

M. Ging

IN THE COURT OF COMMON PLEAS OF SOMERSET COUNTY, PENNSYLVANIA

COPY

MARY JO TAKACS AND
JAMES LYONS

VS

INDIAN LAKE BOROUGH

) NO. 1122 CIVIL 2009
)
)
) PRELIMINARY OBJECTIONS TO
) AMENDED NOTICE OF APPEAL
)
)
) ARGUMENT

APPEARANCES:

PLAINTIFFS:

ROBERT P. GING, JR., ESQ.;
CONFLUENCE, PA

DEFENDANT:

DANIEL W. RULLO, ESQ.;
SOMERSET, PA

BEFORE:

THE HONORABLE DAVID C. KLEMENTIK, JUDGE

* * *

ARGUMENT

HELD ON FRIDAY, DECEMBER 4, 2009

IN COURTROOM NO. 1

SOMERSET COUNTY COURTHOUSE

SOMERSET, PENNSYLVANIA 15501.

2010 JAN 14 AM 8:52
FILED FOR RECORD
ANDREW STONAVES
PROthonotary
SOMERSET, PA

Certified to be true and correct copy of the original Document on file in this office.
Angie Johnson
Prothonotary

1 FRI., DEC. 4, 2009 - 1:13 P.M. - CRM.#1 - #1122 CIVIL 2009

2 PRESIDENT JUDGE JOHN M. CASCIO

3 * * *

4 THE COURT: Afternoon.

5 MR. GING: Afternoon, Your Honor.

6 MR. RULLO: Afternoon.

7 THE COURT: We have specially scheduled an
8 argument on amended objections, preliminary objections, to a
9 local agency appeal; and, I certainly recognize that there
10 was an original round of preliminary objections. There was
11 an amendment as of right, and then there was a second round
12 of preliminary objections; and, that's why we're here. So,
13 Attorney Rullo?

14 MR. RULLO: Thank you, Judge. Judge, we are
15 here on preliminary objections to the appellant's appeal, and
16 it deals with issues that we believe have previously been
17 determined by this Court, and if I may take a moment just for
18 the record to make sure that we are completely on board with
19 where we are.

20 This is an action filed by Mary Jo Takacs
21 for which she's appealed the preliminary adjudication, what
22 she contends is an adjudication -- the Borough Council is
23 holding a vote -- by the Borough Council made on September
24 the 9th, 2009. And, that -- that vote was taken pursuant to
25 an interlocutory order that this Court made or entered on

1 August 26th, 2009, in the case of **Jack Butler, et al,**
2 including Mary Jo Takacs as one of the appellants, **versus**
3 **Indian Lake Borough,** filed at Number **860 Civil 2007.**

4 Our preliminary objections indicate that we
5 believe that the appeal should be dismissed in that it fails
6 to -- the appellant has failed to state a claim upon which
7 relief may be granted, and there's a number of reasons why we
8 allege that.

9 Mrs. Takacs clearly was a party to the action
01:15 10 in Number **860 Civil 2007,** and there has been a final order
11 that was entered which resolved with prejudice the claims
12 taken by the Borough Council in approval of an easement that
13 did not violate the borough code or the administrative agency
14 law.

15 My understanding is that there has been an
16 appeal filed to the Commonwealth Court by Mrs. Takacs and
17 others, but the final order was entered by this Court; and,
18 we have filed a cross-appeal dealing with the issue of the
19 sunshine law violation because, not knowing exactly what in
01:16 20 fact will occur in the Commonwealth Court, we protected our
21 rights.

22 The new appeal that is filed here raises the
23 question again of the same issues that were raised in **860**
24 **Civil 2009.** Based upon the Court's determination that there
25 was a violation of the spirit of the sunshine law, it re -- it

1 required us under the interlocutory order to take action at a
2 public meeting to determine whether we ratify or not ratify
3 the action taken by the board in 2007; and, that, that date
4 had been August the 8th, 2007. The first meeting following
5 the Court's interlocutory order was the meeting that we held
6 on September 9th.

7 At that time, in an open public session, Mr.
8 Ging appeared on behalf of Mrs. Takacs, I believe and
9 potentially others, and posed a offer by letter that he
01:17 10 attaches to this petition to lease or purchase the land that
11 is the subject matter of the easement.

12 Now, this land is the land that is owned by
13 the Borough. It is inundated by the water of Indian Lake,
14 and it is located at the shoreline of the property owned by
15 St. Clair Resorts, L.L.C.

16 So, prior to any action taken, there was this
17 discussion about the presentation of the offer to lease or
18 purchase. And, I took the position there, and that is
19 correctly so under the Borough code, it is different than
01:17 20 easement, that potentially -- or, a lease or a sale would
21 require competitive bidding, would require a different
22 process than was done and that in fact council discussed in
23 open session that they don't sell or lease land in front of
24 other people's property. There is the -- the permissive use
25 is that land for the shoreline so that the -- the dominant

1 tenant essentially has the ability to access the waterway at
2 its shoreline.

3 And, it didn't -- did not take any action on
4 this proposal to buy or lease. It focused on the question
5 that the interlocutory order specifically addressed, and that
6 is whether or not there should be a ratification of the action
7 taken in 2007.

8 Mr. Ging in his appeal, in addition to the
9 issues that I'll address in a moment, took the liberty of
01:18 10 suggesting that somehow the Solicitor, me, had championed
11 according to what his determination -- well, use of language
12 was, championed the decision along with Michael Miscoe, one
13 of the members of council, and that in somehow that was
14 designed to create additional legal fees for my firm.

15 In -- in particular -- and, we objected to
16 the scandalous impertinent material that is identified in
17 those paragraphs because it has absolutely nothing to go to
18 the subject matter of the -- of the action taken. We believe
19 it violates Pennsylvania Rule of Civil Procedure 1028(a)(2)
01:19 20 because it contains scandalous and impertinent material that
21 must be stricken and is immaterial and inappropriate to the
22 cause of action.

