

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

IN RE: CONDEMNATION BY THE : No. 03-00945
BOROUGH OF DUBOISTOWN :
OF CERTAIN REAL PROPERTY : EMINENT DOMAIN
SITUATION IN THE BOROUGH OF :
DUBOISTOWN : PROCEEDINGS-IN REM

MEMORANDUM OPINION AND ORDER

This matter came before the Court on the South Williamsport School District's (hereinafter "Condemnee") preliminary objections to the Declarations of Taking filed by the Borough of Duboistown (hereinafter "Condemnor"). The relevant facts follow.

On or about July 6, 1959, the residents and taxpayers of the School District of Duboistown gave, for the nominal consideration of \$1.00, the South Williamsport Area Joint Schools (now Condemnee) the building and property known as the Duboistown Elementary School. From that date through the 2001-2002 school year, the District used the school as an elementary school for the children of Duboistown and nearby residents of the district. During that time, and as far back as 1876, what is referred to as the "green space" in Condemnor's authorizing Resolution has been essentially a public park, playground and recreational facility for the residents of Duboistown and the general public.

On February 4, 2002, Condemnee's School Board voted

to close the Duboistown Elementary School effective June 30, 2002. On April 21, 2003 and May 19, 2003, Condemnee's School Board adopted resolutions authorizing the sale of the Duboistown Elementary School property at public auction. The public auction was scheduled and advertised for June 19, 2003, at 6:00 p.m. at the school property at 126 Summer Street in the Borough of Duboistown.

On June 17, 2003, Condemnor filed a Declaration of Taking condemning a portion of the property located at 126 Summer Street pursuant to a Resolution adopted by Condemnor's Borough Council on June 5, 2003 and approved by Condemnor's Mayor on June 15, 2003. The Resolution is attached to Condemnor's Declaration of Taking as Exhibit 1. The Resolution noted that the purpose of the exercise of the eminent domain power was to secure the green space portion of the property and maintain it as a park and recreation place for the Borough residents and the public. The portion of the property being condemned was described and depicted in Exhibits B, C, and D, which were attached to the Resolution. The descriptions and depictions in these exhibits included the "green space" as well as a portion of the parking lot. Condemnor never advertised the proposed adoption of the condemnation Resolution prior to its adoption.

Condemnee filed preliminary objections raising three issues: 1) whether Condemnor had the authority to condemn the

property of Condemnee, a public body; 2) whether the resolution authorizing condemnation was legislative in character so as to require advertisement prior to adoption; and 3) whether the Declaration of Taking exceeded the authority contained in its authorizing resolution when it condemned a portion of the parking lot in addition to the "green space."

Condemnee first asserts Condemnor does not have the authority to condemn the property of Condemnee, a public body, because condemnation for the establishment of parks, playgrounds, and recreation places is limited by sections 1501, 2702, and 2703 of the Borough Code (53 P.S. §§46501, 47702, and 47703) to private lands and private property. Condemnee argued that since it is a public body and it owns the land, the land is public. Condemnor countered by arguing that it is the use of the property which determines its character as public or private and Condemnee ceased using the property as a school on June 30, 2002; therefore, the property is private and subject to condemnation. Unfortunately, there is no definition of private lands or private property in the sections of the Borough Code cited by Condemnee and there is no case law directly on point. The Court has reviewed the cases cited by both parties and finds **under the unique facts and circumstances of this case** that the land in question is private. Although the precise statutory limitation to private

property was not at issue, other cases involving eminent domain have determined the character of property as private or public based on its use. In re Township of Lower Macungie, 717 A.2d 1105, 1107 (Pa.Commw. 1998) ("the subject tract, although owned by the school district, was being privately used as farmland, which use negates the school district's assertion of the property's public rather than private character."). Here the property ceased having a public use effective June 30, 2002. Moreover, Condemnee adopted resolutions in April and May of 2003 to sell property at auction. Since the property no longer has a public use and the Condemnee no longer desires to own it and has taken steps to relinquish its ownership interest, the Court finds the property is private for purposes of condemnation.¹

Condemnee next contends the resolution authorizing condemnation was legislative in nature, requiring its advertisement before its adoption. The Court rejects this

1 To find the land in question to be public so as to preclude condemnation would lead to an illogical result. The Court says this because once the Condemnee, South Williamsport School District, would sell the property as planned at auction or otherwise, the Condemnor, Borough of Duboistown, would then condemn the land as it would be out of arguable public ownership. To the extent the South Williamsport School District wants to protect the interest of all the taxpayers in the district, it can do so by obtaining just compensation for the property in eminent domain.

argument on the basis of Appeal of Jordan, 73 Pa.Commw. 572, 459 A.2d 435 (1983).

Condemnee's final preliminary objection asserts Condemnor exceeded the authority contained in the resolution by taking a portion of the parking lot. Again the Court cannot agree. Although the eighth, ninth and tenth whereas clauses of the resolution refer to the "green space" portion of the property, the parking lot is included in the descriptions and depictions of the portion of the property to be condemned. Therefore, the parking lot is mentioned in the resolution through paragraph 1 and its reference to and incorporation of the Exhibits attached thereto. Furthermore, a portion of the parking lot is necessary for the public to be able to use the "green space" as a park and recreation place.

ORDER

AND NOW, this ____day of June 2004, the Court DENIES Condemnee's preliminary objections to Condemnor's Declaration of Taking.

By The Court,

Kenneth D. Brown, P.J.

cc: Garth Everett, Esquire
Robert Wise, Esquire
Work File
Gary Weber, Esquire (Lycoming Reporter)