CHARLES EBERHARD and CAROL EBERHARD, h/w, Plaintiffs/Condemnees	: IN THE COURT OF COMMON PLEAS OF : LYCOMING COUNTY, PENNSYLVANIA :
vs.	: : NO. 01-00,934 :
BOROUGH OF JERSEY SHORE, Defendant/Condemnor	: : PRELIMINARY OBJECTIONS

Date: May 23, 2002

OPINION and ORDER

Before the Court are Preliminary Objections demurring to Plaintiffs/Condemnees' Petition for Appointment of a Board of View, filed on June 15, 2001. The Preliminary Objections and supporting brief were filed on July 18, 2001. A brief in opposition to the Preliminary Objections was filed on August 10, 2001, and Condemnor filed a reply brief on September 7, 2001. Neither party has requested an evidentiary hearing. Argument was held on October 10, 2001. For the following reasons, the demurrer to Petition for a Board of View will be denied at this time, however, the Court finds it necessary to hold an evidentiary hearing prior to making a final ruling on the demurrer.

Facts

The Petition for Appointment of Board of View, filed June 15, 2001, by Charles Eberhard and his wife, Carol Eberhard (describing themselves as "Plaintiffs" but hereafter referred to as "Condemnees" or "Eberhards") requests a Board of View be appointed to assess damages against the Borough of Jersey Shore (named therein as "Defendant" but hereafter referred to as "Condemnor" or "Borough") arising out of the Condemnor's renovation and

operation of its Sewage Treatment Facility (hereafter "Facility"). The Petition's assertions include the following (paragraph numbers reference the Petition filed 6/15/01):

1. Eberhards are the owners and occupants of their home known as 218 Burke Street, in the Borough of Jersey Shore, having acquired the property in 1988. (Paragraphs 1, 2, and 6).

2. Borough is a local government entity having the power of eminent domain and owns and operates the Facility on land adjacent to Condemnee's residence. (Paragraphs 4, 5 and 7).

3. In 1996 Borough began an extensive design construction and renovation project to expand the capacity of the Facility, which became operational in the fall of 1997. (Paragraphs 8 and 9).

4. "10. As an immediate, necessary and unavoidable consequence of Defendant's renovation and operation of the renovated Facility, including receipt, treatment and storage of increased volumes of sewage and other waste, and discharge of byproducts of the process, Plaintiffs were and continue to be subjected on a regular basis to excessive malodor and noise; loss of use and enjoyment of their real and personal property; loss in real and personal property value; damage to real and personal property; and expenses regarding such losses and damages." (Paragraph 10).

5. Borough did not make or tender just compensation and did not file a declaration of taking. (Paragraphs 11 and 12).

The Preliminary Objections filed by the Borough acknowledge the Petition alleges the Facility renovations caused Eberhards' damages from excessive malodor and noise

and loss of use and enjoyment of their property (*See*, Preliminary Objections (P.O.) #5), but nevertheless raise a demurrer because Eberhards do not allege:

1. ". . . loss of use and enjoyment of their entire property" (P.O. #6);

2. a cause of action meeting the heavy burden required in showing a de facto taking (P.O. #8);

3. that the Borough acted intentionally in exercise of the power of Eminent Domain." (P.O. #9).

The demurrer also asserts that Eberhards ". . . have failed to show exceptional circumstances which have substantially deprived them of the use and enjoyment of their property." (P.O. #7).

DISCUSSION

The Commonwealth Court has recently iterated the considerations to be undertaken by this Court in evaluating whether or not a *de facto taking* exists when a landowner seeks to have a Board of View appointed in an inverse condemnation proceeding such as the one before us.

> A *de facto taking* occurs when an entity that is clothed and vested with the power of eminent domain substantially deprives property owners of the use and enjoyment of their property. ***Elser***. [***Elser v. Department of Transportation***, 651 A.2d 567 (Pa. Cmwlth. 1994]. In such proceedings, property owners must establish that they were deprived of the use and enjoyment of their property and that this deprivation was a direct and necessary consequence of actions taken by the governmental entity. ***Id.*** There is no bright line test to determine when government action shall be deemed a *de facto taking*; instead each case before the courts must be examined and decided on its own facts. ***Lehigh-Northampton Airport Authority v. WBF Associates, L.P.***, 728 A.2d 981 (Pa. Cmwlth. 1999). In ***McGaffic v. Redevelopment Authority of the City of New Castle***, 548 A.2d 653 (Pa. Cmwlth. 1988), the Court noted the heavy burden that property owners must bear in these cases and stated that they must show the existence of exceptional

> circumstances to meet their burden of proof. *See also* ***Lehigh-Northampton Airport Authority***.

Newman v. Com. of Pa., Dept. of Transp., 791 A.2d 1287 (Pa. Cmwlth. 2002).

