

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

David F. Giannilli and Leeanne :  
Giannilli, his wife :  
 :  
 :  
 v. : No. 1063 C.D. 2013  
 :  
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Norfolk Southern Railway Company, :  
a Virginia Company, and The City of :  
Latrobe, Pennsylvania :

Appeal of: Norfolk Southern Railway :  
Company :

David F. Giannilli and Leeanne :  
Giannilli, his wife :

v. : No. 1064 C.D. 2013  
 : Argued: December 9, 2013  
 :

Norfolk Southern Railway Company, :  
a Virginia Company, and The City of :  
Latrobe, Pennsylvania :

Appeal of: City of Latrobe :

**BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, Judge**  
**HONORABLE RENÉE COHN JUBELIRER, Judge**  
**HONORABLE ANNE E. COVEY, Judge**

**OPINION NOT REPORTED**

**MEMORANDUM OPINION BY**  
**JUDGE LEADBETTER**

**FILED: March 11, 2014**

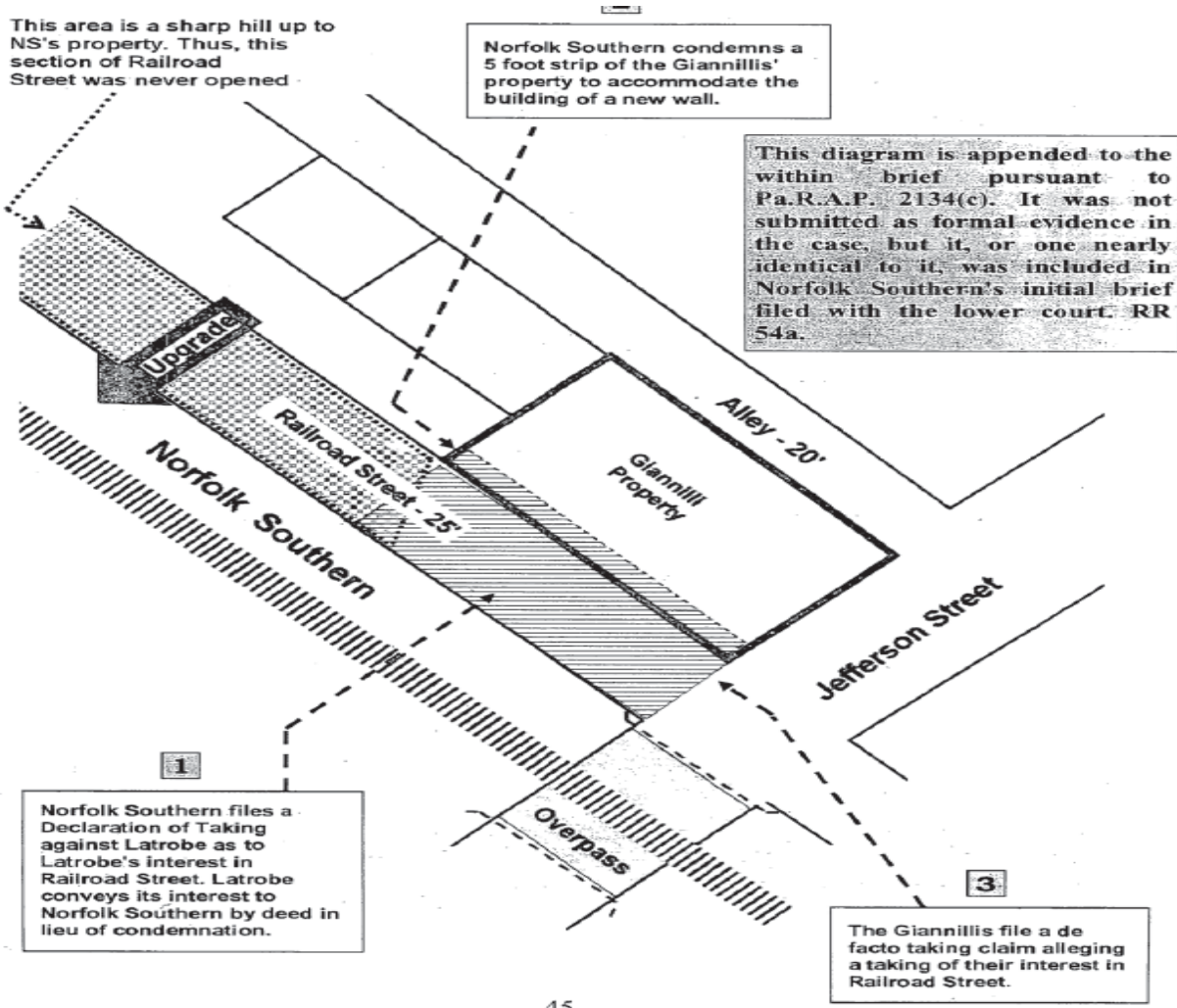
Norfolk Southern Railway Company (Norfolk Southern) and the City of Latrobe<sup>1</sup> (Latrobe) appeal from the order of the Court of Common Pleas of Westmoreland County dismissing their preliminary objections to the petition for the appointment of a board of viewers filed by David F. Giannilli and Leeanne Giannilli, husband and wife. We reverse.

