

COMMONWEALTH OF PENNSYLVANIA

THE STATE BOARD OF PROPERTY

**SARAH O'LAYER MCCREADY,
Petitioner**

v.

**PENNSYLVANIA TURNPIKE COMMISSION,
Respondent**

DOCKET NO. BP-2017-0001

FINAL ADJUDICATION AND ORDER

**Jason E. McMurry, Esquire, designee of the
Secretary of the Commonwealth, Chairman**

**J. Michael Adams, Esquire, designee of the Secretary of
Community and Economic Development**

**Victoria S. Madden, Esquire, designee of the
General Counsel**

**Department of Community and Economic Development
Commonwealth Keystone Building
400 North Street, 4th Floor
Harrisburg, PA 17120**

TAB

HISTORY

This matter comes before the State Board of Property (Board) to determine ownership of mineral rights concerning certain real estate within this Commonwealth otherwise claimed by the Commonwealth pursuant to section 1207 of the Administrative Code of 1929, 71 P.S. § 337. By complaint filed on February 23, 2012, in the Court of Common Pleas for Lawrence County, Sarah O'Layer McCready (Petitioner) sought to quiet title in mineral rights of certain real estate situated in the Borough of New Beaver, Lawrence County, which Petitioner had deeded to the Pennsylvania Turnpike Commission (Commission) in 1990. The Commission filed an answer on April 13, 2012. On July 25, 2016, the Court of Common Pleas granted summary judgment in favor of the Commission. Following appeal by Petitioner, by memorandum opinion and order dated April 26, 2017, the Commonwealth Court held that the Board has exclusive subject matter jurisdiction. The Commonwealth Court vacated the Court of Common Pleas order and remanded with instructions to transfer this matter to the Board.

During a conference call with Board counsel on August 9, 2017, counsel for both parties agreed that the Board could appropriately rule upon their respective motions for summary judgment filed in the Court of Common Pleas, subject to supplemental briefing. On October 6, 2017, the Commission filed a supplemental brief in support of its motion for summary judgment and in opposition to Petitioner's motion. On October 27, 2017, Petitioner filed a supplemental brief in opposition to the Commission's motion for summary judgment and in support of her own motion. On November 9, 2017, the Commission filed a reply brief.

The Board¹ deliberated this matter at its meeting January 18, 2018, and now issues this adjudication and order as a final determination of Petitioner's complaint.

¹ Subsequent to deliberations, the Secretary of Community and Economic Development designated J. Michael Adams, Esquire, who reviewed the entire record prior to participating in the decision.

FINDINGS OF FACT

1. Petitioner is an adult individual residing in Wampum, Pennsylvania. (Complaint and Answer at ¶ 1).

2. Respondent is the Pennsylvania Turnpike Commission, an independent administrative agency of the Commonwealth of Pennsylvania. (Complaint and Answer at ¶ 2).

3. In 1978, Petitioner and her husband as tenants by the entireties acquired an interest in certain property in Lawrence County; upon her husband's death in 1983, Petitioner became the sole owner by operation of law. (Complaint and Answer at ¶¶ 5-6).

4. By deed dated March 2, 1990, and recorded in the office of the Lawrence County Recorder of Deeds, Petitioner conveyed a portion of this property to the Commission. (Complaint and Answer at ¶ 7).

5. The deed in pertinent part recited that Petitioner and her husband

... for and in consideration of the sum of ONE DOLLAR (\$1.00) AND OTHER GOOD AND VALUABLE CONSIDERATION ... have granted, bargained and sold, released and confirmed, and by these presents do grant, bargain and sell, release and confirm unto [the Commission], its successors and assigns, [certain specified real property described by metes and bounds]

Containing 28.527 acres.

BEING a portion of the same property conveyed unto [Petitioner and her husband in 1978 as described above].

Together with all and singular the improvements, ways, streets, alleys, roads, lanes passages, (public or private), waters, water-courses, rights, liberties, privileges, hereditaments and appurtenances, whatsoever unto the hereby granted premises belonging or in anywise appertaining thereto and the reversions and remainders, rents, issues, and profits thereof and all the estate, right, title, interests, property, claim and demand whatsoever of [Petitioner and her husband], as well at law as in equity, of, in and to the same.