The Commonwealth Court has also long recognized that preliminary objections are the sole method under the Eminent Domain Code to raise legal and factual objections to a petition for appointment of viewers, which alleges a *de facto taking*. *See* ***Borough of Barnesboro v. Pawlowski***, 514 A.2d 268 (Pa. Cmwlth. 1986, at 269, 270). The Preliminary Objections are to be decided on the assumption that all well and clearly pleaded facts in the Petition are true, that legal conclusions and averments of law are not deemed to be admitted. ***In Re: Crosstown Expressway***, 281 A.2d 909 at 910 (Pa. Cmwlth. 1971)

Barnesboro also denotes the procedure that should be followed by this Court when confronted with preliminary objections such as the Borough's demurrer, which raises objections both as to the legal and factual sufficiency of the demurrer.

> When confronted with a petition for appointment of viewers alleging a de facto taking to which a preliminary objection in the nature of a demurrer is filed, the lower court must first decide whether as a matter of law the averments of the petition, taken as true, are sufficient to state a cause of action of a **de facto taking**. If not, the preliminary objections must be sustained and the petition dismissed or the petitioner allowed to amend his pleading. If the averments, taken as true, *might* establish a **de facto taking**, the lower court must take evidence by deposition or otherwise so that a judicial determination might be made. If the averments on their face establish a **de facto taking**, then the preliminary objections must be dismissed.

Barnesboro v. Pawlawski*, supra*. At 270.

The Borough's challenges to the legal sufficiency of the Petition exist in the objection that the petition does not allege the loss of use and enjoyment of the entire property

as a result of an <u>intentional</u> exercise of the power of Eminent Domain. To the contrary this Court finds the petition allegations are sufficient in this regard.

The Borough's factual insufficiency challenge to the petition is based upon the claim the petition does not meet the heavy burden of showing the exceptional circumstances by which the renovations to the Facility have directly and substantially caused the loss and enjoyment to the Eberhards' property interests. The Court agrees the petition is factually deficient and accordingly an evidentiary hearing is required to determine if sufficient facts do exist to support the cause of action of a *de facto taking*.

Id., at 270.

The legal sufficiency of the petition

A **de facto taking** is defined in the following manner:

> [W]here an entity, clothed with the power of eminent domain, exercises that power and the immediate, necessary, and unavoidable consequence of that exercise is to destroy, injure or damage private property so as to substantially deprive an owner of the beneficial uses and enjoyment thereof, [a] … "de facto" taking of said property has occurred and just compensation must be paid.

Ibid.; *see also* ***McCracken v. City of Philadelphia***, 451 A.2d 1046 (Pa. Cmwlth. 1982).

Eberhards have alleged that they are abutting owners to the Sewage Treatment Facility which in 1996 the Borough caused to undergo "an extensive design, construction and renovation project to . . . increase and expand upon the Sewage Treatment Facility." Petition, at paragraph 8. *See inter alia*, ***Rawls v. Central Bucks Joint School Building Authority***, 203 A.2d 863 (Pa. Cmwlth. 1973). Clearly this is an allegation of the Borough's exercise of a power of eminent domain. The Borough's renovations were an intentional expansion of the Facility. Although the additional and alleged excessive noise and odor may not have been an

intentioned result of the renovations the Petition does allege they emanate from the Facility due to the renovations and expansion, as opposed to some negligent act such as might have been asserted if there had been an accidental spill or discharge from the Facility.

The Borough's demurrer, in paragraph 5, acknowledges the Petition does allege that excessive malodor and noise from the renovations caused Eberhards to suffer the loss of use and enjoyment of their property and damage to it. Indeed, paragraph 10 of the Petition does asserts not only these contentions but also that both loss of value and actual damage have been sustained by Eberhards' real and personal property as an "immediate, necessary and unavailable consequence" of the renovations. (Petition paragraph #10). Nevertheless, the Borough objects that Eberhards do not allege the loss of use and enjoyment of their "entire property". *See* paragraph 6 of demurrer. This Court believes that the Borough's objection is without merit since when a *de facto taking* occurs, the condemnee need not show an actual taking of whole or part of the property involved. *See,* ***Miller v. Beaver Falls***, 82 A.2d 34, 37 (1951). All that a condemnee must show is that the condemnor's acts constitute a substantial deprivation of landowners' beneficial use and enjoyment of his property; if so, the deprivation constitutes a compensable injury and a *de facto taking*. ***Lando v. Urban Redevelopment Authority of Pittsburgh***, 411 A.2d 1274 at 1276 (Pa. Cmwlth. 1980); *see also* ***Rawls,*** *supra* at 866 and ***Petition of Borough of Boyertown***, 466 A.2d 239 (Pa. Cmwlth. 1983). Nor is a divestiture of title required. ***Department of Transportation v. Greenfield Township***, 582 A.2d 41 (Pa. Cmwlth. 19990), appeal denied 593 A.2d 844 (1991); ***German v. City of Philadelphia***, 683 A.2d 323 (Pa. Cmwlth. 1996).

