



Worth Noting

Conservation Legal Briefs

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TAKINGS OF LAND BY TOWNSHIPS FOR RECREATIONAL AND OPEN SPACE PURPOSES

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Does a township in Pennsylvania have the right, under its power of eminent domain, to condemn property for the purpose of protecting and conserving natural or scenic lands in its jurisdiction? Those who are familiar with the Open Space Lands Act, 32 P.S. §5001 *et seq.*, (“OSLA”), would probably respond that a township in Pennsylvania does not have such authority. In light of recent case law, however, the answer to this question is more complicated than it may first appear.

OSLA governs the purchase or taking of land for open space purposes by governmental units in Pennsylvania. It has its own procedures, requirements and limitations relating to the acquisition of land, by purchase or condemnation, for “open space purposes”. Section 5(c)(1) of the Act, 32 P.S. §5005(c)(1), authorizes “a local government unit” to acquire property within its boundaries for open space purposes by purchase, contract, condemnation, gift, devise or otherwise....” Section 8(b) of the Act, 32 P.S. §5008(b),

goes on to say, however, that notwithstanding the provisions of Section 5(c), “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.” Thus, although townships may acquire land for open space purposes from a willing seller, they may not take land for such purpose by exercise of the power of eminent domain.

The desire to protect and conserve natural or scenic resources, however, often goes hand in hand with the desire to make property available for certain types of recreational activities. These activities may include walking, jogging, bicycling, climbing, fishing, community gardening, conservation activities, wildlife viewing and nature photography, among others. The Second Class Township Code, 53 P.S. §65101 *et seq.* expressly grants to second class townships the right to acquire property by eminent domain for “recreational purposes”. 53 P.S. §67201. Similar

provisions are found in various municipal codes, such as the First Class Township Code, 53 P.S. §56901 and §58001; the Borough Code, 53 P.S. §46501; and the Third Class Cities Code 53 P.S. §37801.

In the situation where a township desires to take property to preserve natural and scenic resources and, at the same time, use the property for certain types of recreational activities, there is a dual purpose, which is in part permissible and in part impermissible. While the taking of property for recreational purposes is authorized under the Second Class Township Code, the taking of the property for open space purposes is not authorized and, moreover, is expressly prohibited under OSLA. The question then is whether the permissible motive renders the taking lawful or the impermissible motive renders the taking unlawful. Based upon recent case law, the answer seems to be that if it is the intention of the municipality to use the space for recreational purposes, the desire to keep the space open and undeveloped does not render the taking unlawful.

Middletown Township v. Lands of Stone, 2005 WL 2233436 (Pa.Cmwlt. 2005) was decided by the Commonwealth Court on September 15, 2005. The case involved a 175-acre farm in Middletown Township, Bucks County. The matter began as an action for partition among the three co-owners of the property. (In a partition action, the owners of a piece of property petition to have the property divided into parcels which they would own separately.) The lower court ordered the three parties to submit a subdivision plan to the Township, and upon approval of the plan, to join in conveyances among themselves, with each co-owner receiving its own separately subdivided parcel. Two weeks after

submission of the subdivision plan to the Township, but before its approval, the Township filed a Declaration of Taking for the entire property pursuant to the Eminent Domain Code, 26 P.S. §1-101 *et seq.*, and the Second Class Township Code. The Declaration expressly stated that the property was being taken for both “recreation and open space purposes.” One of the three co-owners filed preliminary objections to the Declaration of Taking, arguing that the Township lacked authority to condemn the property for open space purposes.

Testimony before the trial court indicated that the property was condemned because the Board of Supervisors “didn’t want it [the Property] to be developed. We like it to be a farm on the one hand, which could be used as passive recreation...[S]ince the condemnation, the Property has been used for recreational purposes, including hayrides, picking pumpkins, picking crops and school trips to learn how a working farm operates.” 2005 WL 2233436 at p. 4. Thus, the Commonwealth Court was presented with the question of whether a dual purpose taking to protect natural resources and provide recreational activities, is lawful.