To have and to hold the said lot or piece of ground above described, the hereditaments and premises hereby granted, or mentioned and intended so to be, with the appurtenances, unto the said grantee, its successors and assigns, to and for the only proper use and behoof of the [Commission], its successors and assigns forever.

And [Petitioner and her husband] for their heirs, executors, administrators, successors and assigns, do hereby release, quitclaim and forever discharge the

[Commission], its successors and assigns of and from any and all actions, rights-of-action, suits, demands, claims and damages of every type or character whatsoever which in law or equity [Petitioner and her husband] ever had, now have or may hereafter have for or by reason of the construction, operation and maintenance of the Pennsylvania Turnpike through or upon the land herein conveyed and any incidental or consequential damage to any remaining portion of the lands of [Petitioner and her husband] of which the herein conveyed land may form a part or parcel.

* * * * *

This deed is being granted in lieu of condemnation.

(Complaint and Answer at ¶¶ 7-8 and attached exhibit A).

6. The “other good and valuable consideration” was \$50,000. (Complaint and Answer at ¶11).

CONCLUSIONS OF LAW

1. The Board has jurisdiction in this matter under section 1207 of the Administrative Code of 1929, 71 P.S. § 337.

2. Petitioner's deed is not capable of any alternative construction that the mineral estate was not conveyed.

3. There is no material fact in dispute and the Commission is entitled to judgment as a matter of law that Petitioner cannot establish ownership of the mineral estate at issue.

DISCUSSION

Petitioner brought this action to quiet title against the Pennsylvania Turnpike Commission, a Commonwealth agency claiming the real estate. The Board has jurisdiction under section 1207 of the Administrative Code of 1929,² 71 P.S. § 337. *See, International Dev. Corp. v. Davidge*, 26 A.3d 1234, 1238-39 (Pa. Cmwlth. 2011) (Board of Property has exclusive jurisdiction to adjudicate action to quiet title to mineral estate where a Commonwealth agency owns and occupies the surface estate and asserts claim to mineral estate).

The Commission has moved for summary judgment, arguing that Plaintiff, the party with the burden of proof, has failed to produce evidence or facts in its pleadings to challenge the 1990 deed, which unambiguously conveyed a fee simple interest in the real estate without reserving the mineral estate. An administrative agency proceeding under the General Rules of Administrative Practice and Procedure may consider a motion for summary judgment under 1 Pa. Code § 35.54 (respondent may file a motion to dismiss a complaint because of lack of legal sufficiency appearing on the face of the complaint). *See, United Healthcare Benefits Trust v. Insurance Comm'r of Pa.*, 620 A.2d 81, 83-84 (Pa. Cmwlth. 1993) (where no factual issues are in dispute, the motion proceedings, including briefs and arguments by the parties, provide ample opportunity for the parties to be heard; summary judgment may be entered by the agency head). In ruling upon a motion for summary judgment, an administrative agency follows the well-known standards of the Rules of Civil Procedure 1035.1-1035.5 (motion for summary judgment). *See, United Transp.*

² **Section 1207. Board of Property.**

The Board of Property shall, subject to any inconsistent provisions in this act contained, continue to exercise the powers and perform the duties by law vested in and imposed upon the said board.

* * *

The Board of Property shall also have jurisdiction to hear and determine cases involving the title to land or interest therein brought by persons who claim an interest in the title to lands occupied or claimed by the Commonwealth.

* * *

71 P.S. § 337.

Union v. Pennsylvania P.U.C., 68 A.3d 1026, 1033 (Pa. Cmwlth. 2013) (summary judgment may be granted if the pleadings, depositions, answers to interrogatories, admissions and affidavits show that there is no genuine issue as to a material fact and that the moving party is entitled to judgment as a matter of law; the record must be viewed in the light most favorable to the nonmoving party, giving that party the benefit of reasonable inferences, and all doubts as to existence of genuine issue of material fact must be resolved against the moving party; however, to preclude summary judgment, the nonmoving party must establish that a genuine issue of material fact exists).