23 Paragraph 16 of his notice of appeal
24 characterized the nature of the discussions on easement as
25 being championed by me and Mr. Miscoe. The Borough Solicitor,

1 Judge, has no vote and therefore as a matter of law no
2 participation in the vote on September the 9th, 2009, which
3 is the subject of the appeal. Any allegations relative to
4 the champion of that -- there clearly was the presentation
5 made of this interlocutory order to the Borough Council and
6 discussions that took place; but, as far as having anything
7 to do with my participation, it's totally irrelevant to the
8 proceeding.

9 It goes so far, however, to show the -- the
01:20 10 venom that is being spewed by some of these parties relative
11 to this, is it contends that the filing of the litigation
12 that they filed was the result of the ratification vote that
13 created a conflict of interest or appearance of conflict of
14 interest because Mr. Miscoe, who is an attorney, does
15 independent contract work for my firm from time to time.

16 Let me back up. We have -- before anything
17 was ever done relative to Mr. Miscoe being engaged by my
18 firm to do anything, there was an ethics evaluation done in
19 an opinion letter that has been offered by the evidence
01:20 20 commission relative to what interaction he could have with
21 my firm. The opinion letter has been posted on the website.
22 It has been known by Borough Council, and it has -- does
23 not participate in any fashion with any matters dealing
24 with Indian Lake. Mr. Miscoe does nothing -- I have him do
25 legal research -- participates in any manner with my firm.

1 It has nothing to do with the Borough of Indian Lake.

2 But, in any event, Mr. Ging indicates that
3 Mr. Miscoe who is a council member and I apparently had
4 control over the litigation because, by the fact that the
5 Borough Council voted in favor of ratification of that
6 vote, that that somehow was designed to recognize that
7 there would be additional litigation and, because the
8 additional litigation would somehow generate additional
9 fees to my firm and as a result of that, that that somehow
01:21 10 makes the action inappropriate. Judge, I think that is so
11 patently frivolous and immaterial that those allegations
12 need to be stricken.

13 Now, getting back to the merits, let me
14 first start off by saying that we do not believe, and we
15 set forth in our -- in our brief, that this is not an
16 adjudication. The re--- the remand and the vote back to
17 Borough Council is not an adjudication as identified under
18 the local agency law. It specifically talks about what an
19 adjudication would be, and it must demonstrate that in this
01:22 20 particular case there is no direct immediate impact upon
21 Mrs. Takacs who is the appellant in this case. She has no
22 greater rights than any other person in the borough relative
23 to the actions taken on that particular occasion.

24 Now, she has filed an amended complaint or
25 amended appeal to try to cure the issues that are raised about

1 the fact that the case law indicates that is not an
2 adjudication. Not every action taken by the Borough
3 results in a local agency standing from the standpoint of
4 an adjudication. She's raised in her new appeal simply
5 identifying or refileing the same appeal she filed before
6 with the exception of adding a couple different paragraphs
7 or sentences to the paragraphs.

8 One is she contends that the easement
9 encroaches on the riparian rights of the appellant to the
01:23 10 use of the land. Now, understand, she has complete access
11 to the water from riparian rights and from her entire
12 shoreline. This easement area is located off of her
13 property.

14 Now, Mr. Ging in a creative manner is
15 attempting to draw a line from her property directly out
16 into the water and, because the line is not perpendicular
17 to the shoreline and it goes at an angle, that he believes
18 her riparian rights continue to expand as it goes out into
19 the water.

01:23 20 If that's the case, he has riparian rights
21 to the entire lake; and, that's certainly not the case.
22 There is nothing that impedes the shoreline of the Takacs
23 property because of the actions taken by the easement.

24 He also contends, without any type of
25 verification or a -- or support, that this would create a

1 private nuisance in that there would be noise, disruption,
2 excessive light, increased smell from exhaust of personal
3 watercrafts and boat docks on the property, and a diminution
4 of her property value.

5 That appears to be -- and, the only other
6 paragraph that has a specific reference is that there
7 essentially is a de facto taking of her property values
8 when she purchased the property in an R-1 area.

9 Judge, we contend first of all that that
01:24 10 does not give them rise to reach standing upon as an
11 adjudication. If they feel that they have a private nuisance
12 claim, they have every right to pursue a private nuisance
13 claim and attempt to prove the things they just alleged; but,
14 by simply referencing it as a bold fact that there would be
15 an increase in smell or an increase in sound or an increase
16 in noise, that somehow that gives her standing relative to
17 the remand that occurred because of the adjudication, we
18 believe it does not raise to the level based on the cases
19 we had identified as to what is an adjudication.

01:25 20 And, I don't -- I don't -- I don't know if
21 the Court has read the briefs yet or not, but I certainly
22 don't think I need to read the cases directly; but, it does
23 specifically indicate that an individual must demonstrate
24 that she is, he or she is, aggrieved and they can only
25 establish that by showing that there is a substantial direct

1 and immediate interest in the outcome of the litigation.

2 It is not sufficient to claim that they're
3 aggrieved to simply assert the common interests of all
4 citizens in procuring a grievance to the law, and we don't
5 believe there is any violation to the law; but, certainly,
6 every property owner would have access over the entire body
7 of water.

8 Now, beyond that, beyond the question as to
9 whether she has standing, Your Honor -- and the only order
01:25 10 entered is that we're going to stop some of this litigation
11 and recognize that she does have standing from an adjudication
12 standpoint, but she attempts to relitigate again the question
13 that was raised in **860 Civil 2009**.

14 In her appeal, she again challenges that
15 there was a violation of the borough code by the granting of
16 this easement both in 2007 and now with the 2009 ratification.

17 The Court has already determined that that
18 is -- there was no violation of the borough code, and there
19 is a final adjudication of that.

01:26 20 She also raises again the exact same argument
21 relative to a violation of the administrative law by
22 contending that the Borough violated administrative law by
23 granting easement in 2007 and by re-ratifying that in 2009.

24 Judge, we believe that she is collaterally
25 estopped to assert those claims in this new action. Those

1 have already been adjudicated. There is nothing new that
2 she's added relative to those claims, and the filing of
3 those is frivolous in that there has already been a complete
4 adjudication of those matters.

