slow the rate at which stormwater drains from the Carlino development. (N.T. 5/16/17, 45:24-49:25)

165. Mr. Padula testified that the Township's stormwater obligations with respect to the Connector Road is to ensure that the post-developed runoff rates and volumes be controlled to the level of the pre-developed rates and volumes. (N.T. 5/16/17, 41:5-8)

166. In so doing, the Township must manage direct rainfall and also runoff from the Carlino property as it is presently configured. (N.T. 5/16/17, 41:9-23)

167. Mr. Padula opined that bioretention basins should be designed to maximize surface area for two reasons: first, shallower basins are preferred for safety reasons; second, best practices requires a drainage basin with a surface area "that is no less than eight times smaller than the drainage area getting to it or five times smaller than the impervious area draining to it." (N.T. 5/16/17, 52:7-18)

168. Mr. Padula opined that, even if absolutely no water from any source other than the Connector Road were to drain to the contemplated detention basin on the L&R Parcel, he would not have reduced the surface area of that basin. (N.T. 5/16/17, 54:1-18)

169. Mr. Padula also noted that the Township had an obligation to install the pipe that will laterally cross the L&R Parcel to handle pre-existing stormwater from the L&R Parcel, which will no longer have access to its existing drain because of the construction of the Connector Road. (N.T. 5/16/17, 55:12-56:10)

170. The pipe the Township will install is not larger than necessary to meet the Township's obligations. (N.T. 5/16/17, 56:11-16)

Charles Dobson

171. Charles Dobson is a civil engineer, licensed professional engineer and president of Inland Design, a consulting engineering company. Mr. Dobson is familiar with the Carlino Development because the Township retained his company as its municipal engineer for the development. (N.T. 5/16/17, 76:17-20, 76:25-77:3, 78:15-79:8)

172. In addition to being a fact witness, Mr. Dobson was qualified as an engineering expert. (N.T. 5/16/17, 80:2-3)

173. Mr. Dobson worked with Mr. Padula on reviewing Carlino's application, and Mr. Dobson agreed with Mr. Padula that the stormwater detention basin proposed for the L&R Parcel is adequately sized to handle runoff from the Connector Road, and that he would not change the surface area of the detention basin, even if the total runoff to the basin were reduced. (N.T. 5/16/17, 80:8-81:1)

174. Mr. Dobson agreed with Mr. Padula that the Township is obligated to install the drainpipe laterally on the L&R Parcel, and that its size and location would not change based on the volume of water it will carry. (N.T. 5/16/17, 81:2-9)

175. Mr. Dobson opined that the alignment of the Connector Road as depicted on the Carlino Plan was generally consistent with good engineering practice. (N.T. 5/16/17, 81:17-82:4)

176. Mr. Dobson opined that running the Connector Road through the Carlino Development, as opposed to along its eastern edge, would be inconsistent with good engineering practice. (N.T. 5/16/17, 82:5-25)

177. Mr. Dobson testified that the Township could not run the Connector Road along the eastern edge of the Carlino Development and allow the remaining portion of the access easement to stay, because it would create inherent vehicular conflicts. (N.T. 5/16/17, 86:1-18)

178. Even if the pavement of the access easement were removed and replaced with grass, Mr. Dobson was concerned that the holder of the easement could attempt to exercise the easement in the future, which would create the same inherent vehicular conflicts. (N.T. 5/16/17, 88:10-18)

179. Mr. Dobson does not believe that the Connector Road will be dangerous for trucks entering the BVA Development. (N.T. 5/16/17, 88:21-91:10, 97:7-98:6, 106:10-109:2)

Preliminary Objections

180. Condemnees have raised sixteen preliminary objections to be considered, which are:

(1) The land taken is in excess of that which is reasonably required to serve the public purpose. (Preliminary objections, Jan. 7, 2015, at ¶ 4(A))

(2) The Declaration of Taking contains an insufficient recital of the purpose of the condemnation. (Preliminary objections, Jan. 7, 2015, at ¶ 4(A)(2))

(3) The purpose of the Condemnor in filing the Declaration of Taking is not to install a new Township street from Horseshoe Pike to North Guthriesville Road as alleged. The recital of purpose in taking the 1.93 acres fails to note it is for a detention basin the condemnation of which by a second class township is not authorized by law. (Preliminary objections, Jan. 7, 2015, at ¶ 4(A)(3))

(4) The condemnation violates Section 204(a) of the Private Property Protection Act, 26 Pa.C.S. § 204(a), which prohibits the taking of private property in order to use it for private enterprise. (Preliminary objections, Jan. 7, 2015, at ¶ 4(A)(5))

(5) The area to be taken as designated in the Declaration of Taking is wantonly injurious to the Condemnees. (Preliminary objections, Jan. 7, 2015, at ¶ 4(A)(7))

(6) The taking is intended for a conditional future use that may never come to pass, the installation of the street being dependent on Carlino East Brandywine LLP's successful Declaratory Judgment action and approved land development constituting the road a future hope based on sheer speculation. (Preliminary objections, Jan. 7, 2015, at ¶ 4(A)(8))

(7) The takings were never properly authorized by the Resolution adopted by the Board of Supervisors of East Brandywine Township. (Preliminary objections, Jan. 7, 2015, at ¶ 7)

(8) The Declaration of Taking is defective because it fails to include all Condemnees necessary to acquire fee simple title as set forth in the Declaration, specifically the individual owners of BVA, their tenants, subtenants, employees, concessionaires, licensees, customers, and invitees. (Preliminary objections, Jan. 7, 2015, at ¶ 13)

(9) The documents attached to the Declaration of Taking do not demonstrate a concrete plan for the use of the specific property taken for a public road. (Preliminary objections, Jan. 7, 2015, at ¶ 19)

(10) The Declaration of Taking impermissibly seeks to widen or improve a state highway, which is barred by 53 P.S. § 67304 absent the consent of PennDOT. (Preliminary objections, Jan. 7, 2015, at ¶ 21)

(11) The Declaration of Taking condemns property greater than 120-feet in width, the maximum size of a right-of-way for any Township of the Second Class. (Preliminary objections, Jan. 7, 2015, at ¶ 21)