In addition, as noted in ***Rawls,*** Article 10, Section 4 of the Pennsylvania Constitution provides that the Borough would be liable to pay just compensation to the Eberhards "for property taken, **injured** or destroyed by the **construction or enlargement of their works**, or **improvements** and compensation shall be paid secured before the taking, **injury** or destruction." Pennsylvania Constitution, Article 10, Section 4, (emphasis supplied).

Pennsylvania Appellate Courts have recognized that it is appropriate for a condemnee to file a petition for a board of view based upon a city's construction activities affected the business and market value of an adjoining landowner's property. *See,* ***MacKenzie v. City of Philadelphia****, supra,* which involved claims of both property damage and economic loss both of which are asserted in Eberhard's petition. The diminution of market value alleged by Eberhards may be a basis for finding a *de facto taking*. *See,* ***In Re: Crosstown Expressway***, *supra.* It is also clear that noise, as from aircraft, under exceptional circumstances may be sufficient to deprive a landowner of the use and enjoyment of a residential property as to constitute a *de facto taking*. *See,* ***Griggs v. Allegheny County,*** Pa., 82 S.Ct. 531 (1962) reviewing 168 A.2d 123 (1961). In so holding the U. S. Supreme Court gave great weight to Chief Justice Bell's dissenting opinion which found the invasion of the property by noise to be so extreme as to prevent conversation, use of telephone and sleep. ***Id.***, at 533. *See also* ***In Re: Harr***, 507 A.2d 899 (Pa. Cmwlth 1986). But *see,* ***Petition of Ramsey***, 342 A.2d 124 (Pa. Cmwlth. 1975) in which the trial court's finding that the actual interference to the property owner's rights caused by aircraft noise was not so substantial as to constitute a taking.

Condemnor contends that the noise and odor emanating from the enlarged facility, if anything, constitutes a nuisance and as such is the basis for damages in negligence by

a trespass action. However, such conditions are also evidence of an on-going infringement upon the property rights of the Eberhards, particularly given the continuous and permanent nature thereof. *See,* ***In Re: Joshua Hill, Inc.***, 199 B.R. 298 (E.D. Pa. 1996 at 317-320 and cases cited therein; reversed in part 151 F.3d 1025, 3rd Cir. 1998 without opinion).

Rawls*, supra*, in dealing with the discharge from a sewer plant, recognizes that an actual physical intrusion upon the real property of the condemnees need not be alleged nor proven and also that "the resulting odors" were among the types of injury which if it resulted from the exercise of the power of eminent domain could give rise to a *de facto taking*. *See* ***Rawls,*** *supra* at 498, 499.

Hence, it can be seen that the allegations of the Petition of Eberhards requesting an appointment of viewers suffices to aver the necessary elements which might establish a *de facto taking*. But these allegations alone do not permit the Court to dismiss the demurrer.

The Factual Sufficiency of the Petition

The facts pleaded in the Petition, even if taken as true, do not assert the nature and extent of the injury suffered by Eberhards nor are the pleaded facts sufficiently detailed to allow this Court to state they allege sufficient details which if true would mandate a finding that Eberhards suffered a substantial deprivation of the beneficial use and enjoyment of their property as a direct result of the Facility renovations. Accordingly, it is necessary that an evidentiary proceeding take place whereby evidence can be introduced by either party addressing the nature of the destruction and injury to the Eberhard property and whether it is a substantial deprivation of Eberhards' beneficial use and enjoyment sustained as a direct and necessary consequence of the renovations to the Facility. In that proceeding the Court will be

mindful that each case must be carefully examined decided on its own facts and that Eberhards bear a heavy burden and must establish the existence of exceptional circumstances to meet their burden of proof. *See,* ***McCracken v. City of Philadelphia*** *supra* and *also* ***Barnesboro v. Pawlawski****, supra.*

This Court will enter an order directing that an evidentiary hearing be held.

ORDER

It is hereby ORDERED and DIRECTED that an evidentiary hearing will be held on the 21st day of August 2002 at 1:30, p.m., Courtroom No. 3 of the Lycoming County Courthouse, 48 West Third Street, Williamsport, Pennsylvania for receipt of evidence in accordance with the foregoing Opinion.

Three hours shall be set aside for the receipt of testimony. Counsel shall confer among themselves concerning the witnesses they intend to call and shall exchange witness and exhibit lists within twenty days of receipt of notice of this order. To the extent that counsel ascertain that witnesses are not available for the date of the proceeding or that the length of anticipated testimony will exceed the three hours allotted therefore, they shall proceed to make use of depositions, discovery, or other forms of introduction of testimony such as affidavits to the extent they can agree to do so by stipulation. If any discovery is to be utilized, it must be initiated so that it is completed by response no later than August 9, 2002.

This Court, at the request of counsel, will also hold a conference on June 5, 2002, at a time to be determined, to establish the procedures to be followed in establishing the evidentiary record that a final ruling on the demurrer to the Petition for Board of Viewers can be determined. Any request for a conference shall be made promptly to the Court's office.

BY THE COURT:

William S. Kieser, Judge

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