5 The next issue that she raises in her appeal
6 is a question that somehow she has been deprived of equal
7 protection of the law and that there was either a private
8 nuisance or a de facto condemnation. Let me back -- go over
9 those backwards.

01:27 10 If there is in fact her belief that she has
11 had a diminution in property because of the action taken by
12 the Borough and that there was a de facto taking, the
13 procedure is not an appeal of that action. The procedure is
14 under the eminent domain code, and there is provisions to
15 determine if in fact there is damages as a result of that
16 action. That is the exclusive remedy in an eminent domain
17 proceeding and a de facto condemnation.

18 If she believes that she has a private
19 nuisance, she must demonstrate the facts of the private
01:28 20 nuisance and address those individuals who wish the nuisance
21 would -- would be -- be generated not by the mere fact that
22 there had been an action taken by Borough Council granting
23 permissive use of land under its water that is identical to
24 easements that have been granted for other occasions such as
25 commercial activities. The marina that is on Indian Lake also

1 has an easement of the same nature. The private individuals
2 have permissive use to put docks on their waterway.

3 Now, she raises the distinction that there is
4 some type of equal protection argument, that she is being
5 treated differently than everyone else. Well, the fact of
6 the matter is she's not. All private property owners have
7 permissive use to put a dock on their shoreline.

8 Commercial individuals -- and, she has never
9 applied for a commercial dock permit; but, the only two areas
01:28 10 that are identified on the lake for commercial purposes are
11 the easement that has been granted here relative to the use
12 of docks for back lots and the marina that is identified in
13 another portion of the lake where there actually is the
14 selling and maintaining and the use of -- of boats and so on
15 and so forth.

16 THE COURT: So, there is a recorded easement
17 for the marina --

18 MR. RULLO: That's correct.

19 THE COURT: -- to place its docks --

01:29 20 MR. RULLO: That's correct, and --

21 THE COURT: -- similar to the one that you
22 have attached or is attached to these pleadings for a boat
23 dock easement?

24 MR. RULLO: There -- there is a -- my
25 understanding is there is a -- a dock -- there is a easement

1 for the use of the marina in a commercial nature in the same
2 manner in which there is an easement for this particular
3 location.

4 Now, they use it for the sale of -- of even
5 portions -- people that buy what is called a general license
6 where they may come onto the -- they may not be a property
7 owner in Indian Lake, but they buy a general permit for the
8 use of that particular season; and, there are so many general
9 permits that are issued per year.

01:29 10 They also have the ability to use it for their
11 own purposes, for their own maintenance purposes. They have
12 maintenance vehicles that or maintenance boats. They go out
13 and work on people's docks; and, they also have a sale of
14 petroleum and those kinds of things on that particular marina.
15 This is not the same commercial type of marina that is being
16 proposed. This is simply the building of docks in which
17 people from back lots would have the ability to place their --
18 their boat on the waterline.

19 But, she is not a commercial -- she does not
01:30 20 intend to be leasing it to others. This is -- and, she has
21 every right and has always had the right to put a boat dock on
22 the shoreline immediately adjacent to her property. So, there
23 is -- there is no distinction insofar as her ability to have
24 access to the waterway, and we have not intended to impair her
25 ability to have access to the waterway.

1 THE COURT: If it was a policy or under the
2 police power a grant that private residences had permissive
3 uses, why did you need an easement in this case --

4 MR. RULLO: Yes.

5 THE COURT: -- for a commercial? Couldn't you
6 just have said we are giving a permissive use for a commercial
7 dock?

8 MR. RULLO: Judge, the reason that happened --
9 and, we need to almost roll back the clock to 2007 and try to
01:31 10 discuss that because it came up in the executive session that
11 gave rise to the action taken.

12 A few days before -- I don't have exactly how
13 many days, but a few days before, we were here on the argument
14 relative to the ordinance itself, the Ordinance 144; and, as
15 part of that discussion, there was an argument that was being
16 made that in somehow the lake itself was not separately zoned.
17 And -- and, that's true. In that particular ordinance, that
18 -- that waterway, unlike, just unlike every other lake in
19 Somerset County, if you look at it, there is not a specific
01:31 20 zoning for the bed of the water, the land under the water,
21 even though there is a new ordinance that is being considered
22 which we will identify. And, for the purpose of this purpose,
23 I can let you know that they're in the process of amending the
24 Ordinance 144 -- it's still under review -- which will include
25 the identification of a municipal lake as part of the zoning

1 ordinance even though we don't believe it has any bearing,
2 bearing on this or the other lawsuit.

3 But, one of the things that was argued is
4 that, even though Ordinance 144 specifically identified
5 the location of how far out the dock could go -- in this
6 particular section, it could go out no more than 70 feet
7 on one section; and, because of the -- of the regression in
8 the shoreline, it could go out 50 feet on one portion and
9 70 feet on the other portion, that that -- that that somehow
01:32 10 in the zoning ordinance reflected something that occurred on
11 land that was not in the zoning ordinance itself, that was not
12 zoned.

13 So, that discussion came up and said, okay,
14 those arguing that there should, there should be some control
15 over the land and there is no ordinance that specifically
16 addresses that, in the executive session, it was discussed
17 that if that's -- if that's an issue now, we'll take that off
18 the table, grant permissive use by way of an easement, and
19 that removes that issue altogether because nobody is saying we
01:33 20 don't own the land. We clearly own the land; and, if we
21 wanted to grant it by way of an -- an easement, we'd prepare
22 the document, record it, and that becomes the end of that
23 issue.

24 Unfortunately, it became a bigger issue
25 because now they're raising somehow that that is a gift which

1 it is not a gift. There is no transfer of title. The title
2 still remains in Indian Lake Borough and will remain in
3 Indian Lake Borough, and it is no different than the
4 permissive use that she has and the other 200 docks that are
5 out there or more.

6 So, that's how it came about. It came about
7 as a spin-off of the discussion that there's nothing in -- in
8 the ordinance itself that talks about the fact that the land
9 under the water is regulated. So, because of that, that was
10 the only reason they took the action that they did. It was
11 to try to take it off, take it off the table, so it was no
12 longer an argument as to whether it was in the zoning
13 ordinance or not in the zoning ordinance. Now, it still is
14 the subject of your review, but -- but that was the purpose
15 of doing it that way, Judge.

