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CARLINO EAST BRANDYWINE,
L.P.

Plaintiff

VS.

BRANDYWINE VILLAGE
ASSOCIATES

Defendant

AND

ASSOCIATED WHOLESALERS,
INC.

Intervenor

IN THE COURT OF COMMON PLEAS
CHESTER COUNTY, PENNSYLVANIA

NO. 2011-05037-MJ

CIVIL ACTION - LAW

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CHESTER CO. PA.

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BRANDYWINE VILLAGE
ASSOCIATES

Plaintiff

VS.

CARLINO EAST BRANDYWINE,
L.P., CHRISTINA B. KETTLETY,
KATHERINE W. KETTLETY, CO-
ADMINISTRATORS OF THE
ESTATE OF FARNK WATTERS,
AND CHRISTINA B. KETTLETY
AND KATHERINE W. KETTLETY,
JOINT AS CO-EXECUTORS OF
THE ESTATE OF BEATRICE S.
WATTERS, DECEASED

Defendants

IN THE COURT OF COMMON PLEAS
CHESTER COUNTY, PENNSYLVANIA

NO. 2011-05189-MJ
CONSOLIDATED WITH 11-05037-MJ

CIVIL ACTION - LAW

Marc B. Kaplin, Esquire, Pamela M. Tobin, Esquire, Attorney for Plaintiffs Carlino
East Brandywine, L.P., et al
Paul Allen Prince, Esquire, Attorney for Brandywine Village Associates

DECISION

Carlino East Brandywine, L.P., Christina B. Kettlety, Katherine W. Kettlety,, Co-Administrators of the Estate of Frank Watters, and Christina B. Kettlety, Katherine W. Kettlety, Co-Executors of the Estate of Beatrice S. Watters, Deceased, (the "Carlino Defendants"), defendants in Brandywine Village Associates ("BVA") Declaratory Judgment action, Docket No. 11-05189-MJ, seek summary judgment and dismissal of BVA's Complaint. The Carlino Defendants' summary judgment motion (the "Motion") was filed on October 29, 2015. BVA filed an Answer on December 16, 2015.

Carlino filed a separate declaratory judgment action, entitled Carlino East Brandywine L.P. v. Brandywine Village Associates et al, Docket No. 2011-05037-MJ) on May 11, 2011. To distinguish the cases, plaintiff in the latter action is identified as "Carlino". The actions were consolidated on September 22, 2011. In Carlino's action, on April 30, 2015, BVA filed a "Brief on the Declaratory Judgment Interpretation of its Easements", to which the Carlino filed a "Response in Opposition". The consolidated cross declaratory judgment complaints and their attached Exhibits are appropriate for our consideration respecting the Carlino Defendant's Motion. In its case, Carlino motioned for summary judgment, which we denied on October 10, 2012.

History of the Case:

At issue in these declaratory judgment actions is the construction of a 1994 Cross Easement Agreement (the "Agreement") between BVA and the late Frank and Beatrice Watters, who originally owned land on Horseshoe Pike (SR322) in East Brandywine Township, Chester County,

subsequently divided into contiguous parcels of 11.535 acres and 10.645 acres. The Watters conveyed the 11.535 acres parcel to BVA on June 24, 1994, and contemporaneously entered into the Agreement with the Watters, pursuant to which the parties granted and conveyed to each other certain cross easements to facilitate development of the parcels. As alleged in BVA's May 16, 2011 Complaint, under the Agreement's terms, the Watters granted BVA the following easements over the Watters' retained 10.645 acre parcel, described in BVA's Declaratory Judgment Complaint as: (1) a "perpetual easement" on the Watters' Parcel, 0.460 one-hundredths of an acre in area, "in common with" the Watters' Parcel" providing access, egress and ingress to BVA's parcel; (2) a 2.282 acre sanitary sewer easement pursuant to which sewage from BVA's parcel would be treated and disposed of in an on-site package treatment plant located on the Watters' Parcel; and (3) an irrevocable stormwater basin and drainage easement 0.540 one-hundredths of an acre in area, intended to accommodate the acceptance of surface stormwater originating on BVA's parcel. *BVA Complaint, Exhibit "A"*. The approved subdivision plan for the Brandywine Village shopping center shows that the stormwater basin was also designed to accept directed water runoff from BVA's access private road from Horseshoe Pike to its shopping center. *BVA's April 30, 2015 Brief on the Declaratory Judgment Interpretation of its Easements, Exhibit "C"*.

