

Pennsylvania's Donated or Dedicated Property Act: A potential hurdle for your gas development project

A recent case in the Orphans' Court Division of the Allegheny County Court of Common Pleas highlights the significant implications that Pennsylvania's Donated or Dedicated Property Act (DDPA), 53 P.S. §§ 3381-3386, can have for projects in or underneath parks or other property that has been donated or dedicated to a political subdivision for use by the public.

Background

Olympus Energy LLC (formerly Huntley & Huntley Energy Exploration LLC) obtained permits to drill unconventional gas wells in Elizabeth Township. Transporting the millions of gallons of water necessary to operate these wells would have required significant truck traffic on township roads. In an effort to alleviate traffic, Olympus approached the township to discuss the installation of a freshwater withdrawal system known as the

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Galene System. The Galene System consists of a water intake system (in this case from the Youghiogheny River) that allows fresh water to flow into a wet well located inside a 20-foot by 32-foot structure. That structure houses two electric pumps that move the water from the wet well through underground pipes to a holding tank located near the gas wells.

Due to topography, the presence of utility rights-of-way and various safety concerns, Olympus and the township determined the only viable location for the Galene System was in Blythedale Park, a 20-acre municipal park located in the township. The township acquired the land comprising Blythedale Park by deeds specifying that the property was acquired for public recreation use. The portion of Blythedale Park that ultimately was chosen as the location for the Galene System is 0.037 acres, heavily wooded and prone to severe flooding.

After a public hearing, and with unanimous approval by the Elizabeth Township Board of Commissioners, the township and Olympus entered into a 15-year easement agreement allowing for the installation of the Galene System. Pursuant to the easement agreement, the township permitted Olympus to temporarily utilize the 0.037-acre portion of the part for the Galene System in exchange for the permanent conveyance to the township of a one-half acre parcel of land adjacent to Blythedale Park. Olympus also agreed to pay the township \$1,000 per month, to be used exclusively for the benefit of Blythedale Park, for the duration of the easement agreement. The easement agreement gave the township complete control over the aesthetics of the building housing the electric pumps, and upon the expiration of the easement agreement, the township has the option to keep the structure housing the pumps or direct Olympus to return the land to its prior condition. After consulting with, and obtaining approval from, various governmental agencies and organizations, Olympus proceeded with the installation of the Galene System.

Following the start of construction of the Galene System, Protect Elizabeth Township, a local environmental group, informed the township that it believed the

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township's act of entering into the easement agreement violated the DDPA.

The Donated or Dedicated Property Act

The DDPA provides that all lands or buildings donated to a political subdivision or dedicated to the public use as a public facility shall be used for the purpose or purposes for which they are originally dedicated or donated. The statute broadly defines "public facility" as "any park, theatre, open air theatre, square, museum, library, concert hall, recreation facility or other public use."

If a political subdivision wishes to utilize donated or dedicated property for a purpose other than the purpose for which the property was originally donated or dedicated, the political subdivision must obtain approval from the orphans' court of the county in which the property is located. Such application may be made if the political subdivision determines that the continuation of the original use of the property at issue "is no longer practicable or possible and has ceased to serve the public interest."

Prior to the filing of a petition with the local orphans' court, the Pennsylvania Attorney General's Office—Charitable Trusts and Organization Division must be given at least 10 days advance notice.

Once the petition is filed, the orphans' court, after a public notice period and a public hearing, may permit the political subdivision to substitute other property of at least equal size and value for the donated or dedicated property, sell the property and apply the proceeds to carry out its original purposes, or apply the property or the proceeds therefrom to a different public purpose if the original purpose is no longer possible or practicable.

Orphans' court hearing on Elizabeth Township's petition

After receiving notice from Protect Elizabeth Township, the township filed a petition with the Orphans' Court Division of the Allegheny County Court of Common Pleas seeking approval of the easement agreement. Protect Elizabeth Township and Olympus intervened, and a public hearing was held.

At the hearing, Protect Elizabeth Township argued that it was possible to continue utilizing the 0.037-acre area subject to the easement agreement for park purposes and, thus, the easement agreement was not permissible under the DDPA. The township and Olympus presented evidence and testimony that the continued use of the 0.037-acre portion of Blythedale Park subject to the easement agreement for park purposes was no longer practicable and ceased to serve the public interest due to flooding issues, among other reasons. The township and Olympus also introduced evidence that the township would permanently receive land of at least equal size and value, as well as monthly payments to be used for the benefit of Blythedale Park, in exchange for the temporary use of the 0.037-acre easement area. Following the hearing, the court found that the township satisfied the DDPA's requirements and, accordingly,

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granted the township's petition. However, because the court has not yet issued an opinion supporting the order, the exact basis on which it approved the petition is not clear.

Companies engaging in development on or under property that has been dedicated or donated to a political subdivision for a specific purpose should be cognizant of the DDPA and its requirement for orphans' court approval. Determining the applicability of this law, however, can be a challenge. Although the DDPA was enacted in 1959, there are relatively few reported cases discussing the statute and numerous unresolved issues regarding its applicability. Failure to consider this relatively obscure "legal hoop" could delay or impede the success of the project. ■

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