16 THE COURT: Okay.

17 MR. RULLO: Because we -- we didn't do
18 anything as far as identifying the location that is different
19 than is in the zoning ordinance itself that specifically
20 authorized the -- the use of docks in that particular
21 location, so it didn't expand it beyond the area that was
22 identified in -- in that section of the ordinance.

23 So, all in all, if I can, Judge, to boil it
24 all down, we believe this continues to be the frivolous
25 natures in which they continue to pursue these claims. They

1 assert claims that we don't believe have any merit and attempt
2 to relitigate matters that have already been litigated; and,
3 we believe to continue to allow this case to continue through
4 a discovery process, Judge, would only incur additional
5 expenses that are unnecessary.

6 So, at a minimum, we would ask -- oh, one
7 other thing I didn't mention, but I think I do need to
8 mention: I also raised the pure procedural nature of the
9 lawsuit.

01:35 10 This is an appeal that was filed; and, Mr.
11 Ging when he originally filed it at **1122 Civil 2009** attached
12 a certificate of service to his -- his appeal. If you look at
13 the certificate of service, it says that he certifies a true
14 and correct copy of the appeal was served on October the 8th,
15 2009, at Indian Lake Borough by first-class mail postage to be
16 paid.

17 This lawsuit was not filed until October the
18 9th, so he would have attempted to -- he would have served
19 something before it even was filed. And, I can represent to
01:35 20 the Court that there was nothing sent to Indian Lake Borough
21 by Mr. Ging. He actually mailed it to me. I'm the one who
22 has the copy that was mailed, dated October of '0--- that was
23 sent on the 9th. There has never been an original service of
24 this appeal.

25 Now, he raises in his brief that we've waived

1 any jurisdictional issue, but I filed in my preliminary
2 objections and specifically said that we've raised the
3 question as to whether or not there was an appropriate filing,
4 an appropriate verified appeal and whether or not there was
5 appropriate original process served.

6 So, if you look at the docket, you'll see
7 that the docket shows that this appeal would have been filed
8 October the 9th. There is nothing that ever demonstrates that
9 there was original process served.

01:36 10 THE COURT: Does the copy that was served upon
11 you have a recorder's --

12 MR. RULLO: No, sir.

13 THE COURT: -- Prothonotary's time, time
14 stamp?

15 MR. RULLO: Actually, what happened and I
16 think what Mr. Ging did is he mailed a copy to me the same
17 time he did to the Prothonotary.

18 I found out about the Case Number of **1122**
19 **Civil 2009** by going to the Prothonotary's office and pulling
01:36 20 the original and seeing it. I don't have the time-stamped
21 copy that shows that there was an appeal filed, and there's no
22 original process ever been filed upon us.

23 THE COURT: Thank you very much. Attorney
24 Ging?

25 MR. GING: May it please the Court, Your

1 Honor, having argued a number of Indian Lake matters before, I
2 do know that the Court reads the briefs ahead of time and is
3 familiar with the issues. So, I'm not going to reiterate all
4 the issues that we put in our brief.

5 Initially, Your Honor, with respect to Mr.
6 Rullo's procedural arguments as to original process and as
7 to the verification affidavit, if the Court thinks the
8 verification affidavit is necessary, give us the right to
9 amend; and, we'll put a verification affidavit on the notice
01:37 10 of appeal, but what Mr. Rullo doesn't appreciate, Your Honor,
11 is that this is an administrative appeal. This is not a civil
12 action as defined in the Rules of Civil Procedure.

13 I'd like to invite the Court's attention to
14 Rule 1001 of the Rules of Civil Procedure. That rule says
15 that the rules apply to actions in equity, actions in
16 assumpsit and actions in trespass and that procedurally all
17 of those rules would be construed under the same rules.

18 The administrative agency law has a specific
19 set of rules and regulations contained in that law and does
01:38 20 not require verification, does not require service of process;
21 and, in fact, Your Honor, I'll invite the Court's attention to
22 Page 16 of my brief and a case decided by the Commonwealth
23 Court of Pennsylvania that clearly contradicts Mr. Rullo's
24 understanding of the law.

25 In **Airo, A-I-R-O, Die, D-I-E, Casting, Inc.**

1 **versus Westmoreland County Board of Assessment Appeals**, the
2 Commonwealth Court said an appeal to the Common Pleas Court
3 does not constitute original process so as to require personal
4 service by the Sheriff. It said that, if the municipality
5 received actual notice within 30 days of the mailing date,
6 that -- that that was sufficient.

7 And, in this case, Mr. Rullo is absolutely
8 correct when we mailed the notice of appeal to the
9 Prothonotary, we mailed a copy to him. He has had actual
01:39 10 notice of the proceeding. He's here in court today.

11 The Borough's subjected itself to the
12 jurisdiction of the Court by appearing. He didn't appear by
13 special objection to challenge the jurisdiction which is a
14 procedure that would be available to him if he challenged the
15 Court's jurisdiction. So, they've waived their jurisdictional
16 arguments.

17 Your Honor, Mr. Rullo -- the thrust of his
18 argument appears to be that my client doesn't have standing,
19 and this is an argument that he's raised in virtually every
01:40 20 one of the Indian Lake cases; and, this is filed with special
21 care to amend our notice of appeal to show where she did have
22 standing.

23 When we over-allege standing as we did here,
24 we're criticized because our pleading is characterized as
25 being the wrong pleading, the wrong forum. Judge, I know

1 Title 26 of Purdon's deals with eminent domain. I know what
2 the procedures are for a de facto taking. We're not asking
3 for money damages in this case. We're not saying that the
4 Court award damages to my clients.

5 What we're saying is it has had an impact that
6 constitutes a de facto taking by diminishing her property.
7 This gives her standing to challenge -- she's an aggrieved
8 party -- to challenge that action.

