



COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE OF GENERAL COUNSEL

March 7, 2017

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

RE: C-2016-2570929

Dear Secretary Chiavetta:

Enclosed for filing please find the Department's *Motion for Summary Judgment*, in the above captioned matter.

I hereby certify that a copy has been sent to all parties of record as indicated by the Certificate of Service.

Very truly yours,

A handwritten signature in blue ink, appearing to read "Jennifer Brown-Sweeney".

Jennifer Brown-Sweeney
Assistant Counsel

Enclosure

220/JBS:igl

cc: David A. Salapa, Administrative Law Judge
Parties of Record
Mark J. Chappell, P.E., Chief, Utilities and Right-of-Way Section
Sarah Fenton, District Grade Crossing Engineer, District 4-0

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

A. Edward Schwartz	:	C-2016-2570929
	:	Electronically Filed
v.	:	
	:	
Norfolk Southern Railway Company,	:	
Pennsylvania Department of Transportation,	:	
Lackawanna County and LaPlume	:	
Township	:	

MOTION FOR SUMMARY JUDGMENT

In accordance with the February 9, 2017, Order Directing Filing of Motions for Summary Judgment the Pennsylvania Department of Transportation (Department) moves that the Administrative Law Judge David A. Salapa grant summary judgment in the above-captioned matter upon the following grounds:

1. On September 21, 2016 Complainant filed an application with the Public Utility Commission (PUC) seeking compensation for damages sustained due to the abolition of a railroad crossing.
2. By Secretarial Letter issued January 31, 2016, the Commission informed the parties that the Application for Damages would be treated as a complaint.
3. Answers and New Matter were filed by the Department, Norfolk Southern Railway Company, Lackawanna County, and LaPlume Township; Complainant responded to the New Matters.
4. A prehearing conference was held on February 8, 2017, wherein the Administrative Law Judge directed the parties to file motions for summary judgment and answers to those motions pursuant to 52 Pa. Code 5.102, addressing whether the Commission has jurisdiction over the issues raised in Schwartz's complaint. An order was issued February 9, 2017, consistent with this instruction.
5. In the instant matter, there are no genuine issues of material fact in dispute. This case stems from a dispute solely regarding a question of law, namely, whether the PUC has jurisdiction to determine de facto taking matters, including just compensation for a de facto taking.
6. The standard for the PUC in granting summary judgment is similar to the standard under the Pennsylvania Rules of Civil Procedure. *United Transp. Union v. Pa. PUC*, 68 A.3d 1026, 1033 (Pa. Cmwlth. 2013). Additionally, the PUC must view the record

in the light most favorable to the non-moving party, giving that party the benefit of reasonable inferences. *Id.* However, to preclude summary judgment, the non-moving party must establish that a genuine issue of material fact exists. *Id.*

