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

IN RE: INTEREST OF ROBERT W. FORRESTER,	:	No. 161 MAP 2001
	:	
	:	Appeal from the Order of the
APPEAL OF: RODNEY J. McKENRICK, BONNIE F. McKENRICK, HAROLD S. FORRESTER, and HELEN B. FORRESTER	:	Commonwealth Court entered on May 2, 2001, Docket No. 1299 C.D. 2000, affirming the Order of the Court of Common Pleas of Franklin County entered on May 4, 2000 docket number 1997-390.
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	:	773 A.2d 219 (Pa. Commw. Ct. 2001)
	:	
	:	ARGUED: May 15, 2002

OPINION ANNOUNCING THE JUDGMENT OF THE COURT

MR. CHIEF JUSTICE CAPPY **Decided: November 20, 2003**

The issue with which we are presented today is whether the Commonwealth Court erred in determining that there is no requirement that the Agricultural Lands Condemnation Approval Board ("ALCAB") must approve of the opening of a private road under the law commonly known as the Private Road Act ("Act"), 36 P.S. § 2731 et seq., when that road is in an Agricultural Security Area ("ASA"). For the following reasons, we affirm.

Robert W. Forreseter ("Appellee") owns a twenty-acre tract of land in Franklin County that is landlocked. Appellee filed a petition under the Act requesting that a Board of View ("Board") be appointed pursuant to 36 P.S. § 2731 to locate and open a private road from his landlocked property over farmland owned by Rodney J. McKenrick, Bonnie F. McKenrick, Harold S. Forrester, and Helen B. Forrester (collectively, "Appellants"). As Appellants' land is located in an ASA as defined by the Agricultural Area Security Law, 3

P.S. § 901 et seq., Appellants argued that a private road may not be opened without the prior approval of ALCAB.

The Board filed a report with the court of common pleas. It rejected Appellants' argument that the private road could not be opened without prior approval from ALCAB. It proceeded to find that Appellee had established the necessity sufficient to entitle him to have a private road opened so that he could access his landlocked property. The Board fixed the location of the private road, and assessed damages against Appellee in the amount of $ 11,325.00. The trial court affirmed the Board's report.

On appeal, the Commonwealth Court affirmed, finding that no approval was needed from ALCAB prior to the opening of the private road pursuant to the Act.

Appellants filed a petition for allowance of appeal with this court. We granted allocatur, limited to the question of whether ALCAB needed to grant approval prior to the opening of a private road on land within an ASA. As this question is purely one of law, our review is de novo. Buffalo Twp. v. Jones, 813 A.2d 659, 664 n.4 (Pa. 2002).

Appellants argue that the Commonwealth Court erred in determining that approval from ALCAB did not need to be obtained prior to the opening of a private road across their land. They note that the Agricultural Area Security Law states that 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 ASA unless prior approval has been obtained from ALCAB. 3 P.S. § 913(a) and (b). Appellants contend that the opening of a private road pursuant to the Act constitutes an exercise of eminent domain by a governmental or other body within the meaning of § 913 of the Agricultural Area Security Law. Thus, they argue, a private road could not be opened on their land, which is located within an ASA, unless Appellee had first obtained approval of ALCAB.

Appellants commence their argument that § 913 applies to this matter with the proposition that the opening of a private road pursuant to the Act constitutes an exercise of

the powers of eminent domain. In making this argument, Appellants concede that proceedings under the Act are not controlled by the Eminent Domain Code ("Code"), 26 P.S. § 1-101 et seq.[1] Yet, a determination that proceedings under the Act are not controlled by the Code does not provide a definitive answer to this issue. Section 913 of the Agricultural Area Security Law speaks in terms of eminent domain powers, and does not limit the definition of such powers to those enumerated in the Code. Thus, we must determine whether the opening of a private road is an exercise of eminent domain.

It is axiomatic that the state exercises its powers of eminent domain when it takes property for a "public use". Balent v. City of Wilkes-Barre, 669 A.2d 309, 314 (1995). Appellants contend that this court has long recognized that the opening of a private road serves a public use or purpose; thus, they conclude, the opening of a private road constitutes an exercise of eminent domain. In support of their position, they cite to Waddell's Appeal, 84 Pa. 90 (Pa. 1877). They contend that this court in Waddell's Appeal declared that the opening of a private road did not authorize the taking of private property for private use; rather, this court ostensibly concluded that such a taking confers benefits on the public at large. Appellants' brief at 13 (quoting Waddell's Appeal, 84 Pa. at 93-94).

Unfortunately, the language cited by Appellants was not written by this court, but rather was penned by the trial court in that matter;[2] there is no indication that this court adopted such language. Thus, Waddell's Appeal does not provide the irrefutable support for Appellants' position that they had concluded it did.

