Recent "Open Space Lands Act" Cases

Municipal acquisition of land for public park purposes, and the construction of improvements and maintenance thereof, have always been recognized as a legitimate purpose of local governments. The concept of "recreational use" has likewise been broadly defined, to include such concentrated activities as basketball courts, tennis courts and swimming pools on the one hand and bucolic trails for bird watching and other "passive" recreational uses, on the other. Municipal governments' efforts to preserve open space for the sake of agricultural and land conservation uses are a more recent phenomenon. The authority for local governments – here most particularly second class townships – to do these functions is premised upon two separate laws, the Second Class Township Code, 53 P.S. §65101, et. seq. (and for other forms of municipalities, their respective codes) and the Open Space Lands Act, 32 P.S. § 5001, et seq. ("OSLA").

Fundamentally, Townships have the authority, under the Second Class Township Code, to purchase land outright (in fee simple ownership) for park or recreational purposes and also have the authority, pursuant to the Open Space Lands Act, to purchase "less than fee" interest in property, such as conservation easements or purchase of development rights. It is very important, however, for Townships to use these powers constitutionally and in accordance with statutory requirements.

The Second Class Township Code, at 53 P.S. Section 67201, authorizes a township board of supervisors to acquire lands (or buildings) in fee simple, by gift, devise, purchase or the exercise of the right of eminent domain.

There is, however, a very substantial limitation on a Township's right to acquire such lands by the exercise of eminent domain, since that action—the condemnation of private property—can only be "for recreational purposes," effectively, parkland.

Conversely, in such instances where a township wishes only to preserve existing land uses against development—i.e., acquiring conservation easements, agriculture use easements, development rights or whatever similar mechanism may be used for this purpose—a township does not act under the authority of the Second Class Township Code, but rather acts under the authority of the Open Space Lands Act (OSLA).

The Open Space Lands Act (OSLA) both "giveth" and "taketh away" township powers. On the one hand, OSLA authorizes local governments to acquire property interests in land not only by fee simple ownership, but alternatively by any "property interest." Thus, for purposes of open space preservation, a municipality need not acquire ownership of the property, but may purchase a conservation easement, agriculture use easement, development rights, etc., leaving the property in private ownership under and subject to the restrictions imposed by the municipality's acquisition of the easement/development rights, etc.

The OSLA specifically precludes local governments, however, from exercising the power of eminent domain for such purposes. Section 5008.b of OSLA states:

"Local government units other than counties or county authorities may not exercise the power of eminent domain in carrying out the provisions of this Act."

Middletown Township v. Lands of Stone

The situation can become confusing where a township decides to condemn a substantial parcel of private property—say a farm or portion thereof—ostensibly for recreational uses, but without a specific recreational plan in mind. Such occurred in the case of Middletown Township v. Lands of Stone, 939 A.2d 331 (Pa. 2007). This case arose in the Bucks County municipality of Middletown Township, organized and existing under the Second Class Township Code. The Township Board of Supervisors, upon being informed that a particular farm (that it had denoted in its 1991 Recreation, Parks and Open Space Plan as desirable for acquisition) had been partitioned into four parcels, and the board whiffed the scent of potential development in the near future.

The board then filed a Declaration of Taking, stating that it was acquiring the farm "for recreation and open space purposes." The Declaration of Taking properly cited the authority of the Second Class Township Code, quoted above, and made no mention of the Open Space Lands Act.

The landowner, however, filed preliminary objections to the Declaration of Taking, arguing (i) that since the farm was a substantial tract of open space, it was governed by the limitations in the Open Space Lands Act relating to open space preservation, or in the alternative (ii) that even if the Open Space Lands Act did not facially apply to this type of condemnation, the real purpose of the Board of Supervisors was not to create parkland, but rather to prevent development and preserve agricultural use, thus negating the "recreational" purpose for which condemnation is allowed under the Second Class Township Code.

The case wound its way to the Pennsylvania Supreme Court, which dealt with the two primary issues as follows: first, the majority of the Pennsylvania Supreme Court concluded that the two statutory provisions did not, in fact, overlap. Thus, any taking of a fee simple interest in land for recreation purposes—whether it be an urban lot for a swimming pool or basketball court or a farm for passive recreational use—would be permissible under the Second Class Township Code's authorization to condemn property for recreation purposes. The Court concluded:

"This Court holds that, as a matter of law, a second class township does have the authority to condemn property under the Township Code, for any legitimate recreational purpose, despite the restrictions promulgated by the legislature in the [Open Space] Lands Act. … The Township Code gives power to second class townships to condemn land for recreational purposes. The [Open Space] Lands Act withholds power from second class townships to condemn land for open space purposes. The two statutes do no conflict."

