IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

IN RE: LOYALSOCK TOWNSHIP SCHOOL DISTRICT OF CERTAIN REAL PROPERTY LOCATED IN LOYALSOCK TOWNSHIP OWNED By Jayne Horner, Emil P. Horner, Jr., Mary L. Horner, et. al.,	:	**No. 01-01475**
Plaintiff	:	
vs.	:	**CIVIL ACTION - LAW**
JAYNE HORNER, EMIL P. HORNER, JR., MARY L. HORNER	:	**Preliminary Objections**
Defendants	:	

ORDER

AND NOW, this 8th day of November 2002, the Court DENIES the defendants' remaining preliminary objections to the plaintiff's notice of condemnation.

In an Opinion and Order docketed May 30, 2002, the Court denied many of the defendants' preliminary objections after argument, but without evidentiary hearing. On the issues regarding the necessity of the taking, ownership of the property, and de facto taking, the Court granted the defendants an evidentiary hearing. Hearings were held on these issues on or about July 22, 2002 and October 1, 2002.

1. NECESSITY OF TAKING

The Court has limited review of the condemnor's actions. As the Pennsylvania Commonwealth Court stated in Appeal of Waite:

> The trial court is limited in its review of a decision to condemn property and of the extent of the taking to determining whether the condemnor is guilty of fraud, bad faith, or has committed an abuse of discretion. Octorara Area School Dist. Appeal, 124 Pa.Commonwealth Ct. 472, 556 A.2d 527 (1989). The burden of proving that the condemnor has abused its discretion is on the objector or condemnee. Id. The condemnee's burden of proving fraud or abuse of discretion is a heavy one. Pittsburgh School Dist. Condemnation Case, 430 Pa. 566, 244 A.2d 42 (1968). In such cases, there is a strong presumption that the condemnor has acted properly. Pidstawski v. South Whitehall Township, 33 Pa.Commonwealth Ct. 162, 380 A.2d 1322 (1977).

163 Pa.Commw. 283, 641 A.2d 25, 28 (1994). The testimony established that the School District is land deficient. The District plans to close Becht Elementary School and move those students to Four Mile Elementary School. Based on the number of students that will be at Four Mile Elementary School once Becht is closed, the District needs at least four acres of property. When confronted with this information, the defendants argued taking their entire parcel was excessive and the District could have taken the Liberty Mutual property instead. The record, however, does not support this claim. The District presented credible evidence that it needed additional land for athletic fields, drainage and the like. In fact, the District's witnesses testified the District could use land in addition to the defendants' property. The District also presented evidence that the defendants' property was best suited for its purposes, because that property was vacant land adjacent to Four Mile Elementary School. The Court finds this testimony credible. Even assuming for the

sake of argument that the Liberty Mutual property could have satisfied the District's needs, the Court cannot substitute its discretion for that of the District. See Swartz v. Pittsburgh Public Parking Authority, 63 Pa.Commw. 434, 439, 439 A.2d 1254, 1257 (1981).

The only evidence presented by the defendants that allegedly showed bad faith on the part of the District related to the amount of compensation offered by the District to the defendants when the District was negotiating to purchase the property. The amount of compensation, however, is an issue for the Board of View; it has nothing to do with the District's need for the land in question.

The defendants also asserted that the District could not take their land without following a Governor's Executive Order or getting approval from a state board, because their land is agricultural. The Court already rejected this argument in its Opinion and Order docketed May 30, 2002. The Court would supplement that decision with the following observations. First, the Governor's Executive Order attached as Exhibit A to the defendants' preliminary objections only applies to state agencies under the Governor's jurisdiction. The District is not a state agency under the Governor's jurisdiction. Therefore, the Governor's Executive Order does not apply to this case. Second, the defendants' preliminary objections do not raise the Agricultural Lands Condemnation Approval Board statute; the objections only raise "Clean and Green" and the Governor's Executive Order. The "Clean and Green" Act is found at 72 P.S. §5490.1 et seq. The Agricultural Lands Condemnation Approval Board is established in 71 P.S. §106. Since the defendants' did not raise

this statute, the objection regarding failure to get approval from this board is waived. Even if the defendants had properly raised this objection, board approval is only required when the purpose of the condemnation is for highways or disposal of solid or liquid waste materials. 71 P.S. §106(b) and (d). Finally, although he claimed his actions were at the direction of Mr. Holland (the District's former solicitor), Mr. Horner admitted he ceased farming the property prior to the taking by the District. To meet the definition of land devoted to agricultural use, the land must be farmed for the preceding three years and contain 10 contiguous acres or have an anticipated yearly gross income of $2,000. 72 P.S. §5490.3(1). The defendants did not present any evidence regarding the income anticipated from the property and Mr. Horner admitted he did not farm the property for the preceding three years. Therefore, the defendants did not meet their burden to show that the property was land devoted to agricultural use.

2. DE FACTO TAKING

This is really a non-issue. The District believed the Horners' property contained 9.25 acres based on its survey and the defendants asserted the property was 10 acres. The District made it clear at the hearings, though, that it intended to take the **entire** parcel adjacent to Four Mile Drive owned by the defendants whether it was 9.25 acres or 10 acres.

3. OWNERSHIP

The defendants asserted the condemnation by the District could not proceed because the District did not serve all the owners of the property with the notice of

taking. The defendants presented evidence that the Emil Horner Trust (hereinafter "Trust") owned a one-quarter interest in the property. Even if the Trust owns a one-quarter interest, the Court does not believe that fact is fatal to these proceedings for two reasons. First, the District served notice on all the **record** owners. There is nothing in the Lycoming County property records to indicate the Trust is an owner. The District did a search of the real estate records in Lycoming County. Although the qualified disclaimer is filed, neither the will creating the Trust nor a deed to the Trust is filed of record. There simply is nothing of record in the Register and Recorder's Office to inform the District that the Trust is an owner. Second, the Trust is not an individual; therefore, service would be effectuated on the trustee of the Trust. The trustee of the Trust is Jayne Horner. In the event Jayne Horner cannot serve as trustee, Emil Horner Jr. becomes the trustee. In the event Jayne Horner and Emil Horner cannot serve as trustee, Mary Horner becomes the trustee. These individuals have been served and have had actual notice of the condemnation and these proceedings.

By The Court,

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Kenneth D. Brown, J.

cc: E. Eugene Yaw, Esquire
Emil Horner, Jr.
Jayne Horner
Mary L. Horner
Work File
Gary Weber, Esquire (Lycoming Reporter)