7. The presiding officer will grant a motion for summary judgment of a party when there is no genuine issue as to a material fact and the moving party is entitled to judgment as a matter of law. *See* 52 Pa. Code § 5.102(d)(1).
8. This case involves an averment of a de facto taking. A de facto taking has been defined previously as occurring when a declaration of taking has not been filed and “when an entity clothed with the power of eminent domain substantially deprives an owner of the use and enjoyment of his property.” *Conroy-Prugh Glass Co. v. Dep’t of Trans.*, 321 A.2d 598, 599-600 (Pa. 1974); *Elser v. Dep’t of Transp.*, 651 A.2d 567, 570 (Pa. Cmwlth. 1994). There is no bright-line test to determine whether a government action has resulted in a de facto taking and each case must be decided on its own facts. *Waldron Street Book Co. v. City of Pittsburgh*, 771 A.2d 111, 114 (Pa. Cmwlth. 2001).
9. Here, complainant alleges a de facto taking in his Complaint when he avers that he “is entitled to Constitutional just compensation for the de facto taking of . . .” his property. Complaint ¶ 21. Additionally, complainant acknowledges that the crossing was demolished per PUC Order and does not claim that a declaration of taking had been filed. *See id.* at ¶ 11.
10. Therefore, the Department does not dispute that a taking, if any, in this situation would be a de facto taking based on the lack of a declaration of taking.
11. The PUC does not have jurisdiction to address de facto taking matters. In the unpublished decision of *Cramer v. Department of Transportation*, the Commonwealth Court discussed how the Public Utility Code does not provide a procedure for the PUC to address de facto taking matters and only provides a procedure to refer damage determinations to a trial court. *Cramer v. Dep’t of Transp.*, (Cmwlth. Ct. No. 1232 C.D. 2005, filed Feb. 28, 2006). Furthermore, the *Cramer* court stated unequivocally in Footnote 15 that “the PUC does not have jurisdiction to handle de facto taking matters.” *Cramer*, No. 1232 at 11, n.15. The *Cramer* case is attached hereto as Exhibit “A”
12. Complainant has an adequate remedy under the Eminent Domain Code in the Court of Common Pleas. The proper procedure in de facto takings cases is for the landowner to file a petition for appointment of a board of viewers pursuant to Section 502(e) of the Eminent Domain Code, 26 Pa.C.S. § 502(e), which provides for the appointment of a board of viewers where a petitioner is claiming to have suffered a compensable injury at the instance of an entity clothed with the power of eminent domain, but no declaration of taking has been filed. 26 Pa.C.S. § 502(e); *Goadby v. Philadelphia Elec. Co.*, 639 F.2d 117 (3d Cir. 1981) (The court found that the correct procedure for challenging a taking by a public utility where a declaration of taking has not been filed is to assert the “loss before the board of view . . . and if dissatisfied with their award . . . appeal to the Court of Common Pleas for a jury trial de novo.”). If the respondent


believes that a question exists as to whether a de facto taking has occurred, the respondent may file preliminary objections and move the case to the Court of Common Pleas to be heard on the issue. *In re Condemnation of 14 East Maple St., New Castle*, 363 A.2d 857 (Pa. Cmwlth. Ct. 1976); *See Sienkiewicz v. Dep't of Transp.*, 584 Pa. 270, 273-274 (Pa. 2005) (The landowner claimed that a de facto taking had occurred due to a reconfiguring of traffic flow that caused interference with access to his property. The Court did not dispute that it was proper for a de facto taking case to be heard by a trial court, where there was a dispute as to whether a de facto taking occurred and for compensation to be determined by the board of viewers.).

13. Complainant is claiming a de facto taking. Therefore as a matter of law, the PUC does not have jurisdiction over this case and the appropriate course of action is for Complainant to file a petition with the board of viewers. *Cramer v. Dep't of Transp.*, (Cmwlth. Ct. No. 1232 C.D. 2005, filed Feb. 28, 2006); *In re Condemnation of 14 East Maple St., New Castle*, 363 A.2d 857 (Pa. Cmwlth. Ct. 1976); *Sienkiewicz v. Dep't of Transp.*, 584 Pa. 270, 273-274 (Pa. 2005); *Goadby v. Philadelphia Elec. Co.*, 639 F.2d 117 (3d Cir. 1981).

WHEREFORE, the Department of Transportation requests that its Motion for Summary Judgement be granted and the Complaint be dismissed.

Respectfully Submitted,

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF TRANSPORTATION



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DATED: March 7, 2017

2004 CV 2380 MP

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

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



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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 condemnors, 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
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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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 Ent


RENEE COHN JUBELIRER, Judge

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

A. Edward Schwartz	:	C-2016-2570929
	:	Electronically Filed
v.	:	
	:	
Norfolk Southern Railway Company,	:	
Pennsylvania Department of Transportation,	:	
Lackawanna County and LaPlume	:	
Township	:	

CERTIFICATE OF SERVICE

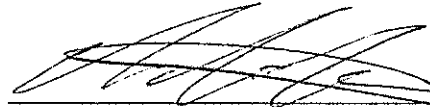
I hereby certify that a true and correct copy of the **Motion for Summary Judgment** was served upon the parties below by electronic mail, followed by first-class mail, postage prepaid this 7th day of March 2017:

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DATED: March 7, 2017