(12) An earlier Township resolution, on August 20, 2014, authorized the Township's Memorandum of Understanding with Carlino, which required the condemnation now at issue, and the Declaration of Taking's failure to attach that resolution makes it defective and untimely. (Preliminary objections, Jan. 7, 2015, at ¶ 30)

(13) Townships of the Second class are barred from enacting resolutions, and the resolution that authorized the Declaration of taking is therefore illegal. (Preliminary objections, Jan. 7, 2015, at ¶ 31)

(14) There is no public benefit to the Connector Road. (Preliminary objections, Jan. 7, 2015, at ¶ 35)

(15) The takings violate 71 P.S. § 512, 36 P.S. § 670-911, and 67 Pa. Code § 441.8(j)(5) (Order, Sep. 16, 2016)

(16) The takings are a violation of Section 10508(4)(iv) of the Municipalities Planning Code. (Order, Sep. 16, 2016)

Discussion:

Condemnees have raised sixteen Preliminary objections which, broadly speaking, may be divided into three types: (1) an assertion that the condemnation is not for a public purpose; (2) an assertion that the condemnation is procedurally flawed; and (3) an assertion that the Connector Road is illegal or administratively barred from construction. Each is discussed below after we first address the burden of proof.

Burden of Proof

Preliminary objections are the exclusive method of challenging the propriety of the exercise of the power to condemn property under the Eminent Domain Code. Appeal of McCoy, 153 Pa.Cmwth. 504, 621 A.2d 1163, 1165 (1993). Condemnees bear the burden of proof in sustaining its preliminary objections. In re Condemnation of Real Estate by Borough of Ashland, 851 A.2d 992, 996–97 (Pa.Cmwth. 2004). Our Courts have called this burden a “heavy one” and afford municipalities a presumption that the condemnor has acted properly. Appeal of Waite, 163 Pa.Cmwth. 283, 641 A.2d 25 (1994).

Our authority to review the exercise of the power of eminent domain is limited and governed by judicial respect for the doctrine of the separation of powers of government. Our Supreme Court enunciated this principle in Weber v. Philadelphia:

First, it is to be presumed that municipal officers properly act for the public good. Second, courts will not sit in review of municipal actions involving discretion, in the absence of proof of fraud, collusion, bad faith or arbitrary action equating an abuse of discretion. Third, on judicial review, courts, absent proof of fraud, collusion, bad faith or abuse of power, do not inquire into the Wisdom [sic] of municipal actions and Judicial discretion should not be substituted for Administrative discretion.

Weber v. City of Philadelphia, 437 Pa. 179, 262 A.2d 297, 299 (1970) (citations omitted).

Bearing this in mind, we consider Condemnees' objections.

1. The Condemnation is for a public purpose, namely, the installation of the Connector Road for the use of the general public.

Eight of Condemnees' objections contend, in one fashion or another, that the Township's condemnation is not intended for a public purpose.¹

A. The Township's eminent domain authority is governed by constitutional principles and the Eminent Domain Code in this instance, and not by the more restrictive provisions of the Property Rights Protection Act.

Townships of the second class, like the Township, have statutory authority to condemn real property. 53 P.S. § 68401, *et seq.* Pennsylvania's Eminent Domain Code, 26 Pa.C.S.A. § 101, *et seq.*, provides the "complete and exclusive procedure and law to govern all condemnations of property[.]" 26 Pa.C.S.A. § 102. Takings of private land must be for a public use, and only to the "extent reasonably required by the public purpose for which the power is exercised." Reading Area Water Auth. v. Schuylkill River Greenway Ass'n, 627 Pa. 357, 100 A.3d 572, 578 (2014)(citing, Belovsky v. Redevelopment Auth. of City of Philadelphia, 357 Pa. 329, 54 A.2d 277, 283 (1947)). Whether an intended purpose is "a public use is highly fact-dependent." Reading Area Water Authority, 100 A.3d at 580. To that end, it is well settled that a "taking does not 'lose its public character merely because there may exist in the operation some feature of private gain, for if the public good is enhanced it is immaterial that a private interest also may be benefited.'" In re Legislative Route 62214, Section 1-A, 425 Pa. 349, 229 A.2d 1, 3 (1967). Roads, in particular, "almost always benefit the owners of land through which they are laid out, and are often constructed at the request of individuals *** but it has never been held that the laying out of a highway *** is invalid on that account." Id. Our Supreme Court has held that "if a street is to be open to public travel it is well settled that it is for the public use, although it is of especial convenience or advantage to certain individuals, or even if its sole or principal object is to enhance the value of the land through which it passes and the entire cost is met by special assessments on the land thus benefited." Id. (citing, 2 Nichols, Eminent Domain s 7.512(1) (3rd ed. 1963)).

Against this landscape, Pennsylvania's Property Rights Protection Act ("PRPA"), 26 Pa.C.S.A. § 201, *et seq.*, prohibits condemnations of private property for private use,

¹ Preliminary objections, Jan. 7, 2015, at ¶¶ 4(A), 4(A)(2), 4(A)(3), 4(A)(5), 4(A)(7), 4(A)(8), 19, and 35.

except under certain specified circumstances. 26 Pa.C.S.A. § 204(a). The PRPA is more restrictive in scope than preexisting constitutional protections against the state's power of eminent domain. Reading Area Water Authority, 100 A.3d at 583.

PRPA, 26 Pa.C.S.A. § 204(b), sets forth a list of exceptions to the Act's restrictions. One such exception applies where a private enterprise "occupies an incidental area within a public project, such as retail space, office space, restaurant and food service facility or similar incidental area." 26 Pa.C.S. § 204(b)(2)(iii). Another exception applies where there is, on or associated with the property taken, "a threat to public health or safety." 26 Pa.C.S.A. § 204(b)(3). Finally, an exception applies where the condemned property "is used or to be used for any road, street, highway, trafficway, or for property to be acquired to provide access to a public thoroughfare for a property which would be otherwise inaccessible as the result of the use of eminent domain or for ingress, egress or parking of motor vehicles." 26 Pa.C.S.A. § 204(b)(9). Each of these three exceptions applies to the takings in this case.