With respect to OSLA, the Commonwealth Court held that since the Township proceeded under the Second Class Township Code, the taking was not subject to the limitations of OSLA. “The Open Space Lands Act only forbids the Township from exercising eminent domain ‘in carrying out the provisions of this act.’ The Township, however, did not exercise eminent domain to carry out the provisions of the Open Space Lands Act, but rather exercised its eminent domain power under the Township Code. Because the Township

did not proceed under the Open Space Lands Act, the restrictions of that statute do not apply here.” 2005 WL 2233436 at p. 6.

Since the taking was not subject to the provisions of OSLA, the question was whether the Second Class Township Code, the statute under which the Township proceeded, authorized the dual purpose taking. The Commonwealth Court held that “the Township properly exercised eminent domain to take the Property for recreational purposes under the Township Code.” 2005 WL 2233436 at p. 6. The decision does not specifically address the fact that a taking for purposes of preserving space as open and undeveloped is not authorized under the Second Class Township Code; however, by implication, it holds that so long as a taking has a permissible purpose, the existence of a second purpose not authorized by the Second Class Township Code does not invalidate the Township’s action.

In contrast, President Judge Colins, in his dissenting opinion, said that the existence of the impermissible purpose rendered the taking unlawful under OSLA. “Since the Township has admitted that one of the major purposes of the Taking was the creation of open space, it is admittedly in violation of the Open Space Lands Act....The fact that the Taking is only partially illegal cannot be bootstrapped into a lawful taking. It is not for Judges to speculate how much of the land will be used for recreational purposes and how much will be illegally condemned for open space purposes. It is overwhelmingly apparent from the totality of the record that the Township seeks to create open space so as to preserve the property values and enhance the esthetic livability of the Township. This is not permitted under the Township Code, or

under the Open Space Lands Act.” 2005 WL 2233436 at p. 7.

It is interesting to note that in June, 2005, the Court of Common Pleas of Lehigh County addressed the same issues as those decided in *Middletown Township v. Lands of Stone. In Re: Condemnation Proceeding of Lower Macungie Township*, Lehigh County Court of Common Pleas No. 2004-C-2865 (June 17, 2005); PICS 05-1343(9). The Township’s Resolution in *Lower Macungie* stated that the property was being taken for “recreation land and open space.”¹ The Court of Common Pleas held that a taking of land by a township for recreational and open space purposes is impermissible. “[T]he Legislature provided separately for condemnation of open space and for recreational land, with the [Second Class Township] Code granting the authority to condemn land only for ‘recreational purposes,’ 53 P.S. § 67201, and expressly addressing open space in the Open Space Land Act....An intermingling of open space and recreational purposes would misapply the law by deviating from the strict construction of a power of eminent domain and implying a power not granted by the Legislature to the Condemnee.” PICS 05-

¹ While the Township’s Resolution in the *Lower Macungie* case stated that the taking was for “recreation and open space” the Declaration of Taking apparently referenced only the intention to take the land for open space purposes. Although the Court of Common Pleas sustained the condemnee’s preliminary objections, it granted the Township’s request for leave to amend the Declaration of Taking. Based upon the Court’s reasoning, however, it is difficult to see how an amendment to the Declaration could cure the flaw, even if the amendment clearly stated the intention to take the property for recreational purposes. Since the intention to take the land for open space purposes was part of the record, the taking would still have a dual purpose, which the Court held to be impermissible.

1343 at p. 3. In the case of a dual purpose taking, the impermissible motive renders the entire taking unlawful. “Although the Court acknowledges that an overlap can exist between recreational purposes and open space purposes, it finds that the provisions of the Open Space Lands Act prevail over those of the Code with respect to such purposes.” PICS 05-1343 at p. 6. If the *Lower Macungie* case were being decided today, after *Middletown Township v. Lands of Stone*, the result would probably be different.

The lessons that municipalities should learn from *Middletown Township v. Lands of Stone* are clear. A taking of land by a township for recreational purposes will not be rendered unlawful by reason of the existence of a secondary intent or effect of preserving natural or scenic resources. In eminent domain proceedings, the recreational purpose should be clearly stated in the Township’s Resolution, Declaration of Taking and all hearings or proceedings. Finally, proceedings must be conducted under the provisions of the Eminent Domain Code and the applicable municipal code, not OSLA.

We may not yet have heard the last word in *Middletown Township v. Lands of Stone*. A Petition for Allowance of Appeal was filed by the condemnees on October 14, 2005. We do not yet know if the Pennsylvania Supreme Court will grant the petition. ■

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