The Giannillis' parcel, which is a commercial property used to store supplies for an off-site restaurant and construction equipment, bordered Railroad Street, a 25 foot-wide alley. Railroad Street was approximately a one-block-long dead-end street. The Giannillis have additional access to their property through a 20-foot-wide alley on the opposite side of their property. Norfolk Southern's rail line runs parallel to Railroad Street and is upgrade from the Giannillis' property. In March 2011, a retaining wall supporting the rail line collapsed, causing the wall and the earth behind it to slide onto Railroad Street and onto the Giannillis' property. Norfolk Southern completed construction of a new wall, which encompassed portions of Railroad Street, in February 2012.

The following diagram of the area was attached to Norfolk Southern's brief. Norfolk Southern's Brief at 45. Although it was not submitted as formal evidence, its accuracy as an illustrative tool is not disputed:

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<sup>1</sup> According to Section 101 of Latrobe's Home Rule Charter "[t]he Borough of Latrobe shall be a municipal corporation under the name, 'City of Latrobe.'" "A municipality which has adopted a home rule charter may exercise any powers and perform any function not denied by the Constitution of Pennsylvania, by statute or by its home rule charter." Section 2961 of the Home Rule Law, 53 Pa. C.S. § 2961. Latrobe adopted the Code of Latrobe pursuant Section 1008(b) of the Borough Code, then in effect, Act of February 1, 1966, P.L. 1656, 53 P.S. § 46008(b). *See* Latrobe Code, Article 1 § 1-1.



On August 5, 2011, Norfolk Southern filed a declaration of taking against Latrobe condemning a portion of Railroad Street. Reproduced Record (R.R.) at 205a. The purpose of the condemnation was to accommodate the construction of a retaining wall and related improvements adjacent to Norfolk Southern's rail line. The declaration of taking states that the "interest in the property that is condemned is fee simple or absolute title, or such other title in the property that is vested in Latrobe." *Id.* The Notice of Condemnation states that "[a]s a result of the Declaration of Taking, any title or interest the City of Latrobe...has in the property...has been divested and lodged in Norfolk Southern Rail Company." R.R. at 209a.