Petitioner's theory is that she had intended to convey only the surface rights and not the mineral rights in response to the Commission's notice of condemnation. However, in construing a deed the intent must be gleaned solely from its language. In the absence of fraud, accident or mistake,³ parol evidence is inadmissible to vary or limit the scope of a deed's express covenants, and the nature and quantity of the interest conveyed must be ascertained by the instrument itself and cannot be orally shown; it is not what the parties may have intended by the language used but what is the meaning of the words. *Moore v. Miller*, 910 A.2d 704, 708 (Pa. Super. 2006) (citing *Teacher v. Kijurina*, 76 A.2d 197, 200 (Pa. 1950)). Notwithstanding, where the language of the written contract is ambiguous, extrinsic or parol evidence may be considered to determine the intent of the parties. *Metzger v. Clifford Realty Corp.*, 476 A.2d 1, 5 (Pa. Super. 1984) (citing *Herr's Estate*, 161 A.2d 32 (Pa. 1960)). A contract will be found to be ambiguous if and only if it is reasonably or fairly susceptible of different constructions and is capable of being understood in more senses than one. *Id.* (citing *Commonwealth State Highway and Bridge Auth. v. E.J. Albrecht Co.*, 430 A.2d 328, 330 (Pa. Cmwlth. 1981)).

Petitioner's deed is clear on its face: it grants to the Commission the described real estate

³ Petitioner has pointed to no evidence of fraud, accident or mistake, nor of bad faith, as is her burden in opposing a summary judgment motion.

“Together will all and singular the improvements, ways, streets, alleys, roads, lanes passages, (public or private), waters, water-courses, rights, liberties, privileges, hereditaments and appurtenances, whatsoever unto the hereby granted premises belonging or in anywise appertaining thereto and the reversions and remainders, rents, issues, and profits thereof and all the estate, right, title, interests, property, claim and demand whatsoever of [Petitioner and her husband], as well at law as in equity, of, in and to the same” and without any reference to reservation of mineral rights. This language is not capable of being understood as excluding the mineral rights.

The deed notes that it “is being granted in lieu of condemnation,” and Petitioner suggests that this at least creates an ambiguity as to whether Petitioner was conveying anything beyond what the Commission could have acquired by condemnation. Although the Commission has the authority⁴ to acquire real estate in fee simple, Petitioner argues that the Commission cannot condemn more than is necessary for the construction or operation of its highway system and because, in Petitioner’s view, the Commission could have built and operated the relevant portion of the Turnpike without having subsurface mineral rights, the deed language supports a construction that the parties might not have intended to convey the mineral rights. The Board rejects this argument.

As property cannot constitutionally be taken by eminent domain except for public use, no more property may be taken than the public use requires – a rule that applies both to the amount of property and the estate or interest to be acquired. *In re: Condemnation by the Beaver Falls*

⁴ At the time of the notice of condemnation and execution of the deed, the Commission was statutorily authorized to condemn “any lands, interests in lands, property rights, rights-of-way, franchises, easements and other property deemed necessary or convenient for the construction and efficient operation of the turnpikes and the toll road conversions” and to “acquire by purchase, whenever it shall deem the purchase expedient, ... any lands, interests in lands, property rights, rights-of-way, franchises, easements and other property deemed necessary or convenient for the construction and efficient operation of the turnpikes and toll road conversions ... upon terms and at a price as may be considered by the commission to be reasonable and agreed upon between the commission and the owner thereof and to take title in the name of the commission.” Former section 9(a) and (b) of the Turnpike Act, 36 P.S. § 651.9(a), (b) (emphasis supplied).

Municipal Auth. for Penndale Water Line Extension, 960 A.2d 933, 937 (Pa. Cmwlth. 2008). The quantum of land to be acquired is, within reasonable limitations, a matter within the condemnor's discretion. *In re: Condemnation of Property of Waite*, 641 A.2d 25, 28 (Pa. Cmwlth. 1994). Where the condemnor has a valid reason to prefer taking in fee simple rather than an easement, the taking is not excessive and not an abuse of discretion.⁵ *In re: Pennsylvania Turnpike Commission*, 84 A.3d 768, 776-77 (Pa. Cmwlth. 2014).

