

**In Re: The Petition of Allegheny County
for Authorization to Lease County Real
Estate to Airside Business Park, L.P.,
Requesting Ancillary Relief/Property
Now or Formerly of Elsie McCutcheon
Boyd and/or Her Heirs at Law,
Located in Moon Township,
Allegheny County, Pennsylvania**

*Property Law—Fee Simple Estates—Reverter—Reformation of
Deed—Easement*

1. A fee simple estate is one in which the owner is entitled to the entire property, with unconditional power of disposition during his life, and descending to his heirs and legal representative upon his death intestate.

2. When a deed is signed, sealed, accepted and recorded, it becomes the mutual act of the parties by acceptance, and the grantee takes the property subject to any burden imposed by the grant.

3. A party wishing to reform a deed by claiming that it contains or omits certain information by mistake or by scrivener's error has the burden of proving such mistake by clear and convincing evidence. The evidence must be of such persuasive quality that reasonable minds could not disagree that a mistake had been made.

4. An easement is a liberty, privilege, or advantage which one may have in the lands of another without profit. It cannot be an estate or interest in the land itself, or a right to any part of it.

(Edward L. Russakoff)

Howard M. Louik for Allegheny County.
 Darlene Nowak for the Boyd Heirs.
 Richard J. Klein for National City Bank.
 No. G.D. 99-7116. In the Court of Common Pleas of Allegheny County, Civil Division.

OPINION

Jaffe, J., December 15, 1999—This is an appeal by Petitioner, Allegheny County (hereinafter "County") from this Court's Order dated October 22, 1999 which approves a lease between the County and Airside Business Park, L.P. (hereinafter "ABP"), except for the provisions in this lease that purport to grant ABP an interest in a certain 6.519 acre parcel of land (hereinafter "Boyd parcel"). This Order also grants Respondent, Boyd Heirs' (hereinafter "Boyd") Cross Petition for Relief whereby it was decreed that said parcel reverted to the Boyds "without further act or conveyance".

Background

The County instituted this action with a Petition for Authorization to Enter into Long Term Lease of County Real Estate with Airside Business Park, L.P. requesting Ancillary Declaratory Relief filed pursuant to §5506 of the Second Class County Code, 16 P.S. §5506. In addition to seeking judicial approval of this lease, the County sought "a judicial declaration regarding the County's title to certain property formerly owned by Elsie McCutcheon Boyd (Boyd parcel) and/or whether there exists a reversionary interest in [this] property..."

The property in question is a 6.519 acre parcel of land in Moon Township, Allegheny County which, after it was acquired by the County in 1946 pursuant to condemnation proceedings under the Act of May 21, 1929, P.L. 295, was apparently used as a parking lot for the main terminal of the Greater Pittsburgh International Airport until sometime in 1992 when that terminal closed and the County's new mid-field terminal opened.

The process by which the County acquired this parcel is not entirely clear. However, as best as can be reconstructed from the historical record, it appears that on April 2, 1946, the County's Board of Commissioners adopted a resolution acquiring this property from the Boyds by condemnation for the purpose of establishing and maintaining an airdrome or aviation landing field. On April 8, 1946, a Board of Viewers was appointed by the Court of Common Pleas at No. 504 July Term 1946 to ascertain just compensation due the Boyds as a result of the taking of this property.

The Board entered its Notice of Award on June 10, 1946 fixing the damages at \$4,225.00. This report was filed with the Prothonotary and confirmed on June 28, 1946.

The next matter of record relative to this property is a Deed dated October 21, 1946 and recorded two days later on October 23, 1946 in the Office of the Recorder of Deeds of Allegheny County at Deed Book Volume 2921, page 180 from Marcus Boyd and Elsie McC Boyd, husband and wife, grantors, to the County.

By this Deed, the Boyd parcel was conveyed to the County, in fee simple, in consideration of the sum of \$4,225.00. The Deed notes that the parcel was "taken and condemned by said County of Allegheny for the purpose of establishing and maintaining thereon an airdrome or aviation landing field..." Further, the Deed contains a reverter which states:

"...that if the property conveyed shall cease to be used by the County of Allegheny, its successors and assigns, for the purposes for which condemned as aforesaid, then the title hereby conveyed shall be extinguished and such title shall revert without further act or conveyance to Elsie McC Boyd, her heirs and assigns."

Finally, the docket at No. 504 July Term 1946 contains a

notation, dated October 22, 1946, that the Board of Viewers award was "satisfied in full by payment in full of the amount awarded." There are no further documents extant regarding this transaction.