On August 22, 2011, Latrobe executed a quit claim deed in lieu of condemnation in favor of Norfolk Southern for a portion of Railroad Street. The quit claim deed provided that “[t]he purpose of this deed is to convey to [Norfolk Southern] any and all interest [Latrobe] has or may have in” Railroad Street. R.R. at 201a-202a. The conveyance was approved by the Council of Latrobe by Resolution 2011-40. On August 24, 2011, Norfolk Southern filed a separate declaration of taking against the Giannillis condemning a five-foot wide by 180-foot-long strip of land along Railroad Street.<sup>2</sup>

On August 12, 2012, the Giannillis filed a petition for the appointment of a board of viewers. The Giannillis asserted that by conveying Railroad Street to Norfolk Southern, Latrobe effectively abandoned or vacated Railroad Street. R.R. at 5a. The Giannillis alleged that upon abandonment or vacation of Railroad Street, they became the owners of one-half of Railroad Street. *Id.* They further asserted that by attempting to convey Railroad Street to Norfolk Southern, Latrobe caused a *de facto* condemnation of their one-half of the street. Alternatively, the Giannillis asserted that by accepting Railroad Street, Norfolk Southern has caused a *de facto* condemnation of one-half of the street because Latrobe did not have the right to convey that portion of Railroad Street. The Giannillis requested an award of damages including loss of value of their half of the street.

Norfolk Southern filed preliminary objections to the petition for appointment of a board of viewers. Norfolk Southern argued that the petition was legally insufficient because its acceptance of the quit claim deed did not result in a *de facto* taking. Latrobe also filed preliminary objections asserting legal

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<sup>2</sup> The second taking is the subject of different action, which at the time of oral argument before this Court was pending before the court of common pleas.

insufficiency, arguing that if the Giannillis are one-half owners of Railroad Street, then the quit claim deed would have no effect and a *de facto* taking did not occur because Latrobe was unable to convey away an interest which it did not own. Latrobe also argued that if a *de facto* taking did occur, the Giannillis did not experience a substantial deprivation of beneficial use and enjoyment of their property, a prerequisite to recovery of damages.

Common pleas held two evidentiary hearings at which Donald Waxter, a land title insurance agent and abstracting service provider, and David Giannilli testified. The parties submitted numerous exhibits into the record including the deeds to the Giannillis' properties, the quit claim deed from Latrobe to Norfolk Southern, pictures of the property and the results of the title abstract searches. The parties also submitted post-hearing briefs.

Common pleas ruled that a *de facto* taking had occurred and appointed a board of viewers to assess damages. Common pleas held that "by its conveyance of a portion of Railroad Street in question to Norfolk [Southern] [Latrobe] has caused a *de facto* vacation of the street" because Latrobe knew that Norfolk Southern would not use that part of Railroad Street as a street. Common pleas' May 24, 2013, Opinion at 2. Consequently, neither the public nor adjacent landowners would be able to use the property as a street. *Id.* at 2. Common pleas determined that condemnation by Norfolk Southern occurred upon execution and acceptance of the quit claim deed on August 22, 2011. *Id.* at 3.

Common pleas further explained its decision in an opinion issued pursuant to Pennsylvania Rule of Appellate Procedure 1925(a), Pa. R.A.P. 1925(a). Common pleas stated that the testimony of Waxter demonstrated that the deeds originated with Oliver Barnes, the original grantor, who in 1851 created and filed

the plan of lots for the entirety of Latrobe, did not provide for reversionary interests to himself in the streets of Latrobe. Common pleas further noted that there was not any evidence that Railroad Street was ever conveyed to Latrobe. Common pleas concluded that in acceding to the condemnation and purporting to convey that portion of Railroad Street, Latrobe effectively vacated or abandoned that portion of Street, and that the Giannillis were entitled to one-half of the vacated street. Common pleas concluded that because the condemnation action and the quit claim conveyance in lieu of condemnation were accomplished by the actions of both Norfolk Southern and Latrobe, each is subject to the payment of just compensation. These appeals followed.<sup>3</sup>

The primary question before the Court is whether a taking occurred when Latrobe's interest in Railroad Street was conveyed to Norfolk Southern. A related question is whether the conveyance by quit claim deed resulted in an abandonment or vacation of the street, which would have made the Giannillis one-half owners of the street.