During seven days of hearings, multiple witnesses confirmed that the intended purpose and the actual outcome of the condemnation will be the construction of a road connecting North Guthriesville Road and SR322 and support facilities necessary for that road. The Declaration of Taking states that the condemnation is for this purpose. Multiple witnesses testified that the Connector Road is important to the Township because it will alleviate traffic at the existing intersection of SR322 and North Guthriesville Road, which has been the site of multiple accidents. Chief Kocsi provided evidence of multiple accidents at the intersection; some serious enough to result in hospitalization. The Township anticipates that the intersection will become more dangerous over time due to increased development. Witnesses for both sides testified that drivers are already using the BVA Development as a cut-through to avoid the intersection, demonstrating a public interest in routing traffic away from that intersection. The Connector Road is a road that will be open to the public, which is a sufficient public purpose to justify condemnation. In re Legislative Route 62214, Section 1-A, 229 A.2d at 3.

B. The Township's only purpose is the construction of the Connector Road, and not a private benefit for Carlino or a harm to BVA.

Condemnees have argued that regardless of the construction of the Connector Road, the Township's real purpose for condemning their property and easements is to harm their economic interests to the benefit of Carlino. In support of this argument, Condemnees point to the Township's repeated approvals of Carlino's land development applications. Additionally, Condemnees point to meetings between Township representatives and Carlino, sometimes attended by multiple members of the Board of Supervisors. Finally, Condemnees rely on the testimony of its expert, Norm Ulrich. This argument fails for four reasons.

First, the Township desired a connector road before the Carlino Development was proposed. The Township first attempted to construct a connector road sometime in 2005-2006, when the Township entertained a Gambone Brothers plan to construct a development similar to that of Carlino, including a connector road. It is not credible that the Township colluded with Carlino to harm Condemnees five years prior to Carlino's first development application.

Second, the condemnation at issue has, at most, a modest effect on BVA's operations. Although the condemnation will result in the loss of BVA's access easement, BVA will retain access to SR322 at roughly the same location. The installation of the Connector Road will provide access to SR322, since BVA will gain a second egress along the Connector Road. BVA has suggested that delivery trucks will have greater difficulty entering the shopping center using the Connector Road; however, that evidence was equivocal at best. Furthermore, delivery trucks currently use and can continue to use a rear access point to enter the BVA Development. BVA will also lose its existing stormwater easement, but Mr. Blair testified that no stormwater from the existing center is currently or has ever been diverted to that easement. Instead, BVA manages its stormwater using underground tanks. And, finally, the L&R Parcel that the Township has condemned in fee simple is, presently, undeveloped and irrelevant to the BVA Development.

Third, the Township has not offered Carlino the unfettered support that Condemnees suggest. To the contrary, the Township denied Carlino's land

development application, which denial Carlino appealed. Judge Nagle ultimately held that Carlino's revised land development plan, including many of the features Condemnees now suggest are improper, such as the bank site, parking, and sewer access, was approvable.

Fourth, Condemnees' reliance on Mr. Ulrich's testimony in support of their claim that the Township lacks a public purpose is misplaced. Although qualified as an expert, Mr. Ulrich never testified that his opinions were held to a reasonable degree of professional or engineering certainty. Such testimony or a close analogue is a requirement for admission and consideration of an expert's opinion. Com. v. Passmore, 2004 PA Super 336, 857 A.2d 697, 713 (Pa. Super. Ct. 2004)(expert must offer her opinion to a reasonable degree of medical certainty; qualifying an opinion as probable contravenes reasonable certainty); Kovach v. Cent. Trucking, Inc., 2002 PA Super 313, 808 A.2d 958, 959 (Pa. Super. Ct. 2002)(expert must testify with reasonable certainty and will not be permitted to guess or state judgment on mere conjecture).

Mr. Ulrich's testimony made clear that his opinions were based on assumptions and guesswork. Mr. Ulrich testified that he was unable to opine "with any degree of certainty" on the subject of one of his opinions, whether Carlino was able to manage all the stormwater that fell on its property without using any of the condemned parcels, but that it was "a possibility." (N.T. 3/27/17 109:1-23) Mr. Ulrich also testified that he believed the new turning radii of the Connector Road were dangerous, but because he performed no analysis of the existing turn radii, Mr. Ulrich was unable to testify to whether the new plan was safer, less safe, or the same as the existing conditions.

In contrast, multiple fact witnesses testified that the intersection of SR322 and North Guthriesville Road is dangerous under existing conditions, and that the Township's plan for the Connector Road to alleviate those dangerous conditions predated the Carlino Development. It is not credible that Supervisor Kring, Chief Kocsi, the Township's Traffic Engineer, and the Township's Manager all conspired to manufacture a pretextual purpose to benefit Carlino and harm BVA years before Carlino entered into an agreement of sale with the Watters family.

In short, despite Condemnees' efforts to show otherwise, the Township's only purpose is to construct a connector road with an intended public purpose and not to harm Condemnees.

C. Carlino's proposed use of the condemned property, if permitted at all, will be incidental and is not subject to the PRPA.

Condemnees argue that the condemnation is not entirely intended for use as a road. Instead, the majority of the L&R Parcel will be used for stormwater facilities, some of which may be used by Carlino to manage stormwater from its development. Furthermore, a fraction of the access easement will be renounced by the Township altogether, and the present Carlino plan calls for development on that area, including approximately one-third of its proposed bank site and eight parking spaces.

However, the evidence suggests that the Township cannot allow the existing egress of the access easement to remain once it routes the Connector Road to SR322 as planned. All witnesses, including Condemnees' witnesses, agreed that PennDOT regulations do not permit two egresses onto SR322 in such close proximity. Neither can the Township allow the existing access easement to continue as an unpaved access easement, since doing so allows the holder of the easement to exercise its right of access in the future, which would be contrary to PennDOT policy and would create a dangerous traffic pattern.

Carlino's original design called for the Connector Road to follow the access easement and exit onto SR322 at the present signalization. Under this plan, Carlino's bank pad and parking were entirely outside the BVA's easements, and could be built by right and without Township assistance. Andreas Heinrich, Township traffic engineer and transportation planner, insisted that the location of the bank pad site and Connector Roads be reversed. Mr. Heinrich testified that doing so was necessary to maximize the distance between signals along SR322, to avoid an unsafe traffic pattern within the bank parking lot, and to align the Connector Road with the property boundary, which is a traffic engineering best practice. The result of the relocation is that although a fraction of Carlino's proposed bank and some parking will be located on land that is presently a BVA access easement, Carlino receives no net benefit. But for the Township's request

that the Connector Road be moved, Carlino would have the right to erect precisely the same bank, as was proposed and approved for the earlier Gambone development.

