

COMMONWEALTH OF PENNSYLVANIA

THE STATE BOARD OF PROPERTY

**FRANK E. BEISHLINE and SANDRA Z. BEISHLINE, husband and wife; PHILLIP M. BALISLE and PATRICIA E. BALISLE, Trustees of the Phillip M. Balisle Revocable Trust dated July 15, 2016; RONALD V. VOUGHT, II and KAREN BETH VOUGHT, husband and wife; CLYDE BARTHOLOMEW, JR. and JUDITH M. BARTHOLOMEW, husband and wife; LAURIE WURSTER TRUST; DONALD J. BOWMAN and KATHY E. BOWMAN, husband and wife; DALE G. MOORE and SUZANNE MOORE, husband and wife; and STILLWATER HOLDINGS, LLC,
Petitioners**

v.

**COMMONWEALTH of PENNSYLVANIA, DEPARTMENT of ENVIRONMENTAL PROTECTION; CMWLTH. of PA., DEPT. of CONSERVATION and NATURAL RESOURCES; and the PENNSYLVANIA FISH and BOAT COMMISSION,
Respondents**

DOCKET NO. BP-2018-0004

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, 400 Plaza Level
Harrisburg, PA 17120**

TAB

HISTORY

This matter comes before the State Board of Property (Board) to determine ownership of 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 July 2, 2018, Frank E. Beishline and Sandra Z. Beishline, husband and wife; Phillip M. Balisle and Patricia E. Balisle, Trustees of the Phillip M. Balisle Revocable Trust dated July 15, 2016; Ronald V. Vought, II and Karen Beth Vought, husband and wife; Clyde Bartholomew, Jr. and Judith M. Bartholomew, husband and wife; Laurie Wurster Trust; Donald J. Bowman and Kathy E. Bowman, husband and wife; Dale G. Moore and Suzanne Moore, husband and wife; and Stillwater Holdings, LLC, (Petitioners) sought a declaratory judgment that Petitioners own as a Crown Grant certain real estate along Fishing Creek situated in the Township of Fishing Creek, Columbia County. Petitioners also request that the Board declare Fishing Creek to be not navigable so that Petitioners may enjoy all rights associated with their ownership including riparian rights. Petitioners requested that the Board declare to be a nullity all actions by the Department of Environmental Protection, the Department of Conservation and Natural Resources and the Fish and Boat Commission (Respondents) determining Fishing Creek to be navigable and enjoin Respondents from asserting claims of ownership or interfering with Petitioners' rights concerning Fishing Creek.

On July 25, 2018, Respondents jointly filed preliminary objections to the complaint. Respondents first objected to the legal insufficiency of the claims, asserting that the Board has no authority to issue a declaratory judgment or grant injunctive relief. Respondents objected to the failure of Petitioners' complaint to show a complete abstract of title or chain of circumstances forming the basis of their claims and to allege that the Commonwealth has granted a warrant or

otherwise taken action or the public has interfered on land in which Petitioners claim an interest. Also, Respondents objected to the lack of proper service of the complaint on their officials.

On August 14, 2018, Petitioners filed an amended complaint. Petitioners again sought a declaration that they own as a Crown Grant the real estate along Fishing Creek and a determination that Fishing Creek is not navigable. On September 4, 2018, Respondents again filed preliminary objections to the legal insufficiency of the claims of the complaint. Respondents also objected to what they believe to be scandalous or impertinent matter in alleging that Respondents' agents have taken certain actions to cause law enforcement to believe that the property claimed by Petitioners is not theirs. On October 4, 2018, Petitioners filed a reply to the preliminary objections to their amended complaint.

By order dated October 9, 2018, the Board set a briefing schedule. On November 9, 2018, Respondents filed a brief in support of their preliminary objections. On December 11, 2018, Petitioners filed a brief in opposition to the preliminary objections, and on January 4, 2019, Respondents filed a reply brief.

The Board deliberated this matter at its meeting January 18, 2019, and now issues this adjudication and order as a final determination of Petitioners' complaint.

FINDINGS OF FACT

1. Petitioners are the record owners and hold title to real estate in the Township of Fishing Creek, Columbia County, along or through which a stream known as Fishing Creek flows. (Amended Caveat at ¶¶ 1-9, 18-26, 28-29 and attached exhibits A-H).

2. Respondents are the Department of Environmental Protection, the Department of Conservation and Natural Resources and the Fish and Boat Commission, all agencies of the Commonwealth of Pennsylvania. (Amended Caveat at ¶¶ 10-13).