The law in Pennsylvania is well settled that when land described as being bounded by a street is conveyed, the grantee's land extends to the middle of the street, subject to the public easement and that when a street is vacated, that portion of the street reverts to the grantee, unless the original grantor has retained a reversionary interest in the land. *Harbor Marine Co. v. Nolan*, 366 A.2d 936, 939 (Pa. Super. 1976); *Barnes v. Philadelphia, N. & N. Y. R. R.*, 27 Pa. Super. 84, 86 (1905). The public right of an easement in the streets of a city is in the "exclusive possession of the municipality, which may authorize the use of the sidewalk, as

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<sup>3</sup> Both Norfolk Southern and Latrobe filed appeals from common pleas' decision. The appeals were consolidated by order of this Court.

well as the street, for any public service, without further compensation to the abutting lot owners.” *46 South 52nd St. Corp. v. Manlin*, 398 Pa. 304, 312, 157 A.2d 381, 386 (1960). *See also In re Altoona*, 479 Pa. 252, 258, 388 A.2d 313, 316 (1978) (holding that dedication of a public street does not grant fee title to the land to the municipality; rather the municipality acquires the right to use, maintain, and regulate that land as a street for the benefit of the public).

A *de facto* taking occurs when an entity with eminent domain powers<sup>4</sup> substantially deprives property owners of the use and enjoyment of their property. *Williams v. Borough of Blakely*, 25 A.3d 458, 464-465 (Pa. Cmwlth. 2011). A *de facto* taking is not a physical seizure of property; it is an interference with one of the rights of ownership that substantially deprives the owner of the beneficial use of his property. The damages sustained must be an immediate, necessary and unavoidable consequence of the exercise of the entity’s eminent domain powers. *Id.* Property owners alleging a *de facto* taking bear a heavy burden of proof. *Id.*

Norfolk Southern argues that the filing of the declaration of taking against Latrobe to condemn Latrobe’s interest in Railroad Street and its acceptance of the quit claim deed in lieu of condemnation did not result in a *de facto* taking of the Giannillis’ reversionary interest in Railroad Street. Norfolk Southern asserts that the Giannillis’ reversionary interest in Railroad Street survived the conveyance and therefore, a *de facto* taking did not occur.

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<sup>4</sup> Railroads are public utilities as defined by Section 102 of the Public Utility Code, *as amended*. 66 Pa. C.S. § 102. Section 204(a) of Eminent Domain Code prohibits the taking of private property for private enterprise. 26 Pa. C.S. § 204(a). However, the taking of private property by a common carrier or railroad is a specific exception to this prohibition. 26 Pa. C.S. § 204(b)(2)(i) and (ii).

Latrobe challenges common pleas' conclusion that the *de facto* taking occurred when the quit claim deed was executed and accepted. Latrobe argues that the taking occurred when the retaining wall gave way in March 2011 and deposited 350 truck-loads of gravel upon Railroad Street, thus depriving the Giannillis' of their use of the street.

The Giannillis argue that it was not necessary for Latrobe to pass an ordinance or resolution formally abandoning Railroad Street and that Latrobe's action in conveying the deed to the street to Norfolk Southern and Norfolk Southern's acceptance of the deed caused, by operation of law, abandonment of the street. Consequently, the Giannillis were one-half owners of Railroad Street, an interest which was taken by Norfolk Southern, while also depriving them of the use of Railroad Street.

*Leach v. Philadelphia, Harrisburg & Pittsburgh Railroad Company*, 258 Pa. 518, 102 A. 174 (1917) is directly on point. In *Leach*, the plaintiff owned land that bordered upon an alley. The railroad's tracks were located immediately north of the alley. In order to construct a siding, the railroad appropriated the alley. The plaintiff asserted that he had not only an easement in the entire alley, but also title in fee to one-half of the alley. The Pennsylvania Supreme Court held that the railroad did not take the fee to the ground it occupied. Rather, the railroad merely substituted its easement or right of way, for that of the public. The Supreme Court noted that if the railroad should thereafter abandon its line, the land would revert to the abutting property owner. The plaintiff merely lost his right of way and was permitted to recover the amount of the depreciation to his property resulting from the loss of that easement.



