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February 6, 2017

Rosemary Chiavetta, Secretary
PA Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

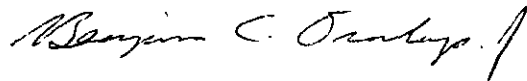
Re: A. Edward Schwartz v. Delaware and Hudson Railway Company
Docket No. C-2016-2570929

Dear Secretary Chiavetta:

I am enclosing Norfolk Southern Railway Company's Pre-Hearing Conference Memorandum, in the above-referenced matter. As evidenced by the attached Certificate of Service, a copy of the Memorandum is being served upon all parties of record.

If you have any questions, please advise.

Sincerely yours,



Benjamin C. Dunlap, Jr.

BCD/lmk
Enclosures
Cc: All Counsel of Record

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

A. Edward Schwartz :
 :
 v. : C-2016-2570929
 :
 Delaware and Hudson Railway Company :

**NORFOLK SOUTHERN RAILWAY COMPANY'S
PRE-HEARING CONFERENCE MEMORANDUM**

Norfolk Southern Railway Company ("Norfolk Southern") submits this Pre-Hearing Conference Memorandum in the above referenced matter in accordance with ordering paragraph 3 of the January 18, 2017, Pre-Hearing Conference Order of Administrative Law Judge David A. Salapa, stating as follows:

a) It is requested that Norfolk Southern's sole entry on the service list shall be as follows:

Benjamin C. Dunlap, Jr., Esquire
Nauman, Smith, Shissler & Hall, LLP
200 North Third Street, 18th Floor
Harrisburg, PA 17108
(717) 236-3010 Ext 21 (phone)
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I will accept electronic service at this email address from Your Honor and counsel.

b) Norfolk Southern does not believe that this matter can be settled. *A de facto* taking, as alleged by Mr. Schwartz, has not occurred under the facts of this case and the law applicable thereto. Therefore, Norfolk Southern would not be responsible for any damages in the form of any alleged diminution of Mr. Schwartz's property value due to the removal of the SR 4009 bridge and abolition of the rail-highway crossing, as ordered by this Honorable Commission.

c-1) Mr. Schwartz alleges in his original Application For Damages in this proceeding, which the Commission decided to handle as a complaint pursuant to its Secretarial Letter issued January 31, 2016, that the abolition of the SR 4009 crossing left him with no “fit means of access” to his home and business improvements on the primary parcel of his property, causing a diminution in fair market value of the property. See Application at ¶¶ 16, 19. He further alleges that this diminution of value constituted a “*de facto* taking” for which he is entitled to “Constitutional just compensation.” See *id.* at ¶ 21.

First, the Commission does have jurisdiction to determine compensation for damages “which the owners of adjacent property taken, injured, or destroyed may sustain in the . . . abolition of any crossing under the provisions of this part.” 66 Pa.C.S. § 2704(a). Such compensation may be determined by the Commission itself, following due notice and hearing, *id.*, or may be submitted by the Commission upon its own motion or upon application of any party in interest, to the court of common pleas of the county where the affected property is located, *id.* at § 2704(b), as is usually how such matters are handled. An application for damages first must be made to the Commission, at least where an actual appropriation of property by the Commission is involved. In such circumstances, an aggrieved property owner may not first make application to the court of common pleas for appointment of a board of view, which is all that the case of *CSX Transp., Inc. v. Pa. Dep’t of Transp.*, 613 Pa. Cmwlth. 620, 641 A.2d 705 (1994), cited by Mr. Schwartz, holds. See also *Huss v. Pa. Dep’t of Transp.*, 99 Pa. Cmwlth. 386, 512 A.2d 1356 (1986) to same effect.