Pursuant to a development plan approved by East Brandywine Township, in 1995 BVA constructed the Brandywine East Towne Center on its parcel, consisting of a food market, various ancillary stores, a bank and a Burger King. Pursuant to the Cross Easement Agreement, BVA constructed the following facilities on the Watters' Parcel to service its

shopping center: (1) an on-site package sewage treatment plant; (2) a 45 feet wide access road providing access to its shopping center over the Watters' Parcel, and (3) a drainage basin encompassing 0.054 one-hundreds of an acre and assorted spillways to accept surface water drainage from BVA's access driveway and, allegedly, from its Towne Center shopping center. BVA's Complaint, pp.32-42 & Exhibits "D" & "E". The Cross Easement Agreement also obligated the Watters to grant such other easements as might be necessary to "facilitate the proper construction and development of the buildings and improvements shown on the Plan" (BVA's approved Plan). No such easements are identified in BVA's Complaint and none have been implemented.

Carlino acquired an equitable interest in the remaining Watters' Parcel from their Estates, and submitted a preliminary land development plan to the Township on May 27, 2010. The lengthy history of Carlino's efforts to secure land development approval is discussed herein where necessary to an understanding of the instant controversy. The Township Supervisors conditionally approved the latter preliminary plan on April 8, 2011 and Carlino accepted the conditions imposed, and on July 20, 2011 entered into a development agreement with the Supervisors memorializing various undertakings to which Carlino and the Township agreed. Among them, the Supervisors required Carlino to construct a road for public use on and through both the Watters' Parcel and a contiguous property now owned by the L&R Partnership to link Horseshoe Pike and nearby Guthriesville Road. L&R is not a party to the declaratory judgment actions. Carlino then submitted a final land development plan, which was approved by the Supervisors on August 4, 2011 (the "2011 Approval"). We granted BVA's appeal and overruled the

Board's decision for reasons not pertinent to the instant case; however, after several iterations of the plan, the Supervisors ultimately conditionally approved Carlino's revised preliminary plan on April 20, 2016, BVA and L&R appealed, and we affirmed the Board on July 18, 2017. Chester County Docket No. 2016-04843. The Board has subsequently approved Carlino's final plan, and BVA's appeal from that approval is now pending in this court before the undersigned.

As noted, from the inception of Carlino's land development applications, the Supervisors insisted that a public road, identified on Carlino's plans as Brandywine Village Drive, be constructed by Carlino through the Watters' Parcel to connect Route 322 and nearby North Guthriesville Road (the "Connector Road"). The Supervisors' intention to connect the latter roadways preceded Carlino's land development application. While the Supervisors have subsequently taken the position that, in lieu of constructing the road, Carlino could pay upwards of \$2 million dollars to finance the Township's construction of the road, the fact remains the Connector Road was going to happen. In the development agreement accompanying the Carlino's land development plan approval, the Supervisors agreed, if necessary, to condemn BVA's access and stormwater drainage/detention basin easements at issue to facilitate construction of the Connector Road by exercising its power of eminent domain at Carlino's sole cost and expense. Carlino has agreed to construct the Connector Road and dedicate it to the Township upon completion of its construction. *Carlino's Response in Opposition, Exhibit "G"*.

From the inception of its shopping center, BVA has had access to its shopping center from SR322 (Horseshoe Pike) over a paved private

road located on the Watters' Parcel within the access easement granted to BVA in the Cross Easement Agreement; however, under Carlino's approved development plans, BVA's access easement will be replaced by relocating such access over and through the Connector Road, to be constructed on the East side of the Watters' Parcel. BVA contends that such disruption of its existing access would require a modification of the access easement itself, which is prohibited by the terms of the Cross Easement Agreement and by applicable law. While it is correct that the Cross Easement Agreement describes the access easement as "perpetual", the easement has been condemned by the Township. Under Carlino's approved development plan, BVA will have continued and unimpeded access to its property over the present access road pending construction of the Connector Road and, thereafter over the Connector Road. BVA's contention has been rendered moot by the Township's condemnation of BVA's access easement. As now configured, the proposed Connector Road also extends over a portion of the existing detention basin on the Watters' Parcel, which accepts surface water drainage from BVA's existing private road. Carlino argues that BVA has abandoned the detention basin and drainage easements by grading BVA's Towne Center to divert surface water drainage away from the Watters' Parcel to underground stormwater management facilities located on BVA's property. The described detention basin located with BVA's second easement will be eliminated by construction of the Connector Road, a fact BVA admits. *BVA Complaint, p. 11, paragraph 69.* BVA raises several arguments in opposition to Carlino's abandonment argument, addressed hereinafter. We find the issue is

moot, considering the Township's condemnation of the detention basin and drainage easement.