Railroad Street can be found on the 1851 plat laid out by the original grantor, Barnes. This resulted in dedication to the public of a right of way or an easement interest over Railroad Street. *Hoffman v. Pittsburgh*, 365 Pa. 386, 392-93, 75 A.2d 649, 652 (1950) (stating that dedication of a street may be accomplished by designating land as a street on plat). Barnes did not specify that he retained any reversionary interests in the streets laid out in plat. Thus, the Giannillis are correct that they owned a reversionary interest in one-half of Railroad Street in the event Latrobe ever vacated the street.

The quit claim deed states that “[t]he purpose of this deed is to convey to [Norfolk Southern] *any and all interest [Latrobe] has or may have* in and to the above described property.” R.R. 202a (emphasis added). Latrobe possessed an easement interest in Railroad Street for use as a public road. Norfolk Southern did not take a fee simple interest in Railroad Street because Latrobe could not convey away that which it did not own. The quit claim deed conveys the easement interest to Norfolk Southern for use as a rail line, a recognized (although different) public use. *Danville, H. & W. R. Co. v. Commonwealth*, 73 Pa. 29, 38 (1873) (reiterating that “taking a street or highway for the purpose of a railroad is taking it for public use is settled by repeated adjudications and can no longer be regarded as an open question”).

As in *Leach*, the Giannillis’ reversionary interest survived the conveyance of Latrobe’s interest in Railroad Street. However, two days after the conveyance by quit claim deed, Norfolk Southern filed a declaration of taking condemning a five-foot wide by 180-foot long strip of the land along Railroad Street. This strip constituted the Giannillis’ entire frontage on Railroad Street. Thus, the Giannillis’ reversionary interest in Railroad Street was extinguished upon

filing of the August 22, 2011 declaration of taking. Significantly, the Giannillis' may seek damages for the loss of their reversionary interest in the case currently pending before the court of common pleas.

The argument that Latrobe abandoned Railroad Street is without merit. Abandonment is the relinquishment of a right, which cannot occur where money has changed hands. *Commonwealth v. Koontz*, 258 Pa. 64, 68, 101 A.2d 863, 864 (1917). Norfolk Southern paid Latrobe in excess of \$46,000 for its interest in Railroad Street. Accordingly, Latrobe did not abandon its interest in Railroad Street.

Similarly, there is no support for the Giannillis' argument that conveyance of Railroad Street by Latrobe acted as vacation of the street by operation of law. A "borough's authority to vacate its streets is not derived from common law, but from statute, and thus may be limited by statute." *Twp. of E. Pennsboro v. Borough of Camp Hill*, 514 A.2d 987, 990 (Pa. Cmwlth. 1986). Section 1731 of the Borough Code, 53 P.S. § 46731, sets out specific procedures such as publication of the proposed ordinance vacating a street and personal notice to adjoining land owners that a Borough must follow when vacating a street. This is the only way a street may properly be vacated. There is no evidence of record that any of Section 1731 procedures were followed by Latrobe prior to conveyance of its interest in Railroad Street. Further, a review of the Section A338 of the Code of Latrobe, which lists every ordinance enacted in order to vacate a street within the borough since 1858, does not list an ordinance vacating this portion of Railroad Street.

For all of the foregoing reasons, we reverse the order of common pleas overruling the preliminary objections of Norfolk Southern and Latrobe and appointing a board of viewers, as requested by the Giannillis.

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**BONNIE BRIGANCE LEADBETTER,**  
Judge

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**ORDER**

AND NOW, this 11th day of March, 2014, the order of the Court of Common Pleas of Westmoreland County overruling the preliminary objections of the Norfolk Southern Railway Company and the City of Latrobe and sustaining the petition for appointment of a board of viewers filed by David F. Giannilli and Leeanne Giannilli, husband and wife, is hereby REVERSED.

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**BONNIE BRIGANCE LEADBETTER,**  
Judge