The Commission, however, does not have jurisdiction to determine *de facto* taking matters. In the Commonwealth Court’s unreported Decision in *Stanford Cramer v. Pa. Dep’t of Transp., et al.*, 1232 CD 2005 (Opinion and Order filed Feb. 28, 2006), which is attached hereto

as Exhibit "A", the Court held at pages 10-11 that the PUC does not have a procedure to address *de facto* taking matters, and thus it can only refer such matters to the appropriate court of common pleas for determination. This lack of Commission jurisdiction over *de facto* taking matters is supported by two subsequent *de facto* taking cases, *Com., Pa. Dept. of Transp. v. Kemp*, 515 A.2d 68 (Pa. Cmwlth. 1986) and *Com., Pa. Dept. of Transp. v. Smoluk*, 514 A.2d 1000 (Pa. Cmwlth. 1986), where the Commonwealth Court distinguished *Huss*, stating: "We note that the present case does not involve a fact situation where the Pennsylvania Public Utility Commission itself appropriates property under Section 2702(b) of the Public Utility Code, 66 Pa. C.S. 2702(b), and thus has initial jurisdiction to determine damages." *Kemp*, 515 A.2d at 70, n. 2 and *Smoluk*, 515 A.2d at 1001 n. 2 (language is identical in both cases). In both of those cases, the plaintiffs had filed for appointment of a board of view in the appropriate court of common pleas without any prior filing with the Commission.

Thus, the appropriate procedure here is for the Commission to refer this matter to the Court of Common Pleas of Lackawanna County for Mr. Schwartz to proceed under Section 502(c) of the Eminent Domain Code, 26 Pa.C.S. § 502(c). In that Court, Mr. Schwartz will have the opportunity to file a petition for the appointment of viewers, and Norfolk Southern and the other respondents will have the court determine whether a *de facto* taking occurred.

Therefore, Norfolk Southern asks that the Commission refer Mr. Schwartz's Application for Damages to the Court of Common Pleas of Lackawanna County. If the Commission or any party will not agree to such a referral at this time, Norfolk Southern requests that briefing be permitted for the Commission to make an initial determination on this jurisdictional issue. Without such a jurisdictional determination at this time, any subsequent proceedings before the Commission would certainly be challenged on jurisdictional grounds by the party or parties

against whom any damages may be assessed, which would result in a waste of resources by the parties involved and the Commission.

g) Issue: Whether the Commission has jurisdiction to determine whether a *de facto* condemnation has occurred and the amount of damages, if any.

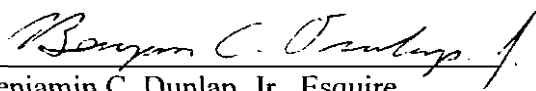
h) Norfolk Southern does not think that any further evidence is necessary for the Commission to determine the initial jurisdictional issue, which is a question of law. Furthermore, the doctrines of *res judicata* and *collateral estoppel* apply to the factual findings and conclusions of law in the prior proceedings at docket numbers P-2011-224170 and C-2011-2237486, in which all parties in the present matter either participated or had the opportunity to participate.

Respectfully submitted,

NAUMAN, SMITH, SHISSLER & HALL, LLP

Date: February 6, 2017

By:


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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Stanford Cramer

v.

Commonwealth of Pennsylvania,
Department of Transportation;
Consolidated Rail Corporation;
and Lower Swatara Township

Appeal of: Commonwealth of
Pennsylvania, Department of
Transportation

No. 1224 C.D. 2005

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DAUPHIN COUNTY
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Stanford Cramer

v.

Commonwealth of Pennsylvania,
Department of Transportation;
Consolidated Rail Corporation;
and Lower Swatara Township

Appeal of: Consolidated Rail
Corporation

No. 1232 C.D. 2005

Argued: December 12, 2005

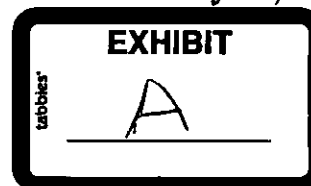
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BEFORE: HONORABLE JAMES GARDNER COLINS, President Judge
HONORABLE BERNARD L. MCGINLEY, Judge
HONORABLE RENÉE COHN JUBELIRER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER

FILED: February 28, 2006



The Consolidated Rail Corporation (Conrail) and the Commonwealth of Pennsylvania, Department of Transportation (DOT)¹ appeal the order of the Court of Common Pleas of Dauphin County overruling their preliminary objections to Stanford Cramer's Petition for a Board of View (Petition), and sustaining Cramer's Motions to Strike Appellants' preliminary objections. The trial court's order also referred Cramer's Petition to the County Court Administrator for appointment of a Board of View.