Throughout this litigation and in the corresponding land development cases, BVA has vigorously contended that Carlino's proposed commercial development of its property unlawfully interferes with and impairs the contractual and vested property rights to which it is entitled by virtue of the 1994 Cross Easement Agreement. Thus it is that BVA filed the instant declaratory judgment complaint in response to Carlino's initial land development application "to prevent Defendant's unwarranted interference with the operation and maintenance of the easements granted to Plaintiff across property owned by the Defendants...". *BVA's Complaint*, p. 3, paragraph 11. BVA has subsequently argued that its position is bolstered by an earlier June 13, 1990 easement agreement with the Watters, which we conclude is superseded by the 1994 Agreement; however, BVA's complaint fails to seek our construction of the earlier easement agreement.

The relief BVA seeks in its declaratory judgment complaint includes declarations that the Cross Easement Agreement is irrevocable and cannot be modified without its consent; that only the existing access drive located within the access easement may be modified, and then only with BVA's consent; and that the said Agreement precludes Carlino from implementing a development plan that modifies or interferes with BVA's easements. *BVA's Complaint*, p. 15.

In order to sustain an action under the Declaratory Judgment Act, a plaintiff must demonstrate an "actual controversy" indicating imminent and inevitable litigation, and a direct, substantial and present interest. *Avrich by Avrich v. General Accident Ins.*, 367 Pa.Super. 248, 251, 532

A.2d 882, 884 (1987). Because an action for declaratory judgment cannot be sustained until these elements can be shown to exist, it follows that a cause of action for declaratory judgment does not arise until such "actual controversy" exists. *Petition of Malick*, 133 Pa.Super. 53, 58-60, 1 A.2d 550, 553-54 (1938). The prime purpose of the Declaratory Judgment Act is to speedily determine issues that "would ... be delayed, to the possible injury of those interested if they were compelled to wait the ordinary course of judicial proceedings." *Osram Sylvania Products, Inc. v. Comsub Commodities Inc.*, 845 A.2d 846 (Pa. Super. 2004), citing *Grambo v. South Side Bank & Trust Co.*, 141 Pa.Super. 176, 14 A.2d 925, 927 (1940).

After BVA filed its complaint, two events intervened, which have direct bearing on BVA's right to declaratory relief. First, under the terms of the Cross Easement Agreement, BVA is required to connect its shopping center to the public sewer system when public sewers become available to serve BVA's shopping center. On January 11, 2013 Carlino filed a Petition at the instant consolidated docket seeking Specific Performance of the mandatory connection provision of the Cross Easement Agreement. By Opinion and Order issued on August 15, 2013, we enforced those provisions that mandated BVA's connection of its property to the East Brandywine Municipal Authority's public sewer system. *Carlino's Response in Opposition, Exhibit "E"*. After much delay in doing so, BVA has connected its shopping center to the public sewer system, has disconnected said property from the on-site septic system constructed on the Watters' Parcel, and has dismantled and decommissioned its on-site septic system, all pursuant to PADEP regulations. *Carlino's Response in Opposition, Exhibit "H"*.

Second, on November 17, 2014, East Brandywine Township filed a Declaration of Taking in which it condemned BVA's access easement and its stormwater basin and drainage easement granted to BVA by the Cross Easement Agreement, discussed more fully herein below. BVA filed preliminary objections, and following multiple hearings the objections were overruled on September 7, 2017. On March 4, 2015, Carlino filed a memorandum to the consolidated captioned docket, contending that the latter events rendered BVA's declaratory judgment action moot. We declined to act on Carlino's Motion or on BVA's declaratory judgment complaint, considering BVA's pending preliminary objections to the Declaration of Taking, more specifically described in our findings of fact below. *N.T. 3/12/15 Hearing, pp. 18 et seq.*