9 Similarly, Your Honor, I don't know many
10 attorneys that have tried private nuisance cases before a
01:40 11 Jury in Pennsylvania, but I have; and, I understand the
12 elements of a private nuisance case. I understand it has to
13 be brought as an action in trespass in the Court of Common
14 Pleas.

15 We're not asking this Court to enjoin a
16 nuisance. We're saying that in creation of this commercial
17 boat dock and in the tailgate atmosphere that
18 goes with it has created a private nuisance for my client,
19 thus giving her standing.

01:41 20 Similarly, Your Honor, I understand where
21 equal protection arguments are brought and how they're
22 brought, but this is another reason why she has standing to
23 bring this appeal.

24 Mr. Rullo also indicates that these issues
25 have previously been determined by the Court. And,

1 procedurally, Your Honor, we're in a bit of a conundrum
2 because the Court has entered a final order as a result of the
3 status report filed by the Borough in this case, indicating
4 that it ratified the action where the Court ruled as a matter
5 of law that they violated the sunshine law.

6 So, we understand that that case was decided
7 by the Court, and we understand what the Court's ruling was;
8 but, we don't understand whether the Court ruled based on the
9 facts of the case, based on whatever it is that the Court did,
01:42 10 why it didn't violate the administrative agency law and why it
11 didn't violate the Borough Code.

12 The Court has recently ruled us to file a
13 1925 statement of matters complained of. I think it's due
14 next week. We delivered that to the Court. The Court, in
15 response to that statement of matters complained of, will
16 likely write an opinion indicating why it decided the way it
17 did.

18 If the Court finds based on that case that
19 these issues are covered by that adjudication, then to the
01:42 20 extent that the same issues are present we would be
21 collaterally estopped; and, I understand that.

22 Even there, Your Honor, Mr. Rullo has
23 improperly raised collateral estoppel as a preliminary
24 objection. Collateral estoppel, clearly under the rules, is
25 to be raised as an affirmative defense even if the rules did

1 apply.

2 So, procedurally, he's not entitled to file
3 preliminary objections to an appeal from an administrative
4 agency, and he's not entitled to file a preliminary objection
5 in the nature of collateral estoppel. And, the case law on
6 that says, Your Honor, that if someone objects to collateral
7 estoppel being raised as a preliminary objection, the Court
8 doesn't decide it. If we didn't object, the Court could
9 decide it, but we have objected to that.

01:43 10 THE COURT: Isn't your prior action also a
11 local agency law appeal?

12 MR. GING: It is, Your Honor.

13 THE COURT: And, this one is a second local
14 agency law appeal?

15 MR. GING: It is.

16 THE COURT: What new action did the Borough
17 take for which you are entitled to raise new issues?

18 MR. GING: Well, Your Honor, what -- what
19 happened -- and, again, Mr. Rullo sort of misstates the nature
01:43 20 of our pleading on this. We went to the Borough Council
21 meeting with a proposal of our own. And, when Mr. Rullo says
22 the Borough doesn't give easements in front of other people's
23 property, if you'll look at the diagram attached to our notice
24 of appeal, it clearly shows that they have given an easement
25 in front of the Takacs property.

1 He says, well, we drew a line parallel to
2 our property line, not perpendicular; but, if you'll look
3 at that map, the easement they gave to Mr. St. Clair was a
4 perpendicular.

5 What they did at the meeting where the
6 easement was to be ratified, Your Honor, was they took a vote;
7 and, the vote would have been a tie vote but for the vote of
8 Mr. Miscoe.

9 Now, I didn't attempt to disparage Mr. Rullo
01:44 10 by suggesting that the sole reason for them doing this was to
11 make his -- his law firm more money. What I suggested was
12 the position that Mr. Miscoe's in with Borough Council and
13 Mr. Rullo's law firm put him in a position where we believe --
14 and, I believe that right now -- that there is a conflict of
15 interest that should have precluded him from voting on this
16 matter. Had he abstained because of the conflict of interest,
17 then the vote wouldn't have passed, an easement wouldn't have
18 passed, we wouldn't be here today. So, we're in a different
19 procedural posture.

01:45 20 And, to say that this is scurrilous and
21 slandorous information, Your Honor, I invite the Court's
22 attention to the minutes of the meeting that constitute the
23 status report when Mr. Vogel, a member of the Borough Council,
24 raised that exact issue. He said, Mr. Miscoe, you shouldn't
25 be voting on this because you work for Mr. Rullo's law firm.

1 Now, to the extent that Dan suggests that
2 we're saying they took the action so that they would make more
3 money, that's not what we're saying, Your Honor. This, this
4 case has been litigated before this Court on four or five
5 different occasions, different issues; and, I think that
6 Mr. Miscoe was well aware when he voted, that if they voted in
7 favor of the easement, that we would take an appeal.

8 So, you have a different procedural posture
9 where we went in to the Borough. We asked for the same
01:46 10 treatment that they had given to Mr. St. Clair, were denied
11 that treatment. Our offer wasn't even put to a vote.

12 And, in terms of Mr. Rullo and Mr. Miscoe
13 championing the easement, Judge, they run the meeting. They
14 -- they guide the discussion. They conducted the discussion
15 as they wanted. They were the primary advocates of the
16 easement during the meeting. And -- and, I believe that it
17 is a conflict of interest for Mr. Miscoe to have voted,
18 particularly where they may not have known that additional
19 litigation would result, Your Honor, but there's a substantial
01:46 20 chance that litigation would result.

21 So, procedurally, we're in a situation where
22 I believe that if Mr. Miscoe wouldn't have voted -- the vote
23 was, I believe, 3-2 or 3-3, whatever the vote was -- I don't
24 think it would have passed, and we wouldn't be here today.
25 So, that's a different procedural issue.

1 THE COURT: How do you view the statement by
2 Attorney Rullo that there has been an ethics commission review
3 of any relationship he has with the Barbera law firm to
4 understand that it excludes anything dealing with Indian Lake
5 Borough matters? Even in the face of that which I understand
6 he just said -- I don't know if it is -- is posted on the
7 website, were you aware that that review had been completed?