With respect to the L&R Parcel, there is no evidence that the Township's taking of the L&R parcel was affected by Carlino's hope that it would be able to use that site for stormwater management. Both Mr. Padula and Mr. Dobson testified that, regardless of Carlino's use of the Township's stormwater facilities, both the drain pipe and the stormwater detention basin would remain the same size and in the same location.

The evidence wholly supports the conclusion that the condemnation is intended for the construction of the Connector Road. The PRPA does not apply to the project because the condemnation is intended to be used to construct a "road, street, highway, trafficway[.]" 26 Pa.C.S.A. § 204(b)(9). To the extent some land will be occupied by Carlino, that occupation is nothing more than "an incidental area within a public project, such as retail space, office space, restaurant and food service facility or similar incidental area", which is also an exception to the PRPA. 26 Pa.C.S.A. § 204(b)(2)(iii). Finally, the land the Township is taking that is not to be used exclusively as a paved road is being taken to manage its stormwater obligations and to avoid the threat to public safety that will be caused by the location of the existing access easement once the Connector Road is built, which is a third exception to the PRPA. 26 Pa.C.S.A. § 204(b)(3).

Importantly, all of Carlino's encroachments on the proposed condemnation are subject to Condemnees' pending land development appeals. They are not intended by the Township but, rather, are the natural result of the Township's condemnation of an easement across land owned by Carlino. Once the easement is removed by condemnation, ownership of the fee reverts to Carlino to do with as it pleases. Carlino may, ultimately, be prevented from proceeding with its proposed bank pad site, parking spaces, or its use of the Township's stormwater facilities. There is no evidence that such a result will have any impact on the construction of the Connector Road.

Regardless, because the PRPA, by its terms, does not apply to this condemnation, the Township's obligation is to do no more than come forward with a legitimate public purpose. It is Condemnees' burden to show that, in fact, Carlino, as a private entity, is the primary intended beneficiary of the condemnation. Here, the

Township has met its obligation. The Township's intent is to build a road open to the general public, which is a legitimate public purpose. In re Legislative Route 62214, Section 1-A, 229 A.2d at 3.

D. The analysis of Reading Area Water Authority is not apposite because the PRPA does not apply to the instant condemnation.

In support of their position that the Township has not stated a valid public use, Condemnees principally rely on the decision in Reading Area Water Authority, 100 A.3d at 574. The case is inapposite.

In Reading Area Water Auth., the Reading Area Water Authority ("RAWA") exercised its eminent domain powers to condemn a utility easement across property owned by the Schuylkill River Greenway Association so that it could supply water to a development proposed by Fortune Development, L.P. Id. at 574. There, as here, the developer was required to indemnify RAWA and pay the costs associated with the taking. Id. Unlike this case, however, the sewage and stormwater facilities RAWA intended to construct would be owned and operated by the developer. Id. at 576. Greenway filed preliminary objections, which the lower court sustained, holding that the PRPA applied and barred the taking. The Commonwealth Court reversed the lower court and Greenway appealed.

The Supreme Court began its review by observing that, under general constitutional principles, a condemnation need not be exclusively for a public purpose, but the public must be the primary beneficiary. Id. at 577. To that end, the Court noted that the federal Supreme Court held in Kelo v. City of New London, "that economic development can qualify as a public use for Fifth Amendment purposes even where private enterprise is the engine of such development." Kelo v. City of New London, Conn., 545 U.S. 469, 125 S.Ct. 2655, 162 L.Ed.2d 439 (2005)). The Court characterized the PRPA as the Pennsylvania General Assembly's response to the Kelo decision and an intentional narrowing of the requirements for condemnations to prevent takings "for private enterprise" as opposed to the earlier and broader restriction on takings "*solely* for private enterprise." Id. at 583 (emphasis in original). Ultimately, because RAWA's taking was both for the benefit of the developer, and the condemned land would be deeded over to the developer, in its entirety for the developer's ownership

and operation, the Court reversed the decision of the Commonwealth Court, affirmed the trial court's decision, and sustained Greenway's preliminary objections. Id.

Here, unlike Reading Area Water Authority, multiple exceptions to the PRPA apply. As discussed above, the Township's condemnation here is for a road, which is an exception to the PRPA. Moreover, unlike in Reading Area Water Authority, Carlino's occupancy of the condemned properties will be incidental to the construction of the Township's Connector Road, as opposed to the sole purpose of its condemnation. In short, the decision in Reading Area Water Authority was anchored to the PRPA, which has no application to this case.

2. The condemnation is not procedurally flawed.

Condemnees offer four objections challenging the Township's compliance with the procedural requirements of the Eminent Domain Code. Specifically, Condemnees contend that: (1) the Board of Supervisors never properly authorized the taking,² (2) the Declaration of Taking is defective because it was authorized by resolution and not by ordinance;³ (3) the Declaration of Taking fails to include all the condemnees, including BVA's tenants and their customers,⁴ and (4) the Declaration of Taking is untimely, because the true resolution authorizing the instant condemnation occurred on August 20, 2014, when the Township entered into the MOU, in which is agreed to condemn BVA's easements.⁵

Condemnees' claim that the resolution authorizing the instant condemnation was defective was not developed at the hearing, and is therefore waived. Dwyer v. Com., Dep't of Transp., Bureau of Driver Licensing, 849 A.2d 1274, 1276 (Pa.Cmwltth. 2004) (issues not raised before trial court are waived). Furthermore, the October 2, 2014 Resolution authorizing the condemnation is attached to the Declaration of Taking and was signed by two of the three Township Supervisors. Nothing further is required.

