[J-86-2002]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

IN RE: IN THE INTEREST OF ROBERT W. FORRESTER	:	No. 161 MAP 2001
	:	Appeal from the Order of Commonwealth Court entered May 2, 2001 at No. 1299 CD 2000 which affirmed the Order of the Court of Common Pleas of Franklin County, Civil Division, entered May 4, 2000 at No. 1997-390.
APPEAL OF: RODNEY J. MCKENRICK, BONNIE F. MCKENRICK, HAROLD S. FORRESTER, AND HELEN B. FORRESTER	:	
	:	ARGUED: May 15, 2002

DISSENTING OPINION

MADAME JUSTICE NEWMAN **Decided: November 20, 2003**

At issue in this case is the interplay between the Private Roads Act (PRA)[1] and the Agricultural Area Security Law (AASL).[2] I disagree with the conclusion reached by the Majority and, therefore, dissent.

In August of 1998, pursuant to Section 11 of the PRA, 36 P.S. § 2731, Robert W. Forrester (Appellee) petitioned the Court of Common Pleas of Franklin County (trial court)

[1] Act of June 13, 1836, P.L. 551, as amended, 36 P.S. §§ 2731-2891.

[2] Act of June 30, 1981, P.L. 128, as amended, 3 P.S. §§ 865-915.

for the appointment of a Board of View[3] to open a 25-foot-wide easement for a “private road” to provide access from his landlocked property to the nearest public road. The trial court granted the petition and, subsequently, the Board of View issued a report fixing the location of the “private road” to run over farmland owned by Rodney J. McKenrick, Bonnie F. McKenrick, Harold S. Forrester, and Helen B. Forrester (collectively "Appellants") and assessing damages against Appellee in the amount of $11,325.00.[4] Thereafter, the trial court affirmed the report.

Appellants objected throughout these proceedings, arguing that because their farmland was located within an "agricultural security area," as defined by the AASL, a

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[3] The duties of the Board of View (or as it has also been termed -- the Board of Viewers) have been defined as follows:

> The persons appointed [as viewers], shall view such ground, and if they shall agree that there is occasion for a road, they shall proceed to lay out the same, having respect to the shortest distance, and the best ground for a road, and in such manner as shall do the least injury to private property, and also be, as far as practicable, agreeable to the desire of the petitioners.

36 P.S. § 1785. See Fengfish v. Dallmyer, 642 A.2d 1117, 1119 (Pa. Super. 1994).

[4] The petition filed by Appellant referenced two existing private roads for which he had no "right of way." The first one is approximately one mile in length. It includes a bridge and crosses over several privately owned properties. The second referenced road, approximately one half-mile in length, crosses the property owned by the Appellants, and is the road at issue. It appears that Appellee preferred an easement incorporating this road, because (1) his father had used that road from 1949 through 1980 without a written easement; (2) it was safer for a truck carrying lumber; and (3) it was shorter than the alternative road.

"private road" may not be opened without approval of the Agricultural Lands Condemnation Approval Board (ALCAB).[5] The Board of View, the trial court, and the Commonwealth Court rejected this position and refused to apply the AASL in "private road" cases. They reasoned that opening a "private road" to a landlocked property does not endanger agricultural production in "agricultural security areas," which is the purpose of the AASL. In re: Forrester, 773 A.2d 219, 221-23 (Pa. Cmwlth. 2001); see also Laying Out a Private Road in Charleston Township, 683 A.2d 947 (Pa. Cmwlth. 1996). The Majority affirms these decisions by way of a different analysis; specifically, according to the Majority:

> [A]s **the opening of a private road pursuant to [the PRA] does not accomplish a public purpose**, it cannot be seen as the exercise of the power of eminent domain. As such, the opening of a private road pursuant to [the PRA] in an ["agricultural security area"] did not require the prior approval of ALCAB.

Majority Opinion, p. 5 (emphasis supplied). Since I disagree with both of these rationales, I will address them in turn.

While I acknowledge that the public must petition before using a road created pursuant to Section 11 of the PRA, see 36 P.S. § 2761, unlike the Majority, I believe that the opening of such a road as an access to an otherwise landlocked property necessarily implicates important public interests. At issue in this case is the creation of a "private road." This Court has previously articulated that the PRA defines a "private road" as "**a road** from

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[5] See 3 P.S. § 913. As the Majority describes, pursuant to Section 913, "no agency of the Commonwealth, political subdivision, authority, public utility or other body 'having or exercising powers of eminent domain shall condemn' any land within an [agricultural (continued…)

the respective dwellings or plantations . . . **to a highway or place of necessary public resort**, or **to any private way leading to a highway**." West Pikeland Road, 63 Pa. 471 (Pa. 1870) (emphasis supplied); Sandy Lick Creek, 51 Pa. 94 (Pa. 1865) (stating that "[u]nder the [PRA], the Court of Quarter Sessions have power to lay out a private road from the dwellings or plantations of the petitioners to a highway or place of necessary resort, or to some other private way that leads to a highway, but they have no power under these sections or any other to lay out private roads except between such termini"); also see Killbuck Private Road, 77 Pa. 39, 43 (Pa. 1874). Hence, by the terms of this definition, which excludes roads that merely interconnect private land, the PRA applies only to roadways that connect private property with public highways. We have observed that, as such,

> [A private road] is part of the system of public roads, essential to the enjoyment of those which are strictly public; for many neighborhoods as well as individuals would be deprived of the benefit of the public highway, but for outlets laid out on private petition and at private cost, and which are private roads in that sense, but branches of the public roads and open to the public for purposes for which they are laid out.