8 MR. GING: I was, Your Honor. In fact, Mr.
9 Miscoe -- when Mr. Vogel raised the fact that he felt there
01:47 10 was a conflict of interest, Mr. Miscoe said, well, Dan's law
11 firm won't make any more money, so it's not a conflict. And,
12 that was basically what he told the Borough Council.

13 If I would have been the Solicitor, I would
14 have told Mr. Miscoe, hey, this looks bad. This just doesn't
15 look right. Don't vote. Let's not have the appearance of
16 impropriety.

17 And, in the ethics commission ruling, Your
18 Honor, on -- on this issue, I think you could go either way.
19 The question is: Is it credible for Mr. Miscoe to indicate
01:48 20 that or for Mr. Miscoe to vote and think, well, this won't
21 result in any additional litigation?

22 If he truly believes that, honestly believes
23 that, after all that's gone on with Indian Lake Borough and
24 the St. Clair zoning ordinance and everything else, that no
25 additional litigation is going to occur, then maybe he's okay

1 on that; but, Your Honor, it's not just the propriety of the
2 act itself. It's the appearance of impropriety that was
3 addressed by another member of the Borough Council. I was at
4 the meeting. I didn't find the response was satisfactory so
5 that that is an issue in this case that's different than the
6 issues in the other case.

7 I just finished a brief on res judicata, Your
8 Honor. I have a case which is the eighth in a series of
9 litigation trying to determine timber rights. The case has
01:49 10 been to the Federal District Court twice, to the Third Circuit
11 Court of Appeals twice, to the Common Pleas Court in Warren
12 County and Superior Court twice; and, I understand the concept
13 of res judicata.

14 And, if the Court in its upcoming opinion in
15 the underlying action or the prior action determines that for
16 the reasons we have in this appeal it's barred by res judicata
17 with the administrative agency law -- for instance, if the
18 Court determines that there was not an adjudication, and the
19 Court can determine that. The Court could say I don't think
01:49 20 that's an adjudication. Now, based on Mr. Rullo's argument,
21 we don't have standing and therefore it's not an adjudication,
22 I think the Court could very easily say, yeah, this lady's a
23 next-door neighbor. It interferes with her property. She
24 does have standing. If the Court finds she has standing, the
25 act has to be an adjudication.

1 Mr. Rullo argues in his brief, well, this
2 isn't an adjudicatory act. And, if you look at the cases
3 we've cited in our brief, Your Honor, sometimes the Borough
4 engages in legislative acts, sometimes it engages in
5 adjudicatory acts; and, where the rights of a person are
6 affected as we've established in this case, it's an
7 adjudicatory act.

8 So, not every act of the Borough Council is
9 a legislative act; and, if the Court finds an adjudication,
01:50 10 then I think we can go forward in this case. If the Court
11 finds it's not an adjudication, then it's not an adjudication
12 now; and, we're going to have to resolve that in Commonwealth
13 Court.

14 Another thing, Your Honor: We have to take
15 this appeal because, if we don't take the appeal, if we fail
16 to raise issues that have an impact, we'll later be considered
17 to have failed to exhaust our administrative remedies.

18 Mr. Rullo suggests, well, we should go into
19 equity and get an injunction; we should file an eminent domain
01:50 20 case.

21 If we went into equity, Your Honor, and asked
22 this Court for an injunction against the Borough, Mr. Rullo'd
23 come in and say, oh, but, Judge, they failed to exhaust their
24 administrative remedies; they could appeal under the
25 administrative agency law. So, we're in a conundrum here in

1 terms of protecting my client's rights.

2 With respect to the Borough Code, I've argued
3 a number of things in the underlying case, first of all, that
4 before the Borough could transfer this property, it had to
5 either bid or appraise. If the Court decides that that
6 argument is not persuasive and therefore not a violation of
7 the Borough Code, then this is probably res judicata; but,
8 if the Court decides as we've argued in this case that the
9 Borough doesn't have the authority to grant an easement,
01:51 10 period, then that -- that would have an impact on that, on
11 this case.

12 And, that's what we have argued here, Your
13 Honor. I know that the Borough Code has stated that the
14 Borough has the property to lease or sell property, period.
15 The Borough has no greater powers than that granted to it by
16 the Borough Code. It doesn't have power to grant easements
17 under the Borough Code. I've not been able to find any cases
18 where the Courts have said sell or lease means grant an
19 easement; and, I think by way of analogy, Your Honor, it is
01:52 20 basically a sale of property.

21 Now, Mr. Rullo argues, well, it's permissive
22 use just like everybody else has. Well, it's not, Your Honor,
23 because the permissive use is granted under the police law.
24 It's under the zoning ordinance. People are given the right
25 to go into the lake under the zoning ordinance. The Borough

1 can change the zoning ordinance at any time. As Mr. Rullo
2 indicated, they're doing that again. They're creating a new
3 special St. Clair zone. Once again --

4 MR. RULLO: I object to that, Judge. I
5 object.

6 THE COURT: I agree.

7 MR. GING: All right. Well --

8 THE COURT: Let's try and keep it on a civil
9 basis.

01:53 10 MR. GING: They're -- they're -- they're
11 adopting a new ordinance, Your Honor, and, you know,
12 basically, they can take away my client's permissive use to
13 the lake in that ordinance. The easement, to the contrary,
14 they can't take back. It's a perpetual easement.

15 We've cited the case of the cell tower in
16 our brief wherein the Court considered whether that was a
17 conveyance or a lease and found that, even though the term of
18 the lease was lengthy, it was renewable for three terms, three
19 successive terms, that it was a lease; and, that's the case
01:53 20 that Dan cited in his brief.

21 It doesn't apply here because we're not
22 talking about a lease. We're talking about an easement. So,
23 depending on what the Court decides in the first case, I
24 think -- and, I think it's premature for the Court to decide
25 this case is barred by res judicata until the Court writes its

1 opinion in the other case; and, if the Court writes its
2 opinion in a manner that makes that case res judicata, the
3 Court dismisses this case, we've protected our appellate
4 rights, and we can go forward; but, I think at this point in
5 time, Your Honor, it's premature for a decision on whether or
6 not that matter is res judicata.