Subsequently, in its Declaratory Judgment Brief filed on April 30, 2015 and its Answer to Carlino's summary judgment motion, BVA opined that its ownership of the easements remained unaffected by both the Township's taking of its easements and the connection of its Towne Center shopping center to the Township Municipal Authority's public sewer system. We discuss and dispose of these contentions herein below. On May 18, 2015, Carlino filed of record its "Response in Opposition to BVA's Declaratory Judgment Brief ("Carlino's Oppositional Response"). Attached to both documents are multiple exhibits from which the parties advance their respective positions. Among these are copies of the Cross Easement Agreement and the Township's Declaration of Taking, which include metes and bounds descriptions of the easements taken, together with graphic plans of the areas taken, and other plans and documents discussed below. Accordingly, the record in

the instant case contains all of the evidence required to allow us to decide the instant summary judgment motion.

We conducted a conference with counsel and the parties on September 16, 2015 during which we asked the parties to identify any additional witness testimony or documents they believed are required before the court has a complete record from which to make a decision on the instant Motion. Neither party identified any such additional evidence. Accordingly, we conclude that the Motion is now ripe for decision.

Findings of Fact:

1. Carlino's East Brandywine Center is proposed to be developed as a mixed use commercial development on the 11.535 acre parcel, located in the Township's MU – Mixed Use District. Proposed is a Giant supermarket, attached retail building and pad site for a bank. *Carlino's Oppositional Response, Exhibit "G"*.

2. Under Carlino's land development plan approved by the Supervisors, the Connector Road will provide public vehicular access to both the proposed East Brandywine Center and BVA's Towne Center (BVA's shopping center), and BVA's existing access road from Horseshoe Pike over the Watters' Parcel will be eliminated. *Carlino's Oppositional Response, Exhibit "G"; BVA's Interpretation of its Easements, Exhibit "A"*.

3. Pursuant to Carlino's petition seeking specific performance of that part of the Agreement that required BVA to connect its property to the Township Municipal Authority's public sewer system, the Court granted specific performance by Opinion and Order dated August 15, 2013, which, together with its findings of fact, discussion and conclusions

of law, are incorporated in this decision on Carlino's Motion. Pursuant to that court order, BVA has connected its Towne Center property to the Township Municipal Authority's public sewer system, by which facilities the property is now served by public sewers, and BVA's on-site septic treatment plant has been dismantled, abandoned and decommissioned pursuant to PADEP regulations. *Carlino's Oppositional Response, Exhibit "E"*.

4. As respects the Sewer System Easement on the Watters' Parcel [identified as parcel B in said Cross Easement Agreement], the Agreement obligates Brandywine as owner of parcel "A" to connect to "a publically operated sewer system" when such facilities become available. Paragraph No. 11 thereof provides pertinently as follows:

*The owner of Parcel A [Brandywine Village] agrees that if a publicly operated sewer system becomes available to service Parcel A hereafter, the owner of Parcel A shall file for the appropriate permits to connect Parcel A to the public sewer system. If Parcel A does receive such a permit, then upon connection, the owner of Parcel A agrees to cease using any portion of the sewer system which has been constructed by the owner of Parcel A on Parcel B [Watters Parcel] to the extent that the owner of Parcel A is permitted to tie into the public system in terms of capacity. The owner of Parcel A shall retain an easement and right of use of the sewer system on Parcel B to the extent necessary to provide capacity allocated under paragraph 9, above, and not provided by connection to the public sewer system. At such time as the owner of Parcel A is required to cease using the sewer system on Parcel B, or any portion thereof, the owner of Parcel A shall, at its sole cost, seal off such portion of the sewer system located on Parcel B which is not required to service Parcel A, to the fullest extent possible in keeping with the preceding provisions of this paragraph. . . . **At such***

time or times as the provisions of this paragraph become operative, the parties agree to execute such other and further documentation as may be required to terminate or modify (as applicable) the easement for the sewer system on Parcel B...".
(emphasis added).