² (Preliminary objections, Jan. 7, 2015, at ¶ 7)

³ (Preliminary objections, Jan. 7, 2015, at ¶ 31)

⁴ (Preliminary objections, Jan. 7, 2015, at ¶ 13)

⁵ (Preliminary objections, Jan. 7, 2015, at ¶ 30)

Condemnees argue that the Declaration of Taking is barred because it was authorized by resolution and not by ordinance. This precise issue was raised and soundly rejected by in Appeal of Heim:

Condemnees next argue that the declaration of taking is invalid because it was based upon a resolution enacted by the township and not an ordinance. Condemnees cite no caselaw to support this argument, and they provide no reasons in their brief to support the idea that a resolution was improper in this instance. To resolve this issue, we have only to look to *Jordan Appeal*, 459 A.2d 435 (1983), where this court held that a borough could authorize a declaration of taking with a resolution. In so holding we noted that, although The Borough Code requires the enactment of an ordinance for the opening of a street, the code does not specify what procedure should be used to authorize the taking of the land for the street. We also noted the language of section 402(b)(3) of the Eminent Domain Code which states that a declaration of taking requires a "specific reference to the action, whether by ordinance, resolution or otherwise, by which the declaration of taking was authorized. . . ." The present case is analogous in that there is no provision in the Second Class Township Code specifying what procedure should be used to authorize the taking of land for a street.

Appeal of Heim, 151 Pa.Cmwlth. 438, 617 A.2d 74, 77 (1992). This claim fails as a matter of law.

Condemnees' claim that the Township must name its tenants and their customers as condemnees is inconsistent with the Eminent Domain Code, which sets forth the required content of a Declaration of Taking and specifically requires that the action be captioned *in rem*, without listing the names of the interested parties. 26 Pa.C.S.A. § 302(b). Furthermore, the Eminent Domain Code requires that notice be served on the condemnee. 26 Pa.C.S. § Section 305. A "condemnee" is "[t]he owner of a property interest taken, injured or destroyed. The term does not include a mortgagee, judgment creditor or other lienholder." 26 Pa.C.S.A. § 103. Condemnees have cited no authority that requires notice of condemnation to be given to tenants and customers. A fair reading of the Eminent Domain Code demonstrates no such requirement.

Finally, Condemnees claim that the true resolution authorizing the condemnation is the August 20, 2014 resolution executing the MOU, rendering the Declaration of Taking untimely. This argument fails because memoranda of understanding are, generally, unenforceable agreements, and the Township's unenforceable indication that

it intended to condemn the property now at issue is not a resolution that authorizes such a condemnation. Pennsylvania Ass'n of State Mental Hosp. Physicians v. Com., Pennsylvania Labor Relations Bd., 125 Pa.Cmwlt. 276, 557 A.2d 825, 828 (1989) (“memoranda of understanding are non-binding and unenforceable”). In any event, even if the MOU was binding and enforceable and was sufficient to authorize the Township’s Declaration of Taking that does nothing to void the October 2, 2014 resolution more explicitly authorizing the condemnation. Where a Township’s Declaration is untimely, the defect is cured by filing a new resolution and restarting the condemnation process. In re Condemnation by Com., Dept. of Transp. of Right-of-Way for State Route 0095, Section BSR, 131 A.3d 625, 635–36 (Pa.Cmwlt. 2015) (“In the face of an objection on the basis of the untimeliness of the declaration of taking, the condemnor must begin the process anew (i.e., reauthorize its previous plan or revised plan or pass a new resolution, etc.) in order to condemn the property in question.”)

In any event, it is well settled that procedural irregularities “will not set aside a condemnation decision where the condemnee has not been prejudiced.” In re Condemnation by Com. of Pennsylvania, Dep’t of Transp., of Right-of-Way for State Route 0079, Section 290, A Ltd. Access Highway in Twp. of Cranberry, 805 A.2d 59, 67 (Pa.Cmwlt. 2002) (citing, Avery v. Com., 2 Pa.Cmwlt. 105, 276 A.2d 843, 844 (1971)); see, also, In re Lands of Patterson, 722 A.2d 1176 (Pa.Cmwlt. 1999) Here, Condemnees have come forward with no evidence that they were prejudiced by any of the irregularities to which they now object.

3. The Connector Road is not illegal or administratively barred from construction.

Finally, Condemnees have advanced four objections that amount to a claim that the Connector Road is illegal. Specifically, Condemnees contend that (1) the Township requires the consent of PennDOT to widen the state highway;⁶ (2) the Township requires the consent of PennDOT to condemn the property at all;⁷ (3) the proposed right-of-way is wider than 120-feet and is therefore barred by the Municipalities Planning

⁶ (Preliminary objections, Jan. 7, 2015, at ¶ 21)

⁷ (Order, Sep. 16, 2016)

Code,⁸ and (4) the takings are a violation of Section 10508(4)(iv) of the Municipalities Planning Code.⁹

A. All of Condemnees' objections to the legality of the Connector Road and the procedure employed to construct it are collateral, and not cognizable as preliminary objections.

Condemnees' legality challenges are premised on the Connector Road as most recently designed by Carlino. However, the Township is under no obligation to support a condemnation with a completed development plan. The Township need do no more in its Declaration of Taking than offer a "brief description of the purpose of the condemnation." 26 Pa.C.S.A. § 302(b)(4). If the Township's present plan for the Connector Road is unsuccessful or impractical, there is no legal impediment to its construction of an alternate design of the Connector Road using the same condemned property, so long as the Township's use of the condemned property remains unchanged. Accordingly, issues related to the development plan are collateral to the issue of condemnation and are not cognizable as preliminary objections.

By way of example, in Appeal of Gaster, 124 Pa.Cmwlth. 314, 556 A.2d 473 (1989), PennDOT sought to condemn five acres of land owned by the Gasters "'to replace wetlands adversely affected' by the construction of [the Blue Route]." Appeal of Gaster, 556 A.2d at 474. The Gasters filed preliminary objections asserting that federal environmental regulations prevented the creation of wetlands at the site proposed by PennDOT, thus frustrating PennDOT's plan to use the land and defeating the taking's public purpose. Id. at 475. The lower court overruled the Gasters' objections and they appealed. The Commonwealth Court began its analysis by observing that "the appellants are not actually challenging the power or right of PennDOT to take their land. This is provided by statute[.] More accurately, they are challenging a collateral procedure to be followed as part of highway planning." Id. at 478. The Court recognized that preliminary objections to a condemnation are limited to: (1) the power or right of the condemnor to appropriate the condemned property, (2) the sufficiency of the security, (3) the declaration of taking, and (4) any other procedure followed by the condemnor.