7 And, depending on how the Court decides, it
8 may very well be, and I'm not going to stand here and argue,
9 oh, no, it's not res judicata. I mean, the parties are the
10 same. Most of the issues are the same. There are other
11 issues that weren't raised in the initial notice of appeal.
12 Most of the elements of res judicata are there but may not be
13 once the Court makes its decision.

14 Mr. Rullo indicated that the Borough doesn't
15 sell or lease property in front of other people's property,
16 Your Honor, and we've shown on the map that that's what
17 happened here.

18 And, in -- I'd like to suggest to the Court
19 that Mr. Rullo also argued that Mrs. Takacs can put a dock
20 in front of her property; but, if she puts it in the area
21 in front of her property that's covered by the easement,
22 Mr. St. Clair then has a right of action against her.

23 In terms of the other marina, Your Honor, that
24 marina as I recall was a marina that was constructed at Indian
25 Lake Borough by the original private developer; and, it was

1 there and grandfathered in long before there was an Indian
2 Lake Borough. It's a different circumstance entirely, and --
3 and it's not an area that was recently zoned commercial and
4 granted an easement.

5 Another thing, Your Honor: In terms of
6 standing, and I need to back up a little on this, when my
7 client purchased her property, this area was not zoned the
8 way that it is today and commercial boat docks were not a
9 realistic anticipation for her at that time.

01:56 10 She bought a home in a residential area. She
11 was aware when she bought it that the property next to her
12 could not be perked, most likely wouldn't be developed, and
13 bought three lots in that area because of the serenity and
14 peace.

15 THE COURT: She bought a property next to an
16 area that was zoned commercial-recreational and/or commercial-
17 recreation hotel, that had a hotel on it.

18 MR. GING: It did, but the --

19 THE COURT: You don't think that she could
01:56 20 anticipate that the hotel would utilize its property to have
21 some kind of commercial activity with the water?

22 MR. GING: Well, Your Honor, traditionally, it
23 had been used for a ski slope.

24 THE COURT: Well, that hadn't been for
25 20 years.

1 MR. GING: No, I agree, Your Honor, but the
2 anticipation that the Borough Council would pass a new zoning
3 ordinance along the commercial docks there -- commercial docks
4 have approximately 40 boats. I don't think realistically
5 anybody could have anticipated that at the time she purchased
6 that property.

7 THE COURT: What part of commercial didn't she
8 get?

9 MR. GING: Well, Your Honor, they --

01:57 10 THE COURT: She could have put a -- they could
11 have had a McDonald's down by the water.

12 MR. GING: Well, Your Honor, I can't imagine
13 Indian Lake Borough giving a building permit to a McDonald's.

14 THE COURT: We're not here to imagine. We're
15 here to argue what their rights were.

16 MR. GING: I understand, Your Honor. And, you
17 know, when -- when my clients purchased the property, there
18 was a lodge there. The lodge had opened and closed over the
19 years. There was a golf course. There was an apartment
01:57 20 building or a hotel there.

21 No one ever anticipated that all the trees on
22 their property line would be cut down, that there would be
23 townhouses put in next to them, because that had never been
24 the use that was made. So, I think they had a right to rely
25 upon what they believed the Zoning Ordinance 99 provided at

1 that location.

2 And, I don't believe there was anything else
3 that that -- I don't believe there's anything else, Your
4 Honor, unless --

5 THE COURT: All right. Thank you.

6 MR. GING: -- does the Court have any
7 questions?

8 THE COURT: I was going to give Attorney Rullo
9 a chance for rebuttal and you a chance for surrebuttal, if you
10 wish.

01:58

11 MR. GING: Thank you, Your Honor.

12 MR. RULLO: Very short rebuttal, Judge, on a
13 couple of things. First, this issue about potential conflict
14 with Mr. Miscoe: Let me just take a moment to talk about
15 that.

16 The action taken by the Borough Council was
17 to ratify something that was done in 2007. There is no
18 additional documentation needed to be prepared, that no
19 easement that was to be done, there was nothing my firm would
20 have done that would generate any additional legal fees.

01:58

21 What they're implying is that because they
22 potentially could file a lawsuit that Mr. Miscoe should recuse
23 himself because that may mean the Borough Solicitor would have
24 to defend the action taken by Borough Council. Essentially,
25 if you boil it down, it means that, unless we do what they

1 want to do, we -- Mr. Miscoe always has to recuse himself
2 because the potential is that the Solicitor may have to
3 defend it.

4 Now, even if there was a tie vote doesn't mean
5 it fails. The Mayor has to then break the tie. Mr. Lichty
6 would have had to have then break the tie if Mr. Miscoe would
7 have recused himself; but, the fact of the matter is there was
8 nothing when it was raised by -- by Vogel which his -- Mr.
9 Vogel has been sympathetic to their -- their plight all the
01:59 10 way back to the time the zoning ordinance. He testified on
11 behalf of Mr. Lyons and those people during -- before he was
12 even on council.

13 He always had raised some question about
14 that; but, at this point, he raised the question of whether
15 Mr. Miscoe should recuse himself. And, Mike correctly stated
16 there's no additional legal issues that are going to occur.
17 Mr. Rullo's firm is not going to prepare anything new.

18 We were defending the Borough's action. The
19 fact that they decided to sue, I can't control them. They
01:59 20 are the only ones that control that. And, therefore, Mr.
21 Miscoe can't -- can't anticipate, just because we take action
22 to ratify something we did back in 2007, that somehow he has
23 to recuse himself.

24 And, this appearance of impropriety is only
25 because Mr. Ging spins it that way. There was no legal

1 entitlement for him, him -- no legal, legal obligation for him
2 to back off on voting his conscience. He's a -- he's a member
3 of council. He takes an oath to abide the law, and that's
4 what he did.

5 So, in that sense, there was no prohibition,
6 no conflict of interest, and we had no legal expenses relative
7 to the action taken. It's only because they keep appealing or
8 filing lawsuits that there is additional costs.

9 And, Mr. Miscoe has nothing to do with my firm
02:00 10 relative to Indian Lake Borough matters, and that's clear;
11 and, nobody's ever suggested otherwise.