5. The foregoing terms of the said Agreement expressly provide for the termination of the sewer easement on the Watters' Parcel. BVA has connected its shopping center property (parcel A) to the public sewer system, disconnected the sewage facilities serving its parcel, and has decommissioned the on-site septic plant in accordance with PADEP regulations. Under the provisions of Paragraph No. 11 of the Cross Easement Agreement, BVA is required to terminate the easement. Nonetheless, BVA advances the contention that paragraph E.1 of the Cross Easement Agreement requires the owners of the Watters' Parcel "...to grant and convey all such other cross easements as may be necessary to accommodate the installation and operation of all drainage, water, parking lot, access and other utilities and facilities shown on the Plan". Its argument relates to Section 350-47.B(2) of the Township's Subdivision and Land Development Ordinance, which requires the setting aside of a supplemental reserve sewer area on the Watters' Parcel to accommodate potential sewage effluent disposal thereon generated from BVA's property. The Authority's sewer system requires land application of treated sewage – sewage effluent- on site on the generator's property in the event other off-site land disposal areas are unavailable to accommodate total discharge to the sewer system. We have previously found this contention meritless. There is no evidence in this record that BVA's on-site sewage system located on the Watters'

Parcel was designed and installed with the intention of complying with SALDO Section 350-47.B(2), which Section was not adopted until January 3, 2011 well after BVA's shopping center was approved for development and constructed in 1994-95. Indeed, the Cross Easement Agreement attached to Appellants' appeal as Exhibit "A" specifically states in paragraph "A" that the sewer easement has been granted for "an on-site septic sewer system". The Municipal Authority has previously concluded and opined that the requirement of a supplement sewage effluent storage area, imposed by the above Section and by the Authority's Resolution No. 1 of 2010, does not apply to BVA's shopping center because it is an existing development and is not a "new" subdivision or land development subject to the regulation or Resolution. No provision is made in the cross Easement Agreement for the continued reservation of an area for disposal of sewage effluent once BVA's property is connected to the public sewer system, and none is required. *Carlino's Oppositional Response, Exhibit "B"*.

6. Even were that not the case, we would find the sewer easement has been abandoned. In order for the servient tenement to establish abandonment 'Pennsylvania law requires that there be a showing of intent of the owner of the dominant tenement to abandon the easement, coupled with either (1) adverse possession by the owner of the servient tenement; or (2) affirmative acts by the owner of the easement that renders the use of the easement impossible; or (3) obstruction of the easement by the owner of the easement in a manner that is inconsistent with its further enjoyment.' *Ruffalo v. Walters*, 348 A.2d 740 (Pa. 1975); *Hatcher v. Chesner*, 422 Pa. 138, 221 A.2d 305 (1966); *Piper v. Mowris*, 466 Pa. 89, 351 A.2d 635 (1976); *Joseph V. Fisher and Laverne B.*

Fisher, Appellants, v. WTG-Central, Inc. and National Transit Company, 641 A.2d 681 (Pa. Cmwlth. 1994). Accordingly, we find that BVA's sewer easement is required to be extinguished pursuant to the terms of the Cross Easement Agreement, and has in fact been abandoned as by law provided.

7. On November 17, 2014, the Township filed a Declaration of Taking and supporting documents, condemning the southeastern corner of L&R's parcel, BVA's access easement over the Watters' Parcel (the Carlino development tract), BVA's stormwater easement located on the Watters' Parcel (the Carlino development tract), and a narrow strip of land on the southern boundary of BVA's property, for use as a deceleration lane for Horseshoe Pike. *Carlino's Oppositional Response, Exhibits "I" & "J"*.

8. The land underlying the BVA easements on the Watters' Parcel (the Carlino development tract) will be principally encompassed by the Connector Road, the Horseshoe Pike deceleration lane accessing the Connector Road, and a stormwater detention basin and drainage pipe located on L&R's parcel. *BVA's Interpretation of its Easements, Exhibit "A"; Carlino Defendants' Summary Judgment Motion, Exhibit "I"*.