⁸ (Preliminary objections, Jan. 7, 2015, at ¶ 21)

⁹ (Order, Sep. 16, 2016)

26 Pa.C.S.A. § 306(a)(3). Having concluded that the Gasters' challenge was not a challenge to PennDOT's power or right to condemn, the Court concluded that such a challenge is properly considered "as an objection to 'any other procedure followed by the condemnor.'" Appeal of Gaster, 556 A.2d at 478. The Commonwealth Court then considered the phrase "any other procedure" and concluded that it refers to the procedures specifically set forth "in Sections 403 and 405,¹⁰ inclusive, and other procedures that may be directly related to the filing of the declaration of taking." Id. The federal regulations advanced by the Gasters were not "directly related" to the condemnation and were instead "collateral to the condemnation itself under state law, and, therefore ... not the proper subject of preliminary objections." Id.

This decision is not an outlier but, rather, is the well settled rule. The Commonwealth Court has also held that failure to give personal notice of a related highway project hearing is collateral to the power of eminent domain. In re Condemnation by Com., Dep't of Transp., of Right of Way, for Legislative Route 201, Section 5R/W, 22 Pa.Cmwlth. 440, 349 A.2d 819, 821-22 (1975). The Commonwealth Court has held that failure to comply with the statutory pre-acquisition review requirements related to a proposed right-of-way is also collateral to the power of eminent domain. In re Legislative Route 58018, 31 Pa.Cmwlth. 275, 375 A.2d 1364, 1367 (1977). More recently, the Commonwealth Court held that "the failure to comply with the notice and publishing requirements of an ordinance was a challenge to a collateral procedure" and therefore "not the proper subject of a preliminary objection." In re Condemnation of Prop. Situate in Perry Twp., 938 A.2d 517, 521 (Pa.Cmwlth. 2007).

Condemnees' challenges to the legality of the Connector Road as it is presently designed are not cognizable under the Eminent Domain Code.

B. The Township does not require approval of the Secretary of the Department of Transportation to condemn real property.

Condemnees contend that the Township requires permission from PennDOT to widen the state highway and that its failure to obtain permission pre-condemnation makes the condemnation illegal. Francis Haney, the only witness that testified with

¹⁰ Now §§ 303 and 305 of the Eminent Domain Code, 26 Pa. C.S.A.

respect to PennDOT, offered no testimony on this subject at all. (N.T. 5/3/17, 13-36) Since this issue was not addressed at trial, it has been waived.

Additionally, the Township offered three PennDOT review letters with respect to the Connector Road, in which PennDOT did not raise the necessity of special PennDOT permission to widen the state highway. To the contrary, in its April 6, 2011 review letter, PennDOT specifically observed that:

. . . an eastbound right turn lane is warranted at the proposed signalized access to S.R. 0322. If the lane cannot be provided due to existing constraints, a request for a Design Waiver must be submitted, along with documentation of all efforts to implement.

(Exh. T-7, ¶ 1) PennDOT required the deceleration lane that widens the state highway, and PennDOT made no special demands for additional authorizations.

Similarly, in its February 29, 2012 review letter, PennDOT required that:

East Brandywine Township will acquire the right-of-way from BRANDYWINE VILLAGE ASSOC. (TMP#30-005-0226.0000) to accommodate the proposed deceleration lanes associated with the modified access intersection. Therefore the applicant must provide proof of ownership of the required property to the Department prior to the issuance of a permit. Form M-950D1 (Deed Fee Simple) must be completed by the applicant, accompanied by an 8½" x 11" drawing of the area being conveyed (prepared in accordance with PennDOT Publication 14M), must be recorded in the county courthouse and returned to the Department prior to the issuance of the permit.

(Exh. T-8, ¶ 3(a))(emphasis in original) PennDOT specifically required the Township to acquire the right-of-way for the deceleration lane and, again, made no reference to an obligation for special permission to do so.

Finally, in its April 24, 2017 review letter, PennDOT made specific reference to the instant condemnation case, but, again, offered no comments regarding defects in the Township's taking:

. . . East Brandywine has condemned the proposed Right-of-Way offered for dedication, however an appeal has been made on the condemnation. The appeal and transfer of right-of-way must be resolved prior to issuance of the permit.

(Exh. T-12, ¶ 4)

In summary, PennDOT has already weighed in on the legality of the proposed Connector Road. It has offered conditions to issuance of permits and demanded minor

revisions. PennDOT has not, however, substantiated Condemnees' claim that the Connector Road represents an illegal widening of a state highway. This claim, therefore, would fail if properly preserved.

Condemnees' next claim is similar to its first, namely, that authorization from PennDOT is necessary to effect the condemnation for a public road. With respect to this claim, the evidence established that Mr. Hanney had sent unofficial correspondence to counsel for BVA in which he opined that approval of the Secretary of Transportation was necessary under the PA Highway Act to condemn the property for the Connector Road. However, Mr. Hanney eventually admitted that this may not have been a statutory requirement but, rather, PennDOT policy. As discussed above, the Eminent Domain Code is the "complete and exclusive procedure and law to govern all condemnations of property[.]" 26 Pa.C.S.A. § 102(a). Because the General Assembly has determined that the Eminent Domain Code is the *exclusive* procedure and law governing condemnations, PennDOT lacks authority to impose additional requirements, including a requirement that the Township obtain the approval of the Secretary before filing a Declaration of Taking.

Regardless, PennDOT has issued three review letters, the most recent of which specifically discussed the instant condemnation and PennDOT has not raised an objection that the condemnation is improper and has not asserted that the approval of the Secretary is necessary.

Condemnees also references two statutes and a regulation, 71 P.S. § 512, 36 P.S. § 670-911, and 67 Pa. Code § 441.8(j)(5), in support of its position. All three are inapposite.

Section 512 of the Administrative Code provides that the Department of Transportation shall have exclusive authority and jurisdiction over all state designated highways. 71 P.S. § 512(a)(10). This, however, does not prevent Pennsylvania's cities and townships from exercising their eminent domain authority to condemn land and build roads; 71 P.S. § 512 simply requires townships like the Township to construct roads that intersect state highways in coordination with PennDOT.