The question is not whether the Commission could have proceeded with only the surface estate; the question is whether the Commission would have abused its discretion by acquiring the entire estate without excluding the mineral estate. Petitioner has pointed to no evidence to support a finding that at the time of the condemnation and deed the Commission would have abused its discretion in choosing to acquire the property in fee simple (including both surface and mineral estates), rather than acquiring only the surface estate and not the mineral estate. For example, Petitioner has not identified any evidence that in 1990 one would have considered attempting to develop natural gas under her property as part of the Marcellus Shale despite there being a highway above it. On the contrary, Petitioner's construction engineer testified that horizontal drilling was not available technology being utilized in 1990. (N.T. Feb. 8, 2016 at 23-25). And her consulting geologist was not aware of drilling beneath a highway prior to 2004. (N.T. Feb. 8, 2016 at 66-68). Nor has Petitioner identified any evidence that – in addition to being not necessary – it was not convenient for the Commission to acquire both the surface and mineral estates. Without being able to point to evidence to support her burden of proof, Petitioner cannot identify any genuine

⁵ The Commission's manager for geotechnical engineering testified that it was necessary for the Commission to obtain a fee simple interest in the property to have full control to build, maintain, and operate the turnpike and to prevent others from impeding its safe physical operation. (N.T. 8 Feb. 2016 at 96-97). Consistent with the scope of review, the Board is not making a finding of fact from this testimony to support the grant of the Commission's motion for summary judgment. However, this testimony suggests what persuasive evidence Petitioner would have to present to support a finding that conveyance of the mineral estate was excessive and an abuse of discretion.

issue of material fact to defeat the Commission's motion for summary judgment.

Thus, even if as Petitioner asserts the Commission might have been able to proceed with condemning only the surface estate and without the mineral estate, the Commission was permitted to acquire title in fee simple. In the absence of evidence to show that acquiring the mineral estate would be excessive, an abuse of discretion or otherwise unlawful, the Commission was authorized to acquire a fee simple interest in the property, including the mineral rights, through its eminent domain powers. In the absence of evidence to show that acquiring the mineral estate would be excessive, an abuse of discretion or otherwise unlawful, reciting merely that the "deed is being granted in lieu of condemnation" without reference to any mineral estate does not make the deed susceptible to an alternate construction that the mineral estate is excepted from the conveyance. Because the language of Petitioner's deed is not capable of any alternate construction, it is not ambiguous. Therefore, Petitioner may not present parol evidence that she did not intend to convey the mineral estate. Without such evidence Petitioner cannot overcome the clear language of the deed and cannot prevail on her claim that she did not convey the mineral estate. The Commission is therefore entitled to judgment as a matter of law.

Wherefore, the Board enters the following order.

COMMONWEALTH OF PENNSYLVANIA

BEFORE THE STATE BOARD OF PROPERTY

Sarah O'Layer McCready,
Petitioner

v.

Pennsylvania Turnpike Commission,
Respondent

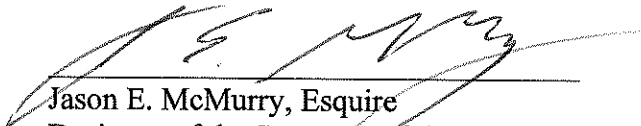
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Docket No. BP-2017-0001

FINAL ORDER

AND NOW, this 20th day of April, 2018, having duly convened and considered the entire record of the proceedings, and based upon the foregoing Findings of Fact, Conclusions of Law and Discussion, the State Board of Property hereby **GRANTS** the motion for summary judgment of Respondent Turnpike Commission and **DENIES** Petitioner's motion for summary judgment, enters judgment in favor of Respondent and **DISMISSES** this matter.

BY ORDER:


Jason E. McMurry, Esquire
Designee of the Secretary of the Commonwealth
Chairman, Board of Property

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Date of mailing:

April 20, 2018