9. The Declaration of Taking describes the condemnation as it applies to BVA's property, as follows:

2a. "Fee simple title to 0.069 acres of vacant land [the land condemned for the Horseshoe Pike widening to the Connector Road) ("Condemned Property I") and certain easements to use a storm water basin and access driveway located on a parcel of land adjacent to Condemned Property I ("Condemned Easement Rights");"

"6. Condemned Easement Rights are easements to use a stormwater basin and access driveway located on a parcel of land adjacent to the Condemned Property I [the Watters' Parcel] which is owned by Christina B. Kettlety and Katherine M. Kettlety, Substitute Executrices of the Estate of Frank Watters, as one-fifty percent (50%) tenant in common, and Christine [sic] B. Kettlety and Katherine M. Kettlety, Executrices of the Estate of Beatrice S. Watters, Frank E. Watters, Jr., Thomas R. Watters, Christina B. Watters (a/k/a Christina B. Kettlety), collectively as the other fifty percent (50%) tenant in common. Said Easements are granted to Brandywine pursuant to a Cross Easement Agreement recorded in Deed Book 3776, page 1125, and are located in East Brandywine Township, Chester County."

"11. The nature of the title to Condemned Property I acquired pursuant to the filing of this Declaration of Taking is that of fee simple title to the condemned property".

"12. The nature of the title to the Condemned Easement Rights is fee simple title. However, the Condemnee is hereby granted a license to use the Condemned Easement Rights in the same manner as it used the Condemned Easement Rights prior to the filing of this Declaration of Taking, until construction of the New Street is completed and open for use by the public." *Carlino Defendants' Summary Judgment Motion, Exhibit "J"*.

10. The legal descriptions and plans of the areas and easements taken are appended as exhibits to the Declaration of Taking, as is a description of the property interests to be acquired, quoted in the preceding finding and specified in Exhibit "A", item "B" of Resolution 15 of 2014, adopted by the Township Supervisors on October 2, 2014 describing the property interests to be acquired by the condemnation as "Extinguishment of certain easement interests held by Brandywine Valley Associates over land owned by the owners of Condemned Property I" (the Watters' Parcel). These descriptions match the general descriptions

for the access easement and the stormwater basin and drainage easement, appended as exhibits to the Cross Easement Agreement. *Carlino Defendants' Summary Judgment Motion, Exhibit "J"*.

11. The Declaration of Taking condemned and extinguished BVA's "perpetual easement" on the Watters' Parcel, 0.460 one-hundreds of an acre in area, providing access, egress and ingress to BVA's parcel from the Horseshoe Pike, granted and conveyed to BVA by the Cross Easement Agreement.

12. The Declaration of Taking condemned and extinguished BVA's irrevocable stormwater basin and drainage easement one-hundreds of an acre in area, which was intended by the Cross Easement Agreement to accommodate the acceptance of surface stormwater originating on BVA's parcel.

13. On January 7, 2015, BVA, John Cropper, its principal, and L&R filed 16 preliminary objections to the Declaration of Taking, and discovery ensued. Hearings were conducted by Judge Edward Griffith, a judge of this Court, on various dates in March and May, 2017. Among pertinent objections raised were the following: "(5) The area to be taken as designated in the Declaration of Taking is wantonly injurious to the Condemnees."; and "(14) There is no public benefit to the Connector Road".

14. On September 7, 2017, the court issued its Decision overruling the preliminary objections in their entirety (the "Condemnation Decision").

Discussion.

Extinguishment of Easements. BVA argues that its rights to easements for access and stormwater discharge to the detention basin

granted in the Cross Easement Agreement remain unaffected by the condemnation. It posits that the Declaration of Taking failed to specify whether the Township extinguished the easements or took fee simple title. This contention is without merit. Aside from the fact that the Condemnation Decision determined otherwise, as we have found, the taking took both fee simple title to the condemned property encompassed by the easements *and* fee simple title to BVA's Easement Rights granted to it in the Cross Easement Agreement. That was the purpose for the condemnation, as specified in the third recital clause of Supervisors' Resolution authorizing the condemnation and acquisition of these property interests, appended to the Declaration of Taking as Exhibit "G". As such, both easements have been extinguished by the condemnation. The Restatement of Property, Section 507 states:

An easement is extinguished by a taking by eminent domain of the servient tenement, or of an interest therein, to the extent to which the taking permits a use inconsistent with the continuance of the use authorized by the easement.

See also *Curtis v. Redevelopment Authority of the City of Philadelphia and Glockner*, 393 A.2d 377 (Pa. 1978).