12 As to the last issue that he raised about
13 Mrs. Takacs somehow, you know, being impaired by the fact
14 that these -- this easement may occur, understand, Judge,
15 she's been a straw party from day one. I mean, they have
16 only been -- the only reason she's -- she's never at the
17 meetings. She's not here today. She is a straw party.
18 Mr. Lyons and Mr. -- and other people that may be involved
19 in it are really the key parties behind all of this issue.

02:01 20 But, in any event, when the Takacses bought
21 their property, they bought it next to a commercial,
22 commercial land. There was a commercial pier that was there
23 during that entire period of time, a place called Pow Wow
24 Pier, if you remember reading in the transcript of the zoning
25 issues, that there had always been some ability to use it for

1 commercial purposes. That was not an owned dock by any
2 individual. It was owned by the developer. So, there has
3 always been some commercial use of all of that land, and
4 you're correct in that it could have been anything from a
5 hotel to a ski resort to a McDonald's to any type of
6 commercial use.

7 So, she had no right to anticipate that it
8 would not be used for commercial purposes; and, the fact that
9 the docks are being installed or will be installed if the
02:02 10 Court affirms the zoning issue would make the whole easement
11 issue moot because the ordinance itself specifically
12 identifies and authorizes that.

13 THE COURT: All right. Thank you.

14 MR. GING: May it please the Court, Your
15 Honor, that the conflict of interest is not that Mr. Miscoe
16 works for the Barbera law firm. The conflict of interest is
17 that the Barbera law firm, at least at the time this easement
18 was passed, worked for Mr. St. Clair; and, that's the
19 conflict.

02:02 20 He's a contractor of the Barbera law firm.
21 They're representing the Borough. They're representing the
22 St. Clair development. In fact, the Court will recall that,
23 at the time the original easement was passed, Mr. St. Clair
24 was the president of Borough Council --

25 MR. RULLO: Objection.

1 MR. GING: -- and, he did --

2 MR. RULLO: Judge, that has nothing to do with
3 this appeal. This appeal deals directly with Mr. Miscoe and
4 the issues on the vote. It does not deal with any previous
5 representation of -- of -- of St. Clair.

6 MR. GING: Excuse me.

7 MR. RULLO: That is not the subject -- I'm
8 objecting to that.

9 THE COURT: I understand.

02:03 10 MR. RULLO: He's raising a whole new issue.

11 THE COURT: I understand.

12 MR. GING: It's not a new issue, Your Honor.
13 It's putting the issue into perspective. It's not a conflict
14 of interest, I don't think that it's a conflict of interest,
15 for Mr. Miscoe to work on Indian Lake matters, I don't
16 necessarily know that we've ever been concerned about.

17 The conflict comes when Mr. Rullo represents
18 St. Clair and the Borough, and Mr. Miscoe is a contractor of
19 the law firm and a president of the Borough Council. That's
02:03 20 where we claim to be the conflict, because of that.

21 As far as Mrs. Takacs being a straw party,
22 Your Honor, there's nothing straw about her ownership of the
23 property immediately adjacent to the St. Clair Resort
24 development property. She's not here today. Mr. Takacs is.
25 He's sitting next to Mr. Lyons. So, to the extent that she's

1 a straw party, Your Honor, she has the property in her name.
2 for estate planning purposes. Her husband is here. I don't
3 know what that has to do with the case.

4 In terms of the Pow Wow Pier, Your Honor, if
5 you remember the testimony from the zoning case, the testimony
6 was that, first of all, that was a pier that was used to ferry
7 people from the marina over to the ski lodge or that would
8 pick people up at the ski lodge and take them around the lake.
9 There were one or two boats. It was also 20 years ago. I
02:04 10 don't know that it was there when the Takacses purchased the
11 property.

12 So, to the extent that there was ever a
13 commercial operation there, if there were boats at the Pow Wow
14 Pier a couple times a year, that's very different than 20 jet
15 skis and 20 boats being there for the entire summer.

16 Thank you, Your Honor.

17 THE COURT: All right. Thank you. I
18 appreciate very much the presentation by counsel. I'm going
19 to indicate, first of all, and I'll give some explanation, I'm
02:04 20 going to sustain the preliminary objections, and I'm going to
21 dismiss the case as a final order.

22 And, my rationale is this: You had a prior
23 local agency appeal which listed a number of different issues
24 that you were raising regarding the actions of the Borough in
25 granting an easement.

1 My remand to them was simply that they needed
2 to have that vote in a public forum when there was a proper
3 opportunity for the public to comment. That was the sole
4 remand.

5 They did that. There's no change in the
6 action that they did at the second meeting than what they did
7 at the first.

8 I don't raise the legal issues that come
9 before the Court. You do. You raised them. That's the
10 issue that you're going to appeal to the Commonwealth Court,
11 and that's why I'm not going to allow a second local agency
12 appeal.

13 Also, I just want to comment: You Mr. Ging,
14 you Mr. Rullo, are both officers of the Court. I was offended
15 by the language of the appeal which chastised that a member of
16 this Bar would raise issues solely for the purposes of
17 garnering fees and wages. I find that offensive. More so
18 would it be appropriate for Mr. Rullo in his petition to say
19 that you are making these appeals because you're trying to
20 garner fees.

21 Neither one would be right, and I will not
22 accept it by either of you on the bare and bold allegations
23 that we see in the pleading here today.

24 So, the ruling of the Court is: This 4th day
25 of December, 2009, the preliminary objections to the local

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agency appeal of Mary Jo Takacs are granted. The case is
dismissed with prejudice. This is a final order. All right.

MR. RULLO: Thank you, Your Honor.

MR. GING: Thank you, Your Honor.

-- (2:06 p.m.) --

* * *

REPORTER'S CERTIFICATE:

I hereby certify that the proceedings and evidence are contained fully and accurately in the notes taken by me on the hearing of the above cause, and that this copy is a correct transcript of the same.



Denise J. Khorey-Harriman, RMR
Official Reporter
16th Judicial District

Date:

Jan. 13, 2010