The facts are as follows. In May 1987, Conrail filed with the Public Utility Commission (PUC) an application for approval of the abolition of a rail-highway crossing that carried Whitehouse Lane over and above the Conrail tracks in Lower Swatara Township, Dauphin County (Bridge). Conrail filed the application to abolish the bridge because it was old, in a state of disrepair, and did not meet current standards.

Whitehouse Lane, a Township road, had been a major access route to the Harrisburg International Airport. In 1984, the Township erected barricades on either side of the Bridge, closing it to vehicular traffic, because of concerns regarding the Bridge's structural integrity, and a new highway spur then provided airport access. Before the Bridge was closed, Whitehouse Lane had essentially been the sole means of ingress and egress to approximately 5.5 acres of land that is located between the airport's property and the Conrail tracks and was purchased by

¹ Conrail and DOT are also jointly referred to as Appellants.

Cramer's mother in 1986 for \$40,000 (Property).² Cramer subsequently purchased the Property from his mother, hoping to build thereon facilities related to his auto sales, rental, repair and servicing businesses. Cramer admitted, in testimony before the PUC in 1988, that the Bridge **was already closed** when his mother purchased the Property, and that his plans to improve the Property were contingent upon, *inter alia*, the PUC's decision regarding the Bridge.

The PUC, by emergency order issued September 1987, affirmed the Township's decision to barricade the Bridge, and determined that it was to remain closed to public use until a hearing could be held to address matters concerning its safety. In December 1994 and October 1995, two PUC hearings were held before an Administrative Law Judge (ALJ), after which he recommended, *inter alia*, abolition of the Bridge. Cramer and Conrail filed Exceptions to the recommended decision.

On December 24, 1996, the PUC issued an opinion and order adopting the ALJ's recommended decision, "as modified," finding the ALJ's findings and conclusions to be amply supported by substantial evidence of record. The PUC thus denied, as not meritorious, the Exceptions of Cramer and Conrail. The PUC found that the evidence firmly established that "a reconstructed crossing would solely benefit Cramer, and would not be in the public interest." (PUC Op. 12/24/96 at 8.) Accordingly, the PUC ordered that Conrail was to demolish and

² Previously, another means of access to Cramer's Property was via Airport Drive; however, DOT came to regard this as a *private* road belonging to the airport and no longer available for public use.

remove the Bridge, at its expense, within one year, and the Township was to permanently barricade the abolished Bridge, at its expense, and erect signs indicating that Whitehouse Lane was closed. This decision was not appealed. In April 1998, Conrail advised the PUC that the Bridge had been demolished.

In July 2002, Cramer filed with the PUC a Petition for Damages for Property Taken, Injured or Destroyed in a Railroad Crossing Proceeding (Petition for Damages).³ He sought damages in excess of \$1,000,000 under Sections 2702 and 2704 of the Public Utility Code, 66 Pa. C.S. §§ 2702, 2704, asserting injury to and appropriation of his Property. Section 2702 essentially provides the PUC with exclusive power to appropriate property for any such crossing, and Section 2704 provides the PUC with authority for determination of the amount of compensation to be paid to an injured property owner. Cramer alleged that actions taken by Conrail, the Township and DOT regarding the Bridge at the crossing, rendered his Property inaccessible and unusable, and denied him necessary "linkage" with other property or businesses in the area. Cramer requested that the PUC empanel a Board of View for determination of his just compensation, pursuant to relevant sections of the Eminent Domain Code.⁴

³ In September 2001, the Susquehanna Area Regional Airport Authority (Authority), a joint municipal authority created for the purpose of holding, owning, improving, maintaining and operating Harrisburg International Airport, condemned Cramer's Property in order to service, improve, promote and maintain continued operations conducted at the airport. The Authority estimated just compensation for this taking to be \$180,000, based on an appraisal conducted on or around September 2000. Cramer now contends that this amount would be much higher had the crossing on Whitehouse Lane remained in place.

⁴ Act of June 22, 1964, Special Sess., P.L. 84, as amended, 26 P.S. §§ 1-101 – 1-903.

In October 2002, the PUC dismissed Cramer's Petition for Damages because "[n]either the December 24, 1996 order nor any other orders we have issued in this proceeding have appropriated Mr. Cramer's property as part of the project to demolish the Whitehouse Lane bridge." (PUC Op. 10/29/02 and Order at 10.) The PUC explained that the procedure for appropriating property at rail-highway crossings is set forth in Section 2702(d) of the Public Utility Code, 66 Pa. C.S. §2702(d),⁵ and "requires that any property to be appropriated must be accurately described by metes and bounds and the record owner of the property must be named in the order of appropriation." (PUC Op. 10/29/02 and Order at 10-11.) That formal appropriation did not occur here; therefore, the PUC held it had no authority under Section 2704(a) or (b) of the Public Utility Code to either determine damages or refer the matter to the trial court. It, therefore, determined it had no jurisdiction to consider the Petition and, so, did not hold a hearing. Instead, the PUC cited Phila. Suburban Water Co. v. Pa. Pub. Utilities Comm'n, 78 A.2d 46 (Pa. Super. 1951), for the proposition that, in grade crossing abolitions, the PUC

⁵ Section 2702(d) of the Public Utility Code provides:

(d) Procedure for appropriation of property.--When any real property is appropriated by the commission under this section, each parcel of such property so appropriated, shall be accurately described by metes and bounds, and the record owner of each such parcel shall be named in the order of appropriation. Unless otherwise recorded, the commission shall file with the recorder of deeds of the proper county, a copy of that portion of the order of the commission which appropriates such property, and such plans and other detailed information as the commission may deem necessary....

66 Pa. C.S. § 2702(d).

exercises the police power of the Commonwealth, for which damages and compensation are not recoverable. (PUC Op. 10/29/02 and Order at 11.)

Cramer appealed the PUC's order to this Court which, in an unpublished opinion, reversed and remanded. Cramer v. Pa. Pub. Util. Comm'n, (Pa. Cmwlth., No. 2750 C.D. 2002, filed Sept. 5, 2003) (Remand Opinion). In the Remand Opinion, we held that: (1) the PUC's failure to hold a hearing denied Cramer his due process rights; (2) even in the absence of a formal act of appropriation, a landowner is not precluded from demonstrating that there has been a compensable taking; and (3) Cramer's action was timely.

In December 2003, the PUC, on remand and without a hearing, *granted* Cramer's Petition for Damages and referred the matter to the trial court, pursuant to Section 2704(a) and (b) of the Public Utility Code, 66 Pa. C.S. §§ 2704(a), (b), for a determination of the amount of damages due.⁶ The PUC stated:

⁶ Section 2704 of the Public Utility Code, entitled "Compensation for damages occasioned by construction, relocation or abolition of crossings," sub-sections (a) and (b), provides, in pertinent part:

(a) **General Rule.**—The compensation for damages which the owners of adjacent property taken, injured, or destroyed may sustain in the construction, relocation, alteration, protection, or abolition of any crossing under the provisions of this part, shall, after due notice and hearing, be ascertained and determined by the [PUC]....

(b) **Judicial review.**--Any party to the proceeding dissatisfied with the determination of the commission may appeal therefrom, as provided by law, and for this purpose is hereby authorized to sue the Commonwealth. *The commission may, of its own motion, or upon application of any party in interest, submit to the court of common pleas of the county wherein the property affected is located, the determination of the amount of damages to any property owner due to such*

(Continued...)

As we noted in our October 24, 2002 order..., we refer petitions for damages such as Stanford Cramer's to the court of common pleas of the county where the crossing is located. We see no reason to deviate from this procedure in this case.

(PUC Op 12/19/03 and Order at 2.)⁷

In June 2004, Cramer filed his Petition with the trial court. Pursuant to Section 504 of the Eminent Domain Code, 26 P.S. § 1-504, both Conrail and DOT filed preliminary objections to Cramer's Petition; Cramer then filed motions to strike those preliminary objections.

The trial court overruled the preliminary objections of DOT and Conrail, and sustained Cramer's motions to strike those preliminary objections. The trial court first determined that this Court, in its Remand Opinion reversing the PUC, "suggests that [Cramer] correctly alleges a *de facto* taking" had occurred at the time Conrail filed its application with the PUC for abolition of the Bridge. (Trial

condemnation, for which purpose such court shall appoint viewers, from whose award of damages an appeal to said court shall lie on the part of any person or party aggrieved thereby, under the general law applicable to the appointment of viewers, for the ascertainment of damages due to the condemnation of private property for public use.

66 Pa. C.S. § 2704(a) and (b) (emphasis added).

⁷ The PUC's order specifically provided that: "the petition filed by Stanford Cramer on July 23, 2002...is granted to the extent herein indicated" and "this matter is referred to the [trial court] for a determination of the amount of damages due Stanford Cramer for his property interests...." (PUC Op. 12/19/03 and Order at 3.)

Ct. Op. at 14.)⁸ It, therefore, ruled that Conrail's argument to the contrary lacked merit. Next, the trial court relied on Sections 2702(d) and 2704(a) of the Public Utility Code to hold that DOT's argument that it was not a condemnor lacked merit. The court noted that these two sections of the Public Utility Code indicate that the PUC may determine which entities shoulder expenses associated with the abolition of a crossing, and that DOT must bear a portion of those costs. Finally, the trial court agreed with Cramer that the only issue left to address was the extent of damage he sustained.⁹ Accordingly, pursuant to the provisions in Section 2704(b) of the Public Utility Code, the court referred Cramer's Petition to the County Court Administrator's office for appointment of a board of view and did not hold an evidentiary hearing. Both DOT and Conrail now appeal the trial court's decision to this Court.¹⁰

On appeal, Conrail and DOT present two main arguments. First, they argue that the trial court should have determined, as a preliminary matter, whether a *de facto* taking occurred under the Eminent Domain Code, and should, therefore, have

⁸ The trial court also writes that this Court's Remand Opinion "**intimates**" that a *de facto* taking occurred at the time that Conrail filed its application with the PUC. (Trial Ct. Op. at 14) (emphasis added).

⁹ The trial court specifically stated: "we agree with [Cramer's] conclusion that the only issue left to be addressed by this Court is the extent of damage, if any, that is sustained by [Cramer]." (Trial Ct. Op. at 16.)

¹⁰ This Court's scope of review in an eminent domain matter, where a trial court has either sustained or overruled preliminary objections to a declaration of taking, is limited to determining whether the trial court has abused its discretion, committed an error of law or whether the findings of the trial court are supported by sufficient evidence. R & J Holding Co. v. Redevelopment Auth. of Montgomery County, 885 A.2d 643 (Pa. Cmwlth. 2005).

held a hearing on the preliminary objections. Second, Conrail and DOT each contend they are not condemners in this case. DOT specifically argues that it was statutorily joined in the action, pursuant to Section 2702 of the Public Utility Code and Sections 3.361 and 5.13 of the Pennsylvania Code,¹¹ and this does not automatically require DOT to bear costs.

In response to these arguments, Cramer counters that Section 2704(b) of the Public Utility Code provides the exclusive procedure for the PUC's acquisition of his property through condemnation, and limits the trial court's jurisdiction to a determination of the amount of damages. He also claims that Section 2702(c) of

¹¹ Section 3.361 of the Pennsylvania Code, entitled "Crossing complaints," provides in pertinent part:

(a) Whenever a complaint is made under section 2702 of the [Public Utility Code] (relating to construction, relocation, suspension and abolition of crossings) that a crossing is dangerous or inadequate and requires reconstruction, relocation, alteration or abolition, public utilities and municipal corporations concerned and, if applicable, the Department of Transportation of this Commonwealth, will be made parties respondent.

52 Pa. Code § 3.361.

Section 5.13 of the Pennsylvania Code, entitled "Applications for construction or alteration of crossings," provides in pertinent part:

(a) Applications for construction, relocation, alteration, protection or abolition of a crossing under section 2702 of the [Public Utility Code] (relating to construction, relocation, suspension, and abolition of crossings) shall comply substantially with the requirements as to crossing complaints as set forth in § 3.361 (relating to crossing complaints).

52 Pa. Code § 5.13.

the Public Utility Code¹² gives the PUC authority to assess damages against DOT and Conrail. Cramer argues that the record adequately reflects that his Property was taken, and that he is entitled to the difference between the fair market value before and after the taking. He further argues that Appellants are estopped from raising, again, arguments they raised in their preliminary objections.

We first clarify the effect of our Remand Opinion. In our Remand Opinion we held that, contrary to the PUC's decision, a landowner is not precluded from demonstrating that there has been a compensable taking, even in the absence of a formal act of appropriation. We did **not** determine that a *de facto* taking had occurred in this case; it would have been premature for this Court to do so in the absence of a trial court hearing and determination, including the presentation of evidence, factual findings and construction of a complete record. Section 761 of the Judicial Code provides that Commonwealth Court is without original jurisdiction over actions in eminent domain. 42 Pa. C.S. § 761(a)(1)(i).¹³

Furthermore, this Court should not be understood to have indicated in its Remand Opinion that the PUC had to, itself, make a determination as to whether Cramer had proven a *de facto* taking, because the Public Utility Code does not

¹² Section 2702(c) of the Public Utility Code, entitled "Mandatory relocation, alteration, suspension or abolition," provides that the PUC, upon its own motion or upon complaint, has the exclusive power, after providing notice and holding a hearing, to order that a crossing be relocated, altered, suspended or abolished.

¹³ See also Lerro v. Dep't of Transp., 379 A.2d 652, 654 (Pa. Cmwlth. 1977) and Monaco v. Dep't of Transp., 363 A.2d 852 (Pa. Cmwlth. 1976)(both citing to Section 401 of the former Appellate Court Jurisdiction Act of 1970, 17 P.S. § 211.401, from which Section 761 is derived).

provide a procedure for the PUC to address *de facto* taking matters.¹⁴ Presumably, recognizing that the Public Utility Code provides only a procedure for the PUC to refer this matter to the trial court for a determination of the amount of damages due, the PUC made the referral.¹⁵ Cramer then filed his Petition with the trial court which provided the trial court, the appropriate document to proceed under the Eminent Domain Code, as it is authorized to do in any and all cases involving a *de facto* taking.

A *de facto* taking involves a situation where “an entity clothed and vested with power of eminent domain substantially deprives property owners of use and enjoyment of their property.” Elser v. Dep’t of Transp., 651 A.2d 567, 570 (Pa. Cmwlth. 1994). It does not involve the physical seizure of property but, rather, “is an interference with one of the rights of ownership that substantially deprives the owner of the beneficial use of his property.” Visco v. Dep’t of Transp., 498 A.2d 984, 985 (Pa. Cmwlth. 1985). There is no bright-line test to determine whether a government action has resulted in a *de facto* taking and, therefore, each case must be decided on its own facts. Waldron Street Book Co. v. City of Pittsburgh, 771 A.2d 111, 113 (Pa. Cmwlth. 2001).

¹⁴ Consequently, Cramer should not have filed **either** his Petition for Viewers or Petition for Damages with the PUC.

¹⁵ In this same order, the PUC also *granted* Cramer’s Petition for Damages. This was an error because, as noted above, the PUC does not have jurisdiction to handle *de facto* taking matters.

Under Pennsylvania law, a claim for a *de facto* taking may be brought by filing, with a trial court, a petition for the appointment of viewers under Section 502(e) of the Eminent Domain Code, as amended, 26 P.S. § 1-502(e). Edward L. Snitzer, Pennsylvania Eminent Domain § 201(1)-1(b)(i) (Cumulative Supp. 2001). Section 502(e) of the Eminent Domain Code provides that “[i]f there has been a compensable injury suffered and *no declaration of taking therefore has been filed*, a condemnee may file a petition for the appointment of viewers...setting forth such injury.” (Emphasis added.)

Property owners have a “heavy burden” to establish that a *de facto* taking has occurred. Miller and Son Paving, Inc. v. Plumstead Twp., 552 Pa. 652, 656, 717 A.2d 483, 485 (1998), cert denied, 525 U.S. 1121 (1999). They must show three things: (1) that exceptional circumstances substantially deprived them of the use and enjoyment of their property; (2) that an entity, clothed with the power of eminent domain, exercised that power; and (3) that damages sustained were the immediate, necessary and unavoidable consequence of the exercise of that power. Jacobs’ Appeal, 423 A.2d 442, 443 (Pa. Cmwlth. 1980). This burden of proof is not altered because Cramer originally filed his Petition for Damages before the PUC.

Preliminary objections are the appropriate method to test the legal sufficiency of a petition for appointment of viewers filed by a property owner alleging a *de facto* taking, and should be of the same scope and serve the same purpose as that assigned to preliminary objections to a formal declaration of taking. Jacobs v. Nether Providence Twp., 297 A.2d 550, 552 (Pa. Cmwlth. 1972); see

also 26 P.S. § 1-504. This is because the role of preliminary objections in eminent domain cases is not precisely that of preliminary objections as described by the Pennsylvania Rules of Civil Procedure.¹⁶ Nether Providence Twp., 297 A.2d at 553 (discussing the application of Section 406 of the Eminent Domain Code, 26 P.S. § 1-406). Rather, in eminent domain cases, preliminary objections serve a “somewhat broader purpose and are intended as a procedure to resolve expeditiously threshold legal issues without awaiting further proceedings before viewers and possibly a jury trial on appeal from a viewer’s report.” Id. The Court explained:

In directing the court to determine promptly all preliminary objections, to make such orders as necessary, including a final order, and to take evidence by deposition or otherwise if issues of fact are raised, the provisions of Section 406 manifest a legislative intent to have such matters *judicially determined, prior to further proceedings* thereby avoiding what might prove to be the unnecessary expenditure of considerable amounts of money and time incident to proceedings before viewers and to a jury trial on appeal from a viewer’s report.

Id. (emphasis added).

The conclusions in Nether Providence Twp. and its progeny, thus, instruct that the trial court here should have first decided, as a matter of law, whether the averments in Cramer’s Petition, taken as true, were sufficient to state a cause of action. Id.; Beltrami Enterprises, Inc. v. Dep’t of Env’tl. Resources, 632 A.2d 989, 991 (Pa. Cmwlth. 1993). If the averments could establish a *de facto* taking, the trial court must take evidence, by deposition or otherwise, in order to make a

¹⁶ See Pa. R.C.P. No. 1028.

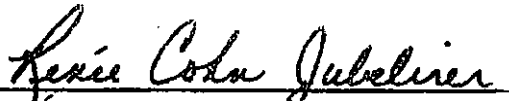
judicial determination as to whether or not a *de facto* taking had occurred based on the evidence obtained. Beltrami, 632 A.2d at 991; see also Domiano v. Dep't of Env'tl. Resources, 713 A.2d 713 (Pa. Cmwlth. 1998); Millcreek Twp. v. N.E.A. Cross Co., 620 A.2d 558 (Pa. Cmwlth. 1993); Dep't of Transp. v. Mano, 613 A.2d 119 (Pa. Cmwlth. 1992); Greger v. Canton Township, 360 A.2d 792 (Pa. Cmwlth. 1976); In re Petition of Ramsey, 342 A.2d 124 (Pa. Cmwlth. 1975); Nether Providence Twp.

In the case sub judice, the averments in Cramer's petition, on their face, do not establish that a *de facto* taking of Cramer's property took place, or that it was taken by Conrail or DOT. See In re Condemnation of 14 East Maple Street, New Castle, 363 A.2d 857 (Pa. Cmwlth. 1976). It is therefore necessary, *before* the matter proceeds to a board of view, for the trial court to hold an evidentiary hearing to determine the facts, render a decision regarding whether a taking of Cramer's Property occurred¹⁷ and, if so, by whom and whether Section 612 damages, 26 P.S. § 1-612,¹⁸ have been suffered. Id.

¹⁷ The parties' other arguments cannot be addressed until this initial determination is made. However, with regard to Cramer's argument that, because Conrail and DOT did not formally request a hearing before the trial court, the issue is waived, "[w]e refuse to read into [Pennsylvania case law] the requirement that a party otherwise entitled to an evidentiary hearing must make formal demand therefor, especially when the holding of such hearings is essential to our eventual review of these matters." City of Philadelphia v. Martorano, 394 A.2d 674, 675 (Pa. Cmwlth. 1978).

¹⁸ Section 612 of the Code, entitled "Consequential damages" provides: "All condemners, including the Commonwealth of Pennsylvania, shall be liable for damages to property abutting the area of an improvement resulting from change of grade of a road or highway, permanent interference with access thereto, or injury to surface support, whether or not any property is taken."

Accordingly, we vacate the trial court's order and remand for the trial court to hold an evidentiary proceeding to resolve the *de facto* taking issue.


RENÉE COHN JUBELIRER, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Stanford Cramer

v.

Commonwealth of Pennsylvania,
Department of Transportation;
Consolidated Rail Corporation;
and Lower Swatara Township

Appeal of: Commonwealth of
Pennsylvania, Department of
Transportation

No. 1224 C.D. 2005

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PENNSYLVANIA

Stanford Cramer

v.

Commonwealth of Pennsylvania,
Department of Transportation;
Consolidated Rail Corporation;
and Lower Swatara Township

Appeal of: Consolidated Rail
Corporation

No. 1232 C.D. 2005

ORDER

NOW, February 28, 2006, the order of the Court of Common Pleas of Dauphin County in the above-captioned matter is hereby vacated and the case remanded for the court to hold an evidentiary proceeding under the relevant provisions of the Eminent Domain Code, in accordance with this opinion.

Jurisdiction is relinquished.

Certified from the Record

FEB 28 2006

and Order Exit

Renee Cohn Jubelirer
RENEE COHN JUBELIRER, Judge

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

A. Edward Schwartz :
 :
 v. : C-2016-2570929
 :
 Delaware and Hudson Railway Company :

CERTIFICATE OF SERVICE

I hereby certify that I served one (1) copy of the foregoing Pre-Hearing Conference Memorandum on behalf of Norfolk Southern Railway Company in the above referenced matter this day by sending same via electronic mail and by depositing same in the United States mail, postage prepaid, in Harrisburg, Pennsylvania, addressed to:

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Date February 6, 2017

By:



Lisa M. Ketterer,
Legal Assistant

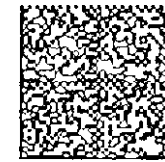
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