Palairet's Appeal, 67 Pa. 479, 492 (Pa. 1871) (citing In re: Hickman, 4 Del. 580 (Del. O.&T. 1847)); see also Philadelphia Clay Co. v. York Clay Co., 88 A. 487 (Pa. 1913); accord Bashor v. Bowman, 180 S.W. 326, 327 (Tenn. 1915) (observing that "[t]he public is interested in every citizen having a right of way to and from his lands or residence [and t]he constitutionality of a so-called private road law rests upon the obligation of the sovereignty

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(…continued)
security area] unless prior approval has been obtained from ALCAB." Majority Opinion, p. 2.

to afford to each member of the community a reasonable means of enjoying the privileges and discharging the duties of a citizen"); Sherman v. Carrick, 32 Cal. 241, 255 (Cal. 1867) (noting that "[r]oads, leading from the main road which runs through the country to the residences or farms of individuals, are of public concern and under the control of the Government"). In turn, there are many public benefits in allowing private property owners access to their landlocked land.

> [I]t is for the public benefit that every citizen should have the means of discharging his public duties, such as voting or attending court as a juror or witness, and because it affords higher assessments upon the landlocked property for municipal tax purposes. Also it is in the public interest that police, firemen, and representatives of other public health, welfare and municipal agencies have access to the dwelling.

Marinclin v. Urling, 262 F.Supp. 733, 736 (W.D.Pa.1967) (finding that the PRA does not authorize a taking for a purely private purpose and, therefore, does not violate the Fourteenth Amendment to the Constitution of the United States), affirmed, 384 F.2d 872 (3rd Cir. 1967); see also Latah County v. Peterson, 29 P. 1089, 1090 (Idaho 1892) (noting that "[without private roads] it would be impossible to improve very many valuable tracts of land in this state which are not reached by public highways"). Accordingly, while the individual property owner may be the immediate beneficiary of the opening of a "private road," I disagree with the Majority, because I view the public benefits described above as important and essential to the existence of our society.

Article I, Section 1 of the Pennsylvania Constitution declares that:

> **All men** are born equally free and independent and **have certain inherent and indefeasible rights, among which are those** of enjoying and defending life and liberty, **of acquiring,**

> **possessing and protecting property** and reputation, and of pursuing their own happiness.

Pa. Const. Article I, Section 1 (emphasis supplied). In turn, Section 10 of the same Article provides "nor shall private property be taken or applied to public use, without authority of law and without just compensation being first made or secured." Pa. Const. Article I, Section 10. Considered together, these passages embody the underlying sanctity of private property ownership enjoyed by the citizens of this Commonwealth, which yields only in the face of **public** interest. See Appeal of Lance, 55 Pa. 16, 25 (Pa. 1867) ("The right of the Commonwealth to take private property without the owner's assent on compensation made, or authorized it to be taken . . . can never be lawfully exercised but for a public purpose -- supposed and intended to benefit the public, either mediately or immediately"). Indeed, as early as 1871, this Court recognized that "[i]t has become, then, a fundamental axiom of constitutional law, not only in this, but in every other state of this Union, that **the legislative power cannot, either directly or indirectly, without the consent of the owner, take private property for merely private use**, with or without compensation." Palairet's Appeal, 67 Pa. at 486 (emphasis supplied); see also Philadelphia Clay, 88 A. at 489 (stating that "[w]hile the Constitution does not in express terms deny the right to take property for a private use under the power of eminent domain, the plain implication is that the power can only be exercised when the property taken is for a public use").

In light of this legal paradigm, the constitutionality of the PRA rests entirely on the existence of public benefits derived from the establishment of a "private road" that creates a passageway from a landlocked property to a public highway. Thus, by declaring that the taking pursuant to the PRA implicates little or no public interest, the Majority, without a

single comment, has essentially invalidated the entire scheme of private road construction that has existed in this Commonwealth since the eighteenth century.[6] Given my previously articulated rationale, I cannot agree with this result.[7]

Furthermore, contrary to this conclusion of the Commonwealth Court, I believe that it is foreseeable that opening a private road through an "agricultural security area" could interfere with agricultural production and the preservation of farmlands. Applying the AASL to private road proceedings would not prohibit the owner of a landlocked parcel from obtaining a "private road," but would simply submit the placement of that road, when located in an "agricultural security area," for approval by the ALCAB. In turn, the ALCAB would review the placement of the road to ensure that it is prudent and reasonable, which would be fair to both the farmer and the owner of the landlocked property.

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[6] See Act of April 6, 1802 (recorded in Laws of the Commonwealth of Pennsylvania 1700-1810, Vol. III, pp. 512-524); Act of February 20, 1735 (recorded in Statutes at Large of Pennsylvania From 1682-1801, Vol. 4 (1724-1744) (Statutes at Large), pp. 296-297). Importantly, the Legislature enacted the 1735 statute, which authorizes the laying out of roads at the request of private individuals to create access to public highways, to address "the great increase of our inhabitants [that] has been found to be very inconvenient and burdensome **as well to the public as to private persons**." Act of February 20, 1735, Statutes at Large, p. 296. (Emphasis supplied). This language further reinforces my conclusion that the statutory scheme that allows for the creation of "private roads" is historically intertwined with the interests the public derives from the existence of such roads.

[7] The Majority chooses not to address my reasoning, because "the constitutionality of the [PRA] is not before this [C]ourt." MO, p. 5, n.4. I note, however, that the invalidation of the PRA is the natural result of the analysis advanced by the Majority. Respectfully, while I agree that this Court should not address issues that were not raised by the parties (continued…)

Accordingly, I would reverse the decision of the Commonwealth Court.

Mr. Justice Nigro joins this Dissenting Opinion.

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(particularly issues of constitutional dimension), I feel compelled to comment on what, I maintain, will be the fallout from the disposition of this matter and its supporting rationale.