

## A Road to Nowhere? Future of The Private Road Act Still in Limbo Following Commonwealth Court Decision

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The Private Road Act, found at 53 P.S. §§ 2731-2891, permits the owner of a landlocked parcel of real estate to petition the local Court of Common Pleas for the appointment of a board of viewers to determine whether that parcel is indeed landlocked and, if so, establish a right-of-way through the private land of neighboring landowners which inflicts the least burden on those landowners. The board of viewers also place a monetary value on this right-of-way, which, when paid, converts the use of that right-of-way to the exclusive use of the petitioning landlocked landowner. The Private Road Act, which has its roots in the colonial legislature of the Commonwealth and has survived nearly 200 years of constitutional analysis, remains in limbo following recent court decisions.

Last fall, in the case of *In the Matter of: Opening a Private Road for the Benefit of Timothy P. O'Reilly*, 5 A.3d 246 (Pa. 2010), the Pennsylvania Supreme Court placed the constitutionality and the continued viability of The Private Road Act in serious question. In the *O'Reilly* case, a landowner's parcel became landlocked when the Commonwealth condemned property for the construction of State Route 79 in Allegheny County. The landowner petitioned for a board of viewers under The Private Road Act to establish access to a public road through neighboring private property. The neighboring landowners affected by the petition filed preliminary objections, citing the constitutional prohibition against takings without just compensation under the Fifth Amendment of the United States Constitution as well as Articles 1 and 10 of the Pennsylvania Constitution. These objections were overruled and the neighboring landowners filed an interlocutory appeal to the Commonwealth Court. The Commonwealth Court, relying on the long history of The Private Road Act, affirmed, and the neighboring landowners appealed to the Supreme Court.

The Supreme Court, largely of its own accord, questioned the record before it on appeal, reversed the decision of the Commonwealth Court, and remanded the case to the lower Courts to perform a full analysis of the specific facts and issues of the case. In essence, the Supreme Court was unwilling to accept the Commonwealth Court's ruling on the general constitutionality of The Private Road Act without a more thorough analysis of the facts of the case. In all fairness to the Commonwealth Court, this matter was originally before that Court as a result of an interlocutory appeal of a decision on preliminary



objections, so an in-depth record was lacking. The Supreme Court did not hold that The Private Road Act is unconstitutional. However, the Supreme Court, echoing its decision in *Middletown Township v. Lands of Stone*, 595 Pa. 607, 939 A.2d 331 (2007), did direct the lower courts to consider whether the taking in this case would have a public purpose, and, importantly, whether the public is the "primary and paramount" beneficiary of the exercise of the taking power. Given the fact that core purpose of The Private Road Act is to provide private landowners with public access, many have questioned whether the ultimate outcome of this case will be the death knell of The Private Road Act.

On May 5, 2011, the Commonwealth Court, having heard argument on remand, elected to vacate the original decision of the Allegheny Court of Common Pleas and remanded the case to that Court for full development of a record and specifically directed that Court to consider the constitutional questions raised by the Supreme Court. The Commonwealth Court did not provide much insight into the ultimate fate of The Private Road Act, but it did defend its original decision in this case. We will monitor the progress of this case as it works its way through the Allegheny Court of Common Pleas and, no doubt, back to the appellate Courts.

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