3. Fishing Creek is a stream, having its source in Sugarloaf Township, Columbia County, and flowing almost 30 miles to the Susquehanna River in Columbia County below the Town of Bloomsburg. (Amended Caveat at ¶ 27).

4. No part of Petitioners' real estate or other property rights regarding Fishing Creek or of their predecessors in title has ever been lawfully appropriated and taken by the Commonwealth or any of its constituent agencies under eminent domain, and neither the Commonwealth nor Respondents have commenced any eminent domain proceedings against Petitioners or their predecessors in interest. (Amended Caveat at ¶¶ 48, 60).

5. Neither the Commonwealth nor Respondents have any recorded deed or other instrument evidencing any claim to Petitioners' property. (Amended Caveat at ¶ 59).

6. Members of the public on multiple occasions and without permission of Petitioners have been found using Fishing Creek and associated land of Petitioners consistent with statements from Respondents and their agents to law enforcement and others that the public has a right to public fishing, boating, bathing, swimming and other activities at Fishing Creek. (Amended Caveat at ¶¶ 54-58).

CONCLUSIONS OF LAW

1. Because the Board does not have jurisdiction over this matter under section 1207 of the Administrative Code of 1929, 71 P.S. § 337, or otherwise to declare Fishing Creek to be navigable, the Board cannot exclude the Commonwealth as owner and declare Petitioners' ownership of the stream bed of Fishing Creek; and Respondents are entitled to judgment as a matter of law. (Findings of Fact Nos. 1-6).

DISCUSSION

Petitioners brought this action, among other things, to quiet title against Respondents, Commonwealth agencies apparently asserting a claim to the real estate. The Board generally has jurisdiction under section 1207 of the Administrative Code of 1929,¹ 71 P.S. § 337, to consider matter involving a dispute of ownership of real estate involving the Commonwealth. *See, York OPA, LLC v. Commonwealth, Dept. of Transportation*, 181 A.3d 5, 13 (Pa. Cmwlth. 2018) (Board of Property has exclusive jurisdiction to determine the title to real estate or to remove a cloud on title to such real estate where private property owners and the Commonwealth claim an interest in the same real estate). However, as discussed below, this jurisdiction is not sufficient to grant Petitioners the relief they seek.

Respondents have demurred to the allegations in the complaint, arguing that Petitioners, the party with the burden of proof, cannot prevail on the legal theories they have presented. The General Rules of Administrative Practice and Procedure apply to quiet title actions before the State Board of Property, and the Board may grant the respondent Commonwealth agency's motion to dismiss under 1 Pa. Code § 35.54 for lack of legal sufficiency appearing on the face of the complaint. *McCullough v. Commonwealth, Dept. of Transp.*, 578 A.2d 568, 571-72 (Pa. Cmwlth. 1990). In ruling upon a motion to dismiss for lack of legal sufficiency, an agency must follow the well-known standards of Pa. R.C.P. No. 1028 (preliminary objections). In ruling on preliminary objections in the nature of a demurrer for legal insufficiency under Pa. R.C.P. 1028(a)(4), a court

¹ **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.

must accept as true all well-pleaded material allegations, as well as all inferences reasonably deduced therefrom; in order to sustain a demurrer, it must appear with certainty that the law will not permit recovery, and any doubt should be resolved by a refusal to sustain the demurrer. *Podolak v. Tobyhanna Tp. Bd. of Supervisors*, 37 A.3d 1283, 1287 (Pa. Cmwlth. 2014).

Petitioners describe Fishing Creek as running through real estate they in the aggregate own exclusively or at least abutting real estate they own. The Commonwealth and Respondents have no title claim and have never attempted to exercise eminent domain. But through the actions of Respondents and their agents the Commonwealth appears to be claiming an interest in Fishing Creek – because it is navigable – in trust for the benefit of the public. *See e.g., Delaware Ave., LLC v. Department of Conservation and Natural Resources*, 997 A.2d 1231, 1233 (Pa Cmwlth. 2010) (even without title interest, the Commonwealth owns submerged lands of navigable streams and holds them in trust for the benefit of the public). Petitioners’ theory is that, because Fishing Creek is not navigable, the Commonwealth cannot have a valid claim to Fishing Creek and thus the respective individual petitioner owns the real estate including the creek bed.

Petitioners’ allegations make clear that the parties dispute whether Fishing Creek is navigable. In order for the Board to award relief to Petitioners and conclude that Respondents do not have a valid claim to the waters and creek bed of Fishing Creek, it must first conclude that Fishing Creek is not navigable. And the Board cannot do that without jurisdiction to do so. There do not appear to be any prior decisions of the Board or appellate decisions specifically addressing whether the Board has jurisdiction to determine whether a particular waterway is navigable. Nor do there appear to be any decisions of the Board determining in the first instance whether a particular waterway is navigable.

