

**COMMONWEALTH OF PENNSYLVANIA
BOARD OF PROPERTY**

**REPUBLIC SERVICES GROUP OF
PENNSYLVANIA, LLC, Successor To
OGBORNE TRASH REMOVAL INC., and
OGBORNE WASTE REMOVAL INC.**

Plaintiffs

v.

**COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF TRANSPORTATION,
and CITY OF CHESTER, PENNSYLVANIA
and CHESTER RESOURCE RECOVERY
AUTHORITY**

Defendants

Docket No. BP-2008-002

OPINION AND ORDER

Before the Board for disposition is the Motion to Dismiss for Lack of Subject Matter Jurisdiction and Motion to Strike Requests for Discovery of the Department of Transportation (PennDOT).

On August 28, 2008, Plaintiff Republic Services Group of Pennsylvania, LLC, as successor to Ogborne Trash Removal, Inc. and Ogborne Waste Removal, Inc., filed two Complaints with the Board to quiet title in two sections of what it claimed to be "paper streets," identified as Front Street and Abbott Street within the city of Defendant Chester. The Board upon filing *sua sponte* consolidated the matters at the same docket number (Docket No. BP-2008-002) based upon the identity of parties and subject matter. No objection has been raised to consideration of these matters in a single proceeding. Named as Defendants were the City of

Chester and the Chester Resource Recovery Authority and the Commonwealth of Pennsylvania, Department of Transportation. PennDOT filed its Motion to Dismiss for Lack of Jurisdiction. On October 2, 2008, Plaintiff filed an answer to the motion.

On December 2, 2008, a prehearing conference was held in accordance with 1 Pa. Code § 35.112. On December 9, 2008, the Board issued a scheduling order for the filing of memoranda of law in support or in opposition to the Motion to Dismiss. Plaintiff filed its Memorandum on January 2, 2009. On January 5, 2009, PennDOT filed a letter waiving its right to file a memorandum of law.

Motion to Dismiss

In the Complaints Republic seeks a declaration it is the fee simple owner of the paper streets as the owner of lots which are adjacent to the paper streets. (Complaint ¶ 8) Each Complaint alleges that PennDOT owns property adjacent to the paper street and may have a property interest in the paper street. (Complaint ¶ 7) Republic claims possession of the paper streets for more than 21 years. It asks the Board to enter judgment in its favor against the Defendants and all persons claiming any rights to the paper streets.

In its motion PennDOT states that it neither occupies nor claims any part of either Front Street or Abbott Street. As such, it contends that the Board does not have subject matter jurisdiction over the actions under Section 1207 of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. § 337. Further, PennDOT asserts that the Board does not have jurisdiction to hear and determine actions brought against non-Commonwealth parties, namely the City of Chester and the Chester Resource Recovery Authority.

Republic asserts that under Pennsylvania case law adjacent property owners may have a property interest in a paper street citing *Murphy v. Martini*, 842 A.2d 262, 266 (Pa. Super.

2005). In ruling on a motion to dismiss, the Board must accept as true all material and well-pleaded facts of the complaints, as well as all inferences reasonable deduced therefrom.

Giordano v. Ridge, 737 A.2d 350 (Pa. Cmwlth. 1999), *aff'd*, 559 Pa. 283, 739 A.2d, 1052 (1999). Accepting as true Republic's averment that PennDOT owns lots directly adjacent to Front Street and Abbott Street the Motion to Dismiss must be denied.

Motion to Strike Discovery

On October 28, 2008, PennDOT filed a Motion to Strike Requests for Discovery, averring that on or about October 7, 2008, PennDOT was served with interrogatories and request for production of documents in accordance with the Pennsylvania Rule of Administrative Procedure and that Plaintiff's attempted discovery is beyond the scope of the rules. On December 1, 2008, Plaintiff requested that the Board allow Plaintiff to take discovery and serve subpoenas under 1 Pa. Code §§ 35.112(5) and 34.142. These sections provide:

§ 35.112. Conferences to expedite hearings.

At a prehearing or other conferences which may be held to expedite the orderly conduct and disposition of a hearing, there may be considered, in addition to offers of settlement or proposals of adjustment, the possibility of the following:

- (1) The simplification of the issues.
- (2) The exchange and acceptance of service of exhibits proposed to be offered in evidence.
- (3) The obtaining of admission as to, or stipulations of, facts not remaining in dispute, or the authenticity of documents which might properly shorten the hearing.
- (4) The limitation of the number of witnesses.
- (5) The discovery or production of data.
- (6) Other matters as may properly be dealt with to aid in expediting the orderly conduct and disposition of the proceeding.

§ 35.142. Subpoenas.

(a) *Issuance.* Subpoenas for the attendance of witnesses or for the production of documentary evidence, unless directed by the agency upon its own motion, will issue only upon application in writing to the agency head or the presiding officer, except that during sessions of a hearing in a proceeding, such application may be made orally on the record before the agency head or presiding officer, who is hereby given authority to determine the relevancy and materiality of the evidence sought and to issue such subpoenas in accordance with such determination. Such written applications shall specify as nearly as may be the general relevance, materiality, and scope of the testimony or documentary evidence sought, including as to documentary evidence, specification as nearly as may be, of the documents desired and the facts to be proved by them in sufficient detail to indicate the materiality and relevance of such documents.

In *McCullough v. Commonwealth, Department of Transportation*, 578 A.2d 568 (Pa. Cmwlth 1990) the Court held that because the Board had not adopted the Pennsylvania Rules of Civil Procedure, with regard to quiet title actions, the Rules of Administrative Practice and Procedure apply. The purpose of prehearing conferences under 1 Pa. Code § 112 is to allow the parties to exchange information and documents prior to a hearing in order to facilitate the orderly conduct of the hearing and disposition of the matter. The Board views the word “discovery” as used in subsection (5) to mean the common definition as opposed to its meaning in legal proceedings.

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ORDER

And now, this tenth day of December, 2009, the Commonwealth's Motion to Dismiss is **DENIED**. The Commonwealth's answer shall be due 20 days from the date of mailing of this Order. The Commonwealth's Motion to Strike Discovery is **GRANTED**. The Board directs its Counsel to schedule and preside at a prehearing conference at the close of the proceedings.

BY ORDER:



Kathleen M. Kotula, Esquire
Pennsylvania Department of State
Designee of Pedro A. Cortés
Secretary of the Commonwealth
Chairman
Board of Property

Date of Mailing: December 10, 2009

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