Section 670-911 of the State Highway Law provides that:

Whenever a State highway is constructed and the State pays of [sic] portion of the cost, and the county, or township, or borough, pays a portion of the cost, or the State pays the entire cost, and it is deemed advisable to widen the State highway beyond the width as laid out and ordered by the secretary or other body having authority over the same, the county and township, or borough, jointly, or the township or borough, may increase the width of the State highway, including the width of right of way, with consent of the secretary or other body having charge of the construction of said State highway. An increase in the width of right of way may be by the adoption of the official plan of the Department of Highways by the township or borough. The cost of such additional width shall be borne jointly by the county and township, or borough, or wholly by the said township or borough, as the case may be. Authority is hereby given the several counties through their commissioners and the several townships and boroughs through their proper officers, to enter into agreement providing for the additional width of the State highway, in accordance herewith. Such additional width shall be constructed under the supervision of the department, and according to its plans and specifications.

36 P.S. § 670-911. Thus, 36 P.S. § 670-911 relates to widening state highways, and not to the Township's power to condemn. As discussed, PennDOT has specifically required that the highway be widened in its April 6, 2011 review letter, and confirmed its intent that the highway be widened in its February 29, 2012 letter. PennDOT has not raised any objection to widening the highway. This statute, therefore, does not prevent the Township's condemnation.

Lastly, a PennDOT regulation provides that:

If an auxiliary lane must be located in front of property of another person, the applicant shall be required to secure the approval of the other person or indemnify the Commonwealth against any action which the other person may bring against the Commonwealth.

67 Pa.Code § 441.8(j)(5). In other words, Carlino will be required either secure BVA's approval to construct the deceleration lane or Carlino will be forced to post a bond to indemnify the Commonwealth. This provision is irrelevant to the Township's power to condemn and will come into play later, when construction of the Connector Road is at issue.

C. The Township is not building a 215-foot wide road.

Condemnees complain that the Township's taking is more than 120-feet, which distance exceeds the maximum right-of-way for Township roads. This claim is disingenuous at best. In fact, as the plans entered into evidence make clear, the Township is not building a 214.76 foot wide road but, instead, is constructing a fifty-foot-wide right-of-way. The balance of the condemned property represents the remainder of BVA's access easement.

D. The Cross Easement Agreement and its inclusion in an earlier Township approved land development application does not preclude condemnation of the Carlino and BVA parcels in perpetuity.

Condemnees object that the condemnation violates Section 10508(4)(iv) of the Municipalities Planning Code, which provides:

Where the landowner has substantially completed the required improvements as depicted upon the final plat within the aforesaid five-year limit, or any extension thereof as may be granted by the governing body, no change of municipal ordinance or plan enacted subsequent to the date of filing of the preliminary plat shall modify or revoke any aspect of the approved final plat pertaining to zoning classification or density, lot, building, street or utility location.

53 P.S. § 10508(4)(iv). By invoking this provision of the MPC, Condemnees allude to the testimony of Attorney Jonas that the Township's reference to the Cross Easement Agreement in approving the BVA Development created an enforceable covenant that runs with the land. Attorney Jonas, however, also testified that it was his opinion that, notwithstanding this enforceable covenant, the Township was still empowered to condemn the eased parcels for a public purpose. Specifically, Attorney Jonas testified that Carlino was bound by the Cross Easement Agreement "absent some extraordinary intervening power, and the Township has the power to condemn." (N.T. 5/4/17, 37:10-13) There is no dispute that BVA has an enforceable easement over the Carlino Parcel as it is for precisely this reason that the Township is condemning those easements, as opposed to simply building the Connector Road without input from BVA, an otherwise uninterested landowner. The fact that BVA has a property interest in the easements at issue, however, does not insulate the easements from condemnation.

Conclusions of Law:

Burden of Proof

1. Preliminary objections are the exclusive method of challenging the propriety of the exercise of the power to condemn property under the Eminent Domain Code. Appeal of McCoy, 621 A.2d at 1165.

2. Condemnees bear the burden of proof in sustaining its preliminary objections. In re Condemnation of Real Estate by Borough of Ashland, 851 A.2d at 996-97.

3. This is a "heavy" burden and municipalities are afforded a presumption that the condemnor has acted properly. Appeal of Waite, 163 Pa. Cmwlth. 283.

4. A court's authority to review the exercise of the power of eminent domain is limited and is governed by judicial respect for the doctrine of the separation of powers of government. Weber, 262 A.2d at 299.

5. Second Class Townships, such as the Township, have been delegated the authority to condemn real property by statute. 53 P.S. § 68401, *et seq.*

6. Pennsylvania's Eminent Domain Code, 26 P.S. § 101, *et seq.*, provides the "complete and exclusive procedure and law to govern all condemnations of property[.]" 26 P.S. § 102.

7. Takings of private land must be for a public use and only to the "extent reasonably required by the public purpose for which the power is exercised." Reading Area Water Authority, 100 A.3d at 578.

8. Whether an intended purpose is "a public use is highly fact-dependent." Reading Area Water Authority, 100 A.3d at 580.

9. A "taking does not 'lose its public character merely because there may exist in the operation some feature of private gain, for if the public good is enhanced it is immaterial that a private interest also may be benefited.'" In re Legislative Route 62214, Section 1-A, 229 A.2d at 3.

10. Roads, in particular, "almost always benefit the owners of land through which they are laid out, and are often constructed at the request of individuals but it has never been held that the laying out of a highway is invalid on that account." Id.

11. "If a street is to be open to public travel it is well settled that it is for the public use, although it is of especial convenience or advantage to certain individuals, or even if its sole or principal object is to enhance the value of the land through which it passes and the entire cost is met by special assessments on the land thus benefited." Id.

12. Pennsylvania's Property Rights Protection Act ("PRPA"), 26 Pa.C.S.A. § 201, *et seq.*, prohibits condemnations of private property for private use, except under certain specified circumstances. Id. at § 204(a).

13. PRPA is more restrictive in scope than preexisting constitutional protections against the state's power of eminent domain. Reading Area Water Authority, 100 A.3d at 583.

14. PRPA §204(b) sets forth a list of exceptions to the Act's restrictions.

15. One such exception applies where a private enterprise "occupies an incidental area within a public project, such as retail space, office space, restaurant and food service facility or similar incidental area." 26 Pa.C.S.A. § 204(b)(2)(iii).