As a creature of statute, the Board can do only what it is statutorily authorized to do. *See*,

Commonwealth of Pa., Dept. of Environmental Resources v. Butler County Mushroom Farm, 454 A.2d 1, 4 (Pa. 1982) (power and authority to be exercised by administrative agencies must be conferred by the legislature). The Administrative Code of 1929 lays out the Board's jurisdiction in full.

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.

It shall hear and determine, in all cases of controversy on caveats, in all matters of difficulty or irregularity touching escheats, warrants on escheats, warrants to agree, rights of preemption, promises, imperfect titles, or otherwise, which heretofore have or hereafter may arise in transacting the business of the Land Office in the Department of Community Affairs: Provided, however, That no determination of the Board of Property shall be deemed, taken and construed to prevent either of the parties from bringing their action at the common law, either for the recovery of possession or determining damages for waste or trespass.

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.

The board shall make its determination within thirty (30) days after the final hearing on any of the above merits.

71 P.S. § 337 (emphasis supplied). No other provisions in the Administrative Code of 1929 appear to provide the Board with authority to determine status or declare rights.

Notwithstanding Petitioners' titling of pleading, this matter does not involve a caveat; nor does it involve an escheat, warrant or title or otherwise in the business of the former Land Office.² Because the Commonwealth and Respondents have no claim of title, there is no need for application of the Board's expertise in resolving such a question of ownership. As reflected in the

² *But see, Schoch v. American International Corporation*, 133 A. 155, 156 (Pa. 1926) (where property reclaimed from bed of navigable stream and abandoned for navigation, board of property heard opposing applications and directed issuance of warrant to owner of abutting land).

line of cases leading to *York OPA*, the Board has exclusive jurisdiction to **determine title to real estate** involving the Commonwealth. *See, e.g., Krulac v. Commonwealth of Pa., Pennsylvania Game Commission*, 702 A.2d 621, 623-24 (Pa. Cmwlt. 1997) (Board of Property has exclusive jurisdiction over any claims involving title to land occupied or claimed by the Commonwealth such as claims in actions to quiet title or in ejectment, but it does not have authority to award damages for trespass).

However, this matter is not about title; it is about declaring a stream non-navigable such that the Commonwealth cannot own submerged lands of the stream **without title interest**. In *Delaware Avenue*, the Board was not asked to determine whether the stream was navigable. Instead, the parties disputed ownership of new land created by placing fill along a navigable waterway. Because as a matter of law artificially accreted land in the bed of a navigable stream inures to the benefit of the Commonwealth and not the adjoining landowner, the court held that the Board properly sustained the demurrer and dismissed the complaint for failure to state a claim. *Delaware Avenue*, 997 A.2d at 1235.

In *Stair v. Commonwealth of Pa., Pennsylvania Game Commission*, 368 A.2d 1347 (Pa. Cmwlt. 1977), the court considered the Board's jurisdiction to determine title to culm banks³ located on land acquired by a Commonwealth agency. The court concluded that the Board had jurisdiction in this controversy "involving the title to land or interest therein" because ownership of the culm banks would result in an easement to enter the land to remove the personal property. *Id.* at 1348. The court pointed out that the Board could not award damages for unlawful appropriation, as that would be beyond the Board's statutory authority. *Id.* At 1349. This matter may be distinguished from that currently before the Board, because it involved an interest in

³ Culm bank is a coalmine waste or spoil heap, a pitheap or as misnamed a slagheap. (Wikipedia. <https://www.merriam-webster.com/dictionary/culm%20bank> last accessed March 29, 2019).

property – albeit personal property. Here, the matter seeks a declaration concerning a natural body – whether or not Fishing Creek is navigable. While such a fact may very well affect a right in property, it is not in itself a right and may have other implications beyond Petitioners.

Similarly, in *McCullough v. Commonwealth of Pa., Dept. of Transportation*, 541 A.2d 430 (Pa. Cmwlth. 1988), the court considered the Board’s jurisdiction to determine whether PennDoT had abandoned the highway easement it previously obtained. The court concluded that the Board had exclusive jurisdiction in this controversy “involving the title to land or interest therein” because whether PennDoT abandoned the easement clearly involves a determination of an interest in land claimed by the Commonwealth. *Id.* at 431. This matter may be readily distinguished from that currently before the Board, because it was a direct interest – abandonment of an easement – that was at issue. Here, navigability is at best a predicate from which an interest might be determined.