The relief requested by the County in its Petition included a declaration that: 1) the County acquired the Boyd parcel in fee simple absolute in 1946; 2) no reversion exists with respect to said property; and alternatively 3) the use contemplated under the ABP lease is consistent with the former use of the property as an airdrome or aviation landing field.

The Boyds filed an Answer, New Matter and a Cross Petition for Relief in which they asserted that the Boyd parcel reverted as per the terms of the October 21, 1946 Deed and that the County's request for ancillary relief is barred by the doctrine of laches. Further, the Boyds sought a judicial declaration that the County had no further interest in said parcel.

After a hearing, argument and consideration of the memoranda filed by the parties, this Court concluded that the County failed to establish, by even a preponderance of the evidence, that the Boyd parcel was still being used for the purposes of an airdrome or aviation landing field. We further found that the County failed to establish any grounds for the reformation of the October 21, 1946 Deed and therefore the parcel reverted to the Boyds. This appeal followed.

Discussion

Counsel for the County, in its "concise" Statement of the Matters Complained of on Appeal filed pursuant to §1925(b), raises twenty-six (26) so-called errors. However, upon close examination, it appears that there only two (2) major issues in this case; 1) whether this Court erred in failing to conclude that the reverter contained in the October 21, 1946 Deed was a nullity given the nature of the condemnation; and 2) whether this Court erred in concluding that the "Boyd parcel" was no longer being used for the purpose of establishing and/or maintaining thereon an airdrome or aviation landing field, thus reverting by operation of law to the Boyd Heirs.

Was the reverter a legal nullity?

The Act of May 21, 1923 authorizes the use of eminent domain by Allegheny County to acquire property for the construction of and maintaining "airdromes or aviation landing fields, whenever the commissioners of the county, by resolution deem it advisable to do so". Further, the Act provides that "title acquired by virtue of any such condemnation shall be in fee simple."

The County vigorously contends that under this Act, the language in the October 21, 1946 Deed which creates a reverter to the Boyd Heirs, is a legal nullity. This Court disagrees.

In support of its argument, the County relies upon the case of *Starkey v. City of Philadelphia*, 156 A.2d 101 (Pa. 1959) which was an equity action instituted by the plaintiffs who claimed a reversionary interest in certain real property that the City of Philadelphia had previously taken in eminent domain proceedings for the purpose of establishing an airport. The facts in *Starkey* are strikingly similar to those in the instant case except for one significant difference. The property therein was no longer being used for an airport or for any other public use, and was apparently, like in this case, being conveyed to private persons for private purposes. The Supreme Court ruled in favor of the City stating that when the City condemned the property in fee simple for a specific purpose, but subsequently abandoned that purpose and used the property for an entirely different purpose, the plaintiffs retained no reversionary interest in that property. 156 A.2d at 105.

However, *Starkey* is readily distinguishable from the instant case because there was no deed or other written instrument creating any reversionary interest. In the instant case, the October

21, 1946 Deed created such an interest. The County asserts that this language is a legal nullity given the language of the Act of 1923 and *Starkey*. This Court once again disagrees.

As counsel for the Boyd Heirs points out, a fee simple estate in land is one of several types of estates recognized under Pennsylvania law. *Black's Law Dictionary* defines a fee simple estate as "one in which the owner is entitled to the entire property, with unconditional power of disposition during his life, and descending to his heirs and legal representatives upon his death intestate." *Id.* At 742 (4th Ed. 1968).

There are three (3) types of fee simple estates: absolute, determinable or base, and conditions. *Bushong, Pennsylvania Land Law*, Vol 1 §21 (1938). A fee simple determinable or base, is still an estate in fee simple. The Pennsylvania Supreme Court, in *Slegel v. Herbine, et al.*, 23 A. 996 (1892) stated:

"The premises of a deed are often expressed in general terms...which may lessen, enlarge, explain or qualify the premises, but not totally contradict them...These...could not have the effect of reducing the grant of a fee in the premises to anything less than a fee, but they can explain the nature of that fee to be either an absolute or a base or a qualified one. It must not be forgotten that such a fee is nevertheless a fee-simple, because it may last forever in a man and his heirs, the duration depending upon the concurrence of collateral circumstances which qualify and debase the purity of the grant..."

Thus, in the instant case, the Boyds, by their October 21, 1946 Deed, did convey the subject property to the County in fee simple. Clearly, under the terms of this Deed, as long as the County used the land for the purposes for which it was condemned, it would remain forever with the County.

We therefore conclude that the County obtained this property in fee simple, albeit fee simple determinable. As the statute upon which the County relies, the Act of May 21, 1923, does not specify that the County take such property in fee simple absolute, but merely provides that the County take such property in fee simple, it appears that the conveyance was proper under the statute.