Having so concluded, however, the majority of the Supreme Court also found that Middletown Township had abused its authority under the Second Class Township Code, since its primary purpose was not to use the Stone Farm for recreation—even passive recreation—but rather to preserve its agricultural use. For example, the Court noted that the Board of Supervisors voted to allow Mr. Stone to continue to use the farm for an open-ended period of time—sort of like a life estate—for his current agricultural use, a concession to the landowner that the Court held to be inconsistent with a good faith recreational purpose. Secondly, the Court noted that in the township's 1991 Recreation, Parks and Open Space Plan, the Stone Farm was not mentioned in the context of parkland acquisition, but rather in the context of open space/agricultural use preservation.

The Pennsylvania Supreme Court did acknowledge that "recreational use" is not limited to active recreation, such as playfields, basketball courts and the like, but is inclusive of passive recreational uses where "a tract of ground [is] kept more or less in its natural state and devoted to the purpose of pleasure, recreation and amusement …"

That being true, however, the Court rejected the township's contention that it could lawfully condemn the property for recreational use, under circumstances where no current recreational purpose was identified, and the only connection with recreation was a hazy potential future conversion from agriculture to passive recreational parkland. The Court stated, in so holding:

> *"In order to uphold the invocation of the power of eminent domain [for recreational purposes] this Court must find that the recreational purpose was real and fundamental, not post-hoc or pre-textual."*

In further elaborating on the standard of proof which a township would have to submit to justify condemnation for recreational purposes, the Court stated:

> *"Precedent demonstrates that condemnations have been consistently upheld when the taking is orchestrated according to a carefully developed plan which effectuates the stated purpose. … Anything less would make an empty shell of our public use requirements. It cannot be sufficient to merely wave the proper statutory language like a scepter under the nose of a property owner and demand that he forfeit his land for the sake of the public."*

In considering specific properties and identifying same for further study and perhaps acquisition, it is important for municipalities to make a clear distinction between these two purposes, recreation on the one hand (which certainly can include both active and passive recreational purposes, so long as the public has access to the property in question) and, on the other hand, resource conservation, agriculture use/open space preservation purposes. With regard to the latter, any acquisition of development rights and/or conservation or agricultural use easements must be effected by negotiation with the property owner, and cannot be acquired by the use of eminent domain.

Ephrata Area School District v. County of Lancaster

On the same day that the Middletown Township case was decided, the Pennsylvania Supreme Court also issued its decision in Ephrata Area School District v. County of Lancaster, 938 A.2d 264 (Pa. 2007). The Ephrata School District case arose in the context of the school district's desire to acquire a 50-foot wide access driveway easement across private property that had previously been subjected to an agricultural use easement by the county.

The property in question had been subjected to an agricultural easement in 1984, in favor of the Lancaster County Agricultural Preserve Board. The Lancaster County Board of Commissioners, as the holder of the easement in question, refused to consent to the grant of the proposed access easement in favor of the School District, by the private property owners.

With the County Board of Commissioners rejecting the School District's request for consent, the school district filed a declaratory judgment action alleging that county consent was not required in any event, and further that the proposed right-of-way sought by the school district would not be in violation of the county's existing easement.

The school district asserted that nowhere in the agricultural easement held by the county was there a requirement that the underlying property owner obtain the county's consent to grant alternative easements to other parties, so long as the new easement would not contravene the provisions of the agricultural preservation easement.

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The county, on the other hand, argued that even if the school district's proposed access easement did not contravene the county's agricultural preservation easement, consent from the county was still required under § 5011(a) of OSLA which states:

> *"In the case of an acquisition [of an interest in real property] from a local government unit by a body other than a public utility, such acquisition shall occur only if the governing body, after public hearing with notice to the public, shall approve such acquisition."*

The Commonwealth Court found in favor of the school district, on the theory that the School District's "acquisition" was from the underlying property owner, not from the county, and hence that § 5011(a) did not apply.

On further appeal to the Pennsylvania Supreme Court, this decision was reversed. The Supreme Court concluded that the underlying property owner could not grant the access easement to the school district unless the county board of commissioners consented to the new easement.

Apparently, the underlying property owners were waiting on the sidelines as this battle between two government agencies took place.

The opinion does not describe the county board of commissioners' reasoning for refusing consent. Ironically, the county had not argued that the proposed access easement for the school district would actually violate the terms of the underlying agricultural easement. Even in the absence of the language set forth in § 5011(a), the agricultural easement itself prohibited non-agricultural uses except where a non-agricultural use may be approved by the county's agricultural preserve board. Either way, the dice here were stacked against the school district. While most land use or development battles are between developers and community residents (with municipalities sometimes caught in between), here we see two governmental agencies at odds with each other over a fairly narrow issue of statutory interpretation.