Consistent with its statutory authority under section 1207 of the Administrative Code of 1929, and as provided in the General Rules of Administrative Practice and Procedure at 1 Pa. Code § 35.19, the Board may hear as against a Commonwealth agency actions in the nature of ejectment or to quiet title. *Kaiser Energy, Inc. v. Commonwealth of Pa., Dept. of Environmental Resources*, 535 A.2d 1255, 1257 n. 3 (Pa. Cmwlth. 1988). However, as it is not a court of record, the Board is not empowered by the Declaratory Judgment Act to issue a declaratory judgment. A court of common pleas does have such authority. For example, in *Lakeside Park Co. v. Forsmark*, 153 A.2d 486 (Pa. 1959), the Supreme Court reviewed a declaration of the Mercer County Court of Common Pleas that Sandy Lake is navigable. After reviewing the standards for a lake or pond rather than a river or other stream, the court concluded that the lake was not navigable and thus the shore-front property owner could not make commercial use – such as hiring out fishing boats

– contrary to the rights of the lake-bed owner. *Id.* at 489. Although an action in equity and not brought for a declaration, in *Pennsylvania Power & Light Co. v. Maritime Management, Inc.*, 693 A.2d 592 (Pa. Super. 1997), the Superior Court reviewed the decision of the Pike County Court of Common Pleas that Wallenpaupack Creek was not navigable and thus PP&L owned Lake Wallenpaupack as private property and could set requirements for its use and thereby prohibit sales of alcohol despite a valid license from the Liquor Control Board. After reviewing the standards for determining whether a stream is navigable, the court concluded that the trial court had properly applied them to find that the stream was not navigable. *Id.* at 595.

Accordingly, accepting as true the allegations of Petitioners' complaint and all inferences reasonably deduced therefrom, it appears with certainty that because the Board does not have jurisdiction to determine whether Fishing Creek is not navigable and thus the Commonwealth would not hold it in trust for the public, the law will not permit Petitioners to prevail before the Board. Respondents are therefore entitled to judgment as a matter of law.

Wherefore, the Board enters the following order.

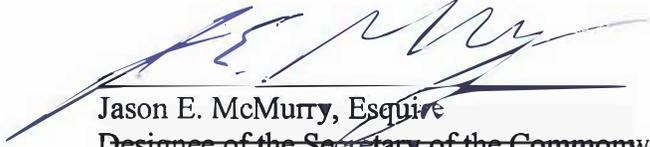
COMMONWEALTH OF PENNSYLVANIA
BEFORE THE STATE BOARD OF PROPERTY

Frank E. Beishline and Sandra Z.	:	
Beishline, husband and wife; Phillip M.	:	
Balisle and Patricia E. Balisle, Trustees of	:	
the Phillip M. Balisle Revocable Trust	:	
dated July 15, 2016; Ronald V. Vought, II	:	
and Karen Beth Vought, husband and	:	Docket No. BP-2018-0004
wife; Clyde Bartholomew, Jr. and Judith	:	
M. Bartholomew, husband and wife;	:	
Laurie Wurster Trust; Donald J.	:	
Bowman and Kathy E. Bowman, husband	:	
and wife; Dale G. Moore and Suzanne	:	
Moore, husband and wife; and Stillwater	:	
Holdings, LLC,	:	
 Petitioners	:	
 v.	:	
	:	
Commonwealth of Pennsylvania, Dept. of	:	
Environmental Protection; Cmwlth. of	:	
Pa., Dept. of Conservation and Natural	:	
Resources; and the Pa. Fish and Boat	:	
Commission,	:	
 Respondents	:	

FINAL ORDER

AND NOW, this 15th day of May, 2019, 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 concludes that it is without authority to grant to relief sought by Petitioners and **SUSTAINS** the preliminary objections in the nature of a demurrer of Respondents Department of Conservation and Natural Resources, Department of Environmental Protection and Fish and Board Commission, enters judgment in favor of Respondents 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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Board counsel:

Thomas A. Blackburn, Esquire

Date of mailing:

May 15, 2019



**COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE OF GENERAL COUNSEL**

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Hearing Examiner

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May 15, 2019

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RE: Final Adjudication and Order
Beishline et al. v. Pa. DCNR, Pa. DEP, and Pa. Fish and Boat Cmsn.,
Docket No. BP-2018-0004

Dear counsel:

Enclosed please find a final adjudication and order issued by the State Board of Property in the referenced matter.

Sincerely,

Thomas A. Blackburn, Counsel
State Board of Property

enclosure

cc: Nickole L. Baker, Board administrator

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