The County further posits that under *Captive v. County of Allegheny*, 459 A.2d 1298 (Pa. Cmwlth. 1983), this reverter was a nullity. Again, we believe that *Captive* is inapposite. In *Captive*, the Commonwealth Court held that when the County condemned certain property under the Act of 1923 for the purposes of establishing an airport, it took the mineral rights attendant to said property even though at the time of the condemnation, the condemnee did not own these rights. The Court in *Captive* stated that: "In the record before us, there exists no evidence from which a contrary intent [intent to condemn mineral rights] can be inferred." 459 A.2d at 1301.

In the instant case, there is clear evidence of such a "contrary intent", to-wit, the Deed of October 21, 1946. Indeed, the County has failed to establish, in this action, any intent contrary to that expressed in the Deed.

The general rule is that when a deed is signed, sealed, accepted and recorded, it becomes the mutual act of the parties by acceptance, the grantee takes the property subject to any burden imposed by the grant. *Beedy v. Nypano R. Co.*, 95 A.2d 343 (Pa. 1915). Further, a party wishing to reform a deed by claiming that it contains or omits certain information by mistake or by scrivener's error has the burden of proving such mistake by clear and convincing evidence. *In re: Estate of Duncan*, 232 A.2d 717 (Pa. 1967). This evidence must be of such persuasive quality that reasonable minds could not disagree that a mistake had been made, *Miller v. Houseworth*, 127 A.2d 742 (Pa. 1956) and either two witnesses or one witness and compelling circumstances

must be presented. *General Electric Credit Corp. v. Aetna*, 263 A.2d 448 (1970).

The County failed to produce any evidence whatsoever, let alone clear and convincing evidence, that the reverter was either a mistake or an error. The condemnation proceedings took place and the Deed was drafted, accepted and recorded over fifty (50) years ago. Apparently, all of the parties involved are now deceased. The only evidence extant is the Deed and the Prothonotary's file from the condemnation action. This evidence does not establish that any mistake or error was made.

For these reasons, the reverter contained in the October 21, 1946 Order was not a legal nullity.

Does the property revert to the Boyd Heirs?

Having established that the reverter was valid, we now turn to the County's contention that this Court erred in finding that the Boyd parcel was no longer being used by the County for the purposes for which it was condemned and therefore it reverted to the Boyd Heirs as a matter of law

In this regard, the evidence established that the Boyd parcel had been utilized as the East parking lot of the old terminal at the Greater Pittsburgh International Airport until that terminal closed in 1992 when the new mid-field terminal opened. From that time, the parcel was not maintained and had become an eyesore. (NT. 103-104) The old terminal was recently demolished and the site upon which it and the Boyd parcel is located is presently being developed by ABP. On the Boyd parcel ABP plans to construct a "flex office building" which apparently is a combination office and warehouse and hopes to rent space to tenants with ties to the airport. However, there is no requirement that a prospective tenant have any connection with the aviation industry; ABP's only requirement is that a tenant be willing to pay the prevailing rent. (NT. 99-101)

To counter this evidence, the County produced one witness, Peter Bernhard, former tower manager at the Greater Pittsburgh International Airport. With respect to the Boyd parcel, Mr. Bernhard testified that even though the site of the terminal had moved, a significant number of aircraft still take off or land each day on runway 28-R which is situated approximately 4,000 feet from the parcel. These aircraft regularly overfly the Boyd parcel at altitudes of three hundred (300) feet or less. (NT. 39-42)

Based upon these overflights, the County contends that it still uses the Boyd parcel as "an airdrome and aviation landing field." There is no merit in this contention.

The term "airdrome" is defined by the Federal Aviation Agency as: "[A] defined area of land or water (including any buildings, installations and equipment) intended to be used either wholly or in part for the arrival, departure and movement of aircraft..." While a terminal parking lot may be a use consistent with an airdrome, this Court fails to see how a private flex office complex, not dedicated in any manner whatsoever to the airdrome, falls within this definition.

The evidence establishes that at most, the County may retain an aviation easement over the Boyd parcel due to numerous flights. However, this is the extent of the County's interest.

An easement is "a liberty, privilege, or advantage which one may have in the lands of another without profit...but it cannot be an estate or interest in the land itself, or a right to any part of it. *Slegel v. Herbine, et al.*, *supra*. Therefore, this Court concludes that the Boyd parcel is no longer being used for the purposes for which it was condemned, to-wit, an airdrome, and it reverts to the Boyd Heirs.

For all of the reasons set for the above, the Amended Order dated October 22, 1999 was proper and should not be disturbed.

BY THE COURT
/s/Jaffe, J.