16. Another exception applies where there is, on or associated with the property taken, "a threat to public health or safety." 26 Pa.C.S.A. § 204(b)(3).

17. Finally, an exception applies where the condemned property "is used or to be used for any road, street, highway, trafficway, or for property to be acquired to provide access to a public thoroughfare for a property which would be otherwise inaccessible as the result of the use of eminent domain or for ingress, egress or parking of motor vehicles." 26 Pa.C.S.A. § 204(b)(9).

18. Preliminary objections to a condemnation are limited to: (a) the power or right of the condemnor to appropriate the condemned property, (b) the sufficiency of the security, (c) the declaration of taking, and (d) any other procedure followed by the condemnor. 26 Pa.C.S.A. § 306(a)(3).

19. Issues that are collateral to the issue of condemnation are not cognizable as preliminary objections.

20. Issues not timely raised in preliminary objections are waived. 26 Pa.C.S.A. § 306(b).

Public Purpose:

21. Condemnees have not sustained their 'heavy burden' of proving that the Township lacked a public purpose in condemning its easements in order to build the Connector Road and its related facilities.

22. The principal evidence advanced on this subject by Condemnees was the testimony of Mr. Ulrich and the Township's admission that it had met with Carlino's representatives, sometimes with multiple Supervisors present.

23. Mr. Ulrich, although qualified as an expert, never testified that his opinions were each held to a reasonable degree of professional or engineering certainty. Passmore, 857 A.2d at 713 ("expert must offer his opinion to a reasonable degree of medical certainty."); see, also, Kovach, 808 A.2d at 959 ("expert must testify with reasonable certainty").

24. Mr. Ulrich specifically testified that he was unable to opine "with any degree of certainty" on the subject of one of his opinions, namely whether Carlino was able to manage all the stormwater that fell on its property without using any of the condemned parcels, but that it was "a possibility." (N.T. 3/27/17, 109:1-23)

25. Mr. Ulrich also testified that he believed the new turning radii of the Connector Road were dangerous, but because he performed no analysis of the existing turn radii, Mr. Ulrich was unable to testify to whether the new plan was safer, less safe, or the same as the existing conditions. (N.T. 5/16/17, 152:1-9)

26. In light of Mr. Ulrich's failure to testify regarding the certainty of his opinions, and the instances in which he specifically identified uncertainties in his opinions, Mr. Ulrich's opinions carry minimal weight.

27. Multiple fact witnesses, including Chief Kocsi, testified and provided evidence that the intersection of SR322 and North Guthriesville Road is dangerous under existing conditions due to the configuration of the roadway and physical features of the land at the intersection.

28. PennDOT has designated the section of SR322 at the intersection of North Guthriesville Road as an "aggressive driving area" and provides grant funds for additional policing.

29. Multiple witnesses confirmed that drivers are already using the existing BVA Development as a cut-through to avoid the dangerous intersection.

30. Supervisor Kring testified that the Township intended the Connector Road for a public purpose.

31. The plan to develop the Connector Road predates the Carlino Development and was first proposed by the Township sometime in 2005 - 2006.

32. It is not credible that Supervisor Kring, Chief Kocsi, Traffic Engineer Heinrich, and Township Manager Piersol all conspired to manufacture a pretextual purpose to benefit Carlino and harm Condemnees years before Carlino entered into any agreement of sale with the Watters Family.

33. The Township intended a public use of the Connector Road.

34. The PRPA does not apply to this project because (a) the condemnation is for the construction of a road; (b) Carlino's use of the condemned property will be incidental as defined by the PRPA; and (c) the Township's use of the condemned land is to avoid a health and safety hazard. 26 Pa.C.S.A. § 204(b).

Procedural Requirements

35. Condemnees have failed to present evidence that meaningfully challenges the resolution authorizing the instant condemnation.

36. The resolution attached to the Declaration of Taking is sufficient on its face.

37. Condemnees' objection that the Declaration failed to give adequate notice to tenants and customers is unsupported by any case law.

38. Condemnees' objection that the Declaration is untimely because it was authorized by the MOU, and not the subsequent resolution authorizing the Declaration of taking, is contradicted by the resolution attached to the Declaration. In any event, even if the MOU were sufficient to authorize the Township's Declaration of Taking, that did nothing to void the October 2, 2014 resolution more explicitly authorizing the condemnation. Furthermore, where a Township's Declaration is untimely, it cures that defect by filing a new resolution and restarting the condemnation process. In re Condemnation by Com., Dept. of Transp. of Right-of-Way for State Route 0095, Section BSR, 131 A.3d at 635-36.

39. Procedural irregularities "will not set aside a condemnation decision where the condemnee has not been prejudiced." In re Condemnation by Com. of Pennsylvania, Dept. of Transp., of Right-of-Way for State Route 0079, Section 290, A Ltd. Access Highway in Tp. of Cranberry, 805 A.2d at 67.

40. Condemnees have come forward with no evidence of prejudice related to the procedural defects of which they now complain.

Collateral Issues

41. Condemnees have raised a collection of collateral issues related to the feasibility of the construction of the Connector Road. Because these issues do not go to the power of the Township to condemn or the procedure it has employed but, rather, to the future construction and permitting process of the Connector Road, these objections fail as a matter of law. Appeal of Gaster, 556 A.2d at 474

42. The only evidence that Condemnees presented with respect to these issues, moreover, was the testimony of Francis Hanney, who admitted that his assertion that condemnations to construct roads adjacent to state highways require the consent of the Secretary of Transportation might be based in PennDOT policy, and not law. (N.T. 5/3/17, 22:6-9, 26:2-13)

43. PennDOT has issued three review letters that do not substantiate the specific issues raised by BVA.

Summary

44. Condemnees' preliminary objections have no merit and are properly overruled.

For all of the reasons stated, we enter this:

ORDER

AND NOW, this 7th day of September, 2017, it is hereby ORDERED that the preliminary objections interposed by L&R Partnership, Brandywine Village Associates and John R. Cropper are OVERRULED.

BY THE COURT:


Edward Griffith, J.

FILED
2017 SEP - 8 PM 3:27
OFFICE OF THE
PROthonARY
CHESTER CO., PA.

SENT
SEP 12 2017