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Public Must Benefit From Use of Private Roads, Justices Rule

Amaris Elliott-Engel

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A sharply divided state Supreme Court has ruled that the taking of private land for a private road leading to a landlocked parcel must be judged under the constitutional standard of whether the public is the primary and paramount beneficiary of the taking.

Justice Thomas G. Saylor, writing for the four-member majority of Justices Debra M. Todd, Seamus P. McCaffery and Joan Orié Melvin, said that "the constitutions of the United States and Pennsylvania mandate that private property can only be taken to serve a public purpose. This court has maintained that, to satisfy this obligation, the public must be the primary and paramount beneficiary of the taking." The court did not directly rule unconstitutional the Private Road Act, an 1836 law that lets owners of landlocked property ask a common pleas court to appoint a Board of Viewers to place a private road between the owners' property and a roadway that leads to or is part of the public road system.

But the court rejected the theories advanced by the 6-1, en banc Commonwealth Court in support of its 2008 ruling in *In the Matter of: Opening a Private Road for the Benefit of Timothy P. O'Reilly*.

The Commonwealth Court ruled that the taking of private land for a private road leading to a landlocked parcel is constitutional because private roads historically have been considered part of the state's road system and because the public gains access to previously inaccessible land.

Appellee Timothy O'Reilly requested the appointment of a Board of Viewers to open a private road between his landlocked parcel in Allegheny County and the nearest public road. The proposed road would cross the property of the Hickory on the Green Homeowners Association and its 124 member owners and the property of Mary Lou Sorbara.

The Commonwealth Court's conclusion that the Private Road Act was constitutional is partially based upon Pennsylvania's colonial history under William Penn's heirs. In that era, purchasers of land in Pennsylvania, originally purchased from American Indians in 1784 and 1785, were given an additional 6 percent of land free of charge in order to help lay out a public road system.

The Commonwealth Court majority concluded that because of this history the creation of a private road under the Private Road Act was not a taking. But Saylor said that the land owned by the litigants was part of another land grant than the land grants in which property owners received an additional 6 percent of land free of charge to support the public road system. Thus the litigants are not subject to the 6 percent "incorporeal burden," the justice said.

The Commonwealth Court also concluded that even if O'Reilly's petition was a taking of his neighbors' property that the Public Road Act fulfilled a public purpose "because otherwise inaccessible swaths of land in Pennsylvania would remain fallow and unproductive ... making that land virtually worthless and not contributing to commerce or to the tax base of this commonwealth."

Saylor, however, rejected the argument made by the Commonwealth Court that the creation of a private road under the act was not a taking. Saylor also rejected O'Reilly's argument that the creation of a road under the act "embodies reasonable regulation of property usage or provision of an otherwise unavailable private easement, both

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exercised under the commonwealth's police power."

Justice J. Michael Eakin, joined by Chief Justice Ronald D. Castille and Justice Max Baer, said in his dissent that the constitutionality of the Private Road Act is well-settled, including from the 1851 Supreme Court decision in *In re Pocopson Road*.

Eakin also said that granting a private right of action under the Private Road Act to landlocked property owners is akin to the common law doctrine of easement by necessity, which allows landlocked property owners to access a public highway over another's private land when no other relief is available. Because O'Reilly's land was cut off from road access by the government to construct Interstate 79, his only relief is under the Private Road Act, Eakin said.

In response, Saylor said that the dissent wants to reaffirm *Pocopson Road* without addressing the case's shortcomings: that the precedent is inconsistent with the prevailing standard for takings and that the *Pocopson Road* case relies on a solitary discredited case.

Kevin P. Allen, the association's attorney and with Thorp Reed & Armstrong in Pittsburgh, said the majority's decision overturned the *Pocopson Road* precedent and found it insubstantial support for the constitutionality of the Private Road Act.

While the court did not ultimately answer whether the Private Road Act is constitutional, the court did conclude the bases supplied by the Commonwealth Court were insufficient, Allen said.

The court's ruling is important for private property owners, Allen said, because of the standard reiterated by the Supreme Court for judging the constitutionality of takings under the Private Road Act: whether the taking's ultimate benefit will accrue primarily to the public, Allen said.

"For any private property owner, what's embedded in both the state and federal constitutions is very strong protections for private property rights," Allen said. "It's a fundamental tenet of our society. Those rights to private property are not absolute. You can be forced to give up your private property.

"But the limits that the constitutions impose on legislatures is that you can only take private property if the public is going to be the beneficiary and in Pennsylvania it's that the public has to be the primary and paramount beneficiary."

O'Reilly's attorney, William P. Bresnahan II of Hollinshead Mendelson Bresnahan & Nixon in Pittsburgh, declined comment.

The Supreme Court remanded the case for the Commonwealth Court to consider any outstanding issues under the test of whether the public is the primary and paramount beneficiary of the proposed taking.

O'Reilly's strongest argument is that his property became isolated from public roads because the state of Pennsylvania used its eminent domain power to construct an interstate highway, Interstate 79, Saylor said.

But aspects of the case are not well-developed, Saylor said, including whether O'Reilly's use of the Private Road Act to restore access to his property was contemplated when the state's eminent domain power was exercised and whether the taking by the government can be considered tied to O'Reilly's attempted private taking because O'Reilly sought relief under the Private Road Act promptly after private property was taken for the highway under eminent domain.

President Judge Bonnie Brigance Leadbetter and Judges Rochelle S. Friedman, Mary Hannah Leavitt, Rene Cohn Jubelirer, Dan Pellegrini and Robert Simpson were in the en banc Commonwealth Court panel's six-member majority. Judge Doris A. Smith-Ribner was the sole dissenter.

The Institute for Justice, a libertarian legal group, filed an amicus curiae brief in support of Hickory on the Green Homeowners Association.

(Copies of the 28-page opinion in *In the Matter of: Opening a Private Road for the Benefit of Timothy P. O'Reilly*, PICS No. 10-3224, are available from Pennsylvania Law Weekly. Please call the Pennsylvania Instant Case Service at 800-276-PICS to order or for information. Some cases are not available until 1 p.m. Tuesday.) •

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