BVA also argues that the condemnation did not extinguish its rights to drain stormwater onto the Watters' Parcel. It contends that the Cross Easement Agreement in paragraph "D" creates two related but different easements, a stormwater basin easement and a drainage easement. BVA's brief acknowledges that the stormwater basin easement is "clearly" located within the area taken by the Township. *BVA's BVA's Interpretation of its Easements, pp. 16-17*. We also observe that comparison of the metes and bounds descriptions in both the taking and

the easement agreement confirm the Declaration of Taking took the entirety of that easement. The metes and bounds description of the easement in the *Cross Easement Agreement, Exhibit "C"*, specifies its area is 0.540 one-hundredths of an acre. The metes and bounds legal description of the "Storm Sewer Easement Area", appended to the Declaration of Taking, specifies its area is 0.540 one-hundredths of an acre. *Declaration of Taking, Exhibit "D"*.

BVA nonetheless argues that the taking did not extinguish the obligation of the Watters' Parcel to accept stormwater flow from BVA's shopping center. This conclusion, it argues, can be determined from an examination of BVA's Erosion and Sedimentation Control Plan for Brandywine Village, specifically Sheet 3, when read in conjunction with paragraph D.2 of the Cross Easement Agreement. That paragraph states: "*D.2. The area within which the easements hereinabove granted may be exercised is as shown on the Plan and as more particularly described in Exhibit "C" attached hereto and made a part hereof". Exhibit "C" states that it is "Attach[sic] Legal Description of Stormwater Basin Easement Area".* BVA's argument ignores that part of paragraph D.2 that explicitly states that the area of the easement is described in Exhibit "C", the metes and bounds description of the area of the "stormwater basin and drainage easement" condemned by the Township. BVA's contends that the "limit of disturbance" around the basin, as shown on the Plan, described by BVA as a "drainage area boundary line", when considered in conjunction with the language of paragraph D.2, creates an additional drainage easement intended to accommodate BVA's shopping center. BVA's contention, that this alleged easement is separate and distinct from the easement specified in the metes and bounds description, is

dispelled by several facts apparent from the Plan. (1) The detention basin is located immediately adjacent to the north side of BVA's access road; (2) two-four feet wide curb openings on the access driveway discharge stormwater runoff directly from the access road to the drainage basin; (3) the elevation of the access road is such that stormwater from the road is discharged to the drainage basin; (4) the Plan clearly shows that BVA's shopping center property, as graded and constructed, is at a lower elevation than the Watters' Parcel, thereby precluding drainage onto the Watters' Parcel; (5) the Plan shows, and BVA admits, that stormwater occurring on BVA's shopping center is managed on-site by means of an underground stormwater collection system, including underground detention basins, and that no stormwater is discharged to the Watters' Parcel, either into the detention basin or otherwise. BVA has not argued easement by implication, nor would such a contention be supportable. Such an easement can be found to exist where the intent of the parties to create it is demonstrated by the terms of the grant at separation of title, the property's surroundings and any other *res gestae* of the transaction. Several factors are considered under the traditional test and that in the Restatement of Property in ascertaining the actual or implied intention of the parties, including whether the easement is necessary to the beneficial enjoyment of the land granted. *Possessky v. Diem*, 665 A.2d 1004 (Pa. Super. 1994).

BVA further argues that the existence of a drainage easement separate and distinct from the grant can be inferred from paragraph E.1 of the Cross Easement Agreement. The provision states that the parties agree to grant and convey "such other cross easements as may be necessary..." to facilitate development. As we noted above, this

argument is a "non-starter" in that neither BVA nor any other party ever acknowledged or sought to implement any other easements to facilitate the construction or development of BVA's property.

BVA further extends its argument by citing the "Miscellaneous" provisions of the Cross Easement Agreement, paragraph "E", subparagraph #3, which states:

"The terms and conditions hereof shall be covenants running with the land and shall benefit and bind the owners of Parcels A and B and their respective heirs, successors, administrators and assigns."

BVA argues that the Declaration of Taking did not condemn the covenants provided for in the Cross Easement Agreement, as a consequence of which BVA retains its rights to use the Watters' Parcel as provided for by the easements under discussion. As we understand BVA's argument, a covenant is to be distinguished from an easement for purposes of condemnation, and extinguishment of BVA's easements did not extinguish its covenanted right of access to its shopping center over and through the BVA's access easement or its drainage basin and stormwater easement. BVA has not cited to pertinent legal authority for support of this proposition, nor is it grounded in logic. By definition, an easement is a right of use over the property of another. Black's Law Dictionary, Sixth Edition defines an "*Appurtenant Easement*", which these easements are, as "*An incorporeal right which is attached to a superior right and inheres in land to which it is attached and is in the nature of a covenant running with the land*". An "easement" is a non-possessory interest in the land in the possession of another that entitles its holder to a limited use of the land in which the interest exists. *In re*