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[1] This concession appears to be a correct one as the comment to Section 511 of the Code, 26 P.S. § 1-511, specifically states that the Act is not "repealed or affected" by the Code.

[2] Appellants' mistaken attribution of this language to our court, rather than to the trial court, in that matter is unfortunate but understandable. The form of opinions predating the turn of the 20th century are at times baffling to our modern sensibilities.

Furthermore, Waddell's Appeal did not concern a challenge to the opening of a private road pursuant to the Act. Rather, the controversy involved the Act of 13th of June 1874, P.L. 286, granting right-of-ways for the mining of anthracite coal. Thus, any mention of the Act was dicta.

Our own review of the case law reveals that this court has on several occasions discussed whether the opening of a private road pursuant to the Act effectuated a public purpose. Unfortunately, the vast majority of these statements were obiter dicta. See, e.g., In re Legislative Route 62214, Section 1-A, 229 A.2d 1 (Pa. 1967); Philadelphia Clay Co. v. York Clay Co., 88 A. 487 (Pa. 1913); Palairet's Appeal, 67 Pa. 479 (1871).

We have discovered only one instance in which this court was squarely presented with the issue of whether the opening of a private road effectuated a public purpose. In Pocopson Road, 16 Pa. 15 (1851), one of the litigants argued that the opening of a private road pursuant to the Act constituted a taking for a purely private use. While we denied relief on this claim, our resolution of the issue was wholly unsupported by any reasoning. In a single sentence, we stated that this claim and several others lacked "an appearance of substance". Id. at 17. We are leery of resting our disposition of the issue of whether the opening of a private road pursuant to the Act constitutes a public purpose on so insubstantial of a foundation as Pocopson Road. Instead, we will conduct our analysis of this issue independent of any holding issued by the Pocopson Road court.

As noted supra, the state exercises its powers of eminent domain when it takes property for a "public use". Balent, supra. We have not, however, required that the taking confer only public benefits. We have explained that a taking does not "lose its public character merely because there may exist in the operation some feature of private gain, for if the public good is enhanced it is immaterial that a private interest may also be benefited." Belovsky v. Redevelopment Authority of Philadelphia, 54 A.2d 277, 283 (Pa. 1947). Yet, a taking will be seen as having a public purpose only where "the public is to be the primary

and paramount beneficiary of its exercise." In re the Condemnation of Bruce Avenue, 266 A.2d 96, 99 (Pa. 1970) (citation and internal quotation marks omitted). Thus, for a taking to be considered as effectuating a public purpose, this court has required that it is the citizenry at large, rather than a private entity or individual, that will be the principal recipient of any benefit.

Appellee contends that the opening of a private road cannot be considered a taking for a public purpose. He reasons that "[a]lthough one can concede that society at large benefits when a landowner has access to his or her property, it is a stretch of logic to say that giving limited, private access is, therefore, a public purpose." Appellee's brief at 3. We must agree. The primary beneficiary of the opening of a private road is the private individual or entity who petitions for such relief. Granted, society as a whole may receive a collateral benefit when landlocked property may be accessed by motorized vehicles, and thus presumably be put to its highest economic use; yet, it cannot seriously be contended that the general population is the primary beneficiary of the opening of a road that is limited to the use of the person who petitioned for it.[3] Thus, as the opening of a private road pursuant to the Act does not accomplish a public purpose, it cannot be seen as the exercise of the power of eminent domain.[4] As such, the opening of a private road pursuant to the Act in an ASA did not require the prior approval of ALCAB. [5]

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[3] We note that a private road is, as its term implies, not open to the general public, but rather is created for a certain person or group of persons. The Act specifically states that where persons other than the recipient of the private road desire to use the road, they must first obtain court permission. 36 P.S. § 2761.

[4] The dissent asserts that this finding de facto renders the Act unconstitutional. Yet, the constitutionality of the Act is not before this court; rather, this claim is raised sua sponte by the dissent. As we are averse to address any issue, particularly one of constitutional dimension, when that issue is not before the court, we decline to respond to the dissent's argument.

(continued…)

For the foregoing reasons, the order of the Commonwealth Court is affirmed.

Former Chief Justice Zappala did not participate in the decision of this case.

Mr. Justice Saylor files a concurring opinion.

Madame Justice Newman files a dissenting opinion in which Mr. Justice Nigro joins.

(…continued)

[5] In their brief, Appellants recognize that if they were able to establish that the opening of a private road pursuant to the Act constitutes an exercise of eminent domain, they would then have to establish that such an exercise was effectuated by a governmental or other "body" in order to obtain the relief they request. See 3 P.S. § 913(a) and (b). As we have determined that the opening of a private road pursuant to the Act does not constitute an exercise of the powers of eminent domain, then Appellants' claim for relief necessarily fails; there is no need for us to consider their additional argument that a governmental or other "body" exercised powers of eminent domain in opening the private road.