

**[J-153-2006]**  
**IN THE SUPREME COURT OF PENNSYLVANIA**  
**MIDDLE DISTRICT**

EPHRATA AREA SCHOOL DISTRICT, : No. 70 MAP 2006  
: :  
: : Appeal from the Order of the  
v. : Commonwealth Court entered November  
: 17, 2005 at No. 2708 C.D. 2004, reversing  
: the Order of the Court of Common Pleas  
COUNTY OF LANCASTER, BOROUGH : of Lancaster County entered November  
OF EPHRATA, AND LANCASTER : 24, 2004 at Docket No. CI-04-02494.  
COUNTY AGRICULTURAL PRESERVE :  
BOARD, : 886 A.2d 1169 (Pa. Cmwlth. 2005)  
: :  
APPEAL OF: COUNTY OF LANCASTER : ARGUED: December 5, 2006

**DISSENTING OPINION**

**MR. JUSTICE EAKIN**

**DECIDED: December 27, 2007**

I find the resolution of the majority to be misplaced. The issue before us is whether the School District was required to obtain the County's consent before it could purchase a right-of-way over land on which the County holds an open space easement. The issue is not whether the County's easement is impermissibly affected by the easement sought by the School District.

The County has an easement. It is not a fee simple owner. That easement gives the County certain limited rights concerning the land and its use; it does not give it a comprehensive right to object to other grants by the actual owners. There simply is no authority for the proposition that a mere easement holder has the right to demand consent before the fee simple owners grant another easement. Clearly the owners