Condemnation Proceeding by South Whitehall Township Authority, 940 A.2d 624 (Pa.Cmwlth.2008). Black's defines a covenant running with the land as "A covenant which goes with the land, as being annexed to the estate, and which cannot be separated from the land, and transferred without it". As we understand the law, an easement that is granted in perpetuity is the equivalent of a covenant running with the land until it is extinguished. It necessarily follows that having condemned the subject easements, the corresponding covenants, which provide no greater rights than do the easements, were also extinguished by the condemnation.

Summary Judgment.

For summary judgment to be granted, the record, examined in the light most favorable to the nonmoving party, must reveal that the nonmoving party cannot win at trial. *Union National Bank v. Cobbs*, 567 A.2d 719 (Pa.Super.1989). In deciding a motion for summary judgment, the Court must determine whether or not the pleadings, depositions, answers to interrogatories, admissions and affidavits, together with any other supporting evidence, disclose that a genuine issue of material fact exists. Summary judgment may be entered in favor of the moving party if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Flannery v. Stamp*, 786 A.2d 255, 257 (Pa. Super. 2001). As with all summary judgment motions, the Court must "view the record in a light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party." *Washington v. Baxter*, 553

Pa. 434, 441, 719 A.2d 733, 737 (1998), citing *Pennsylvania State University v. County of Centre*, 532 Pa. 142, 143-145, 615 A.2d 303, 304 (1992). Further, "[i]n order to withstand a motion for summary judgment, a non-moving party 'must adduce sufficient evidence on an issue essential to his case and on which he bears the burden of proof such that a jury could return a verdict in his favor. Failure to adduce this evidence establishes that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.'" *Washington v. Baxter*, 553 Pa. at 441, 719 A.2d at 737, quoting *Ertel v. Patriot-News Co.*, 544 Pa. 93, 101-102, 674 A.2d 1038, 1042 (1996). Summary judgment shall only be granted in those cases that are free and clear from doubt. *Marks v. Tasman*, 527 Pa. 132, 589 A.2d 205 (1991).

Given our resolution of the facts, our review and evaluation of the Cross Easement Agreement and other pertinent plans and documents pertinent to BVA's Complaint for declaratory relief and Carlino's Motion, and aided by the exhaustive examination of all aspects of this case by counsel for the parties, we come to the conclusion that it is not the essential facts that are in dispute, but, rather, the parties' respective competing interpretations of what is in large part a documents case. Accordingly, we find there is no genuine issue of material fact, and that the Carlino Defendants are entitled to judgment as a matter of law.

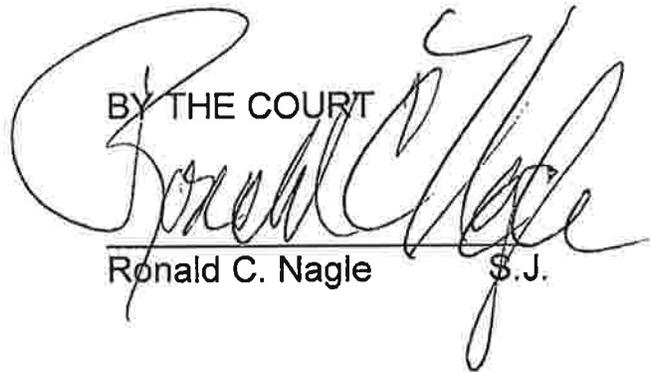
Based on our findings, and for the foregoing stated reasons, we enter this:

SENT
SEP 22 2017

ORDER

And Now, September 22, 2017, it is hereby ORDERED that the Summary Judgment Motion of Carlino East Brandywine, L.P., Christina B. Kettlety, Katherine W. Kettlety, Co-Administrators of the Estate of Frank Watters, and Christina B. Kettlety, Katherine W. Kettlety, Co-Executors of the Estate of Beatrice S. Watters, Deceased is **GRANTED**, and Brandywine Village Associates' Declaratory Judgment Complaint is **DISMISSED**.

BY THE COURT



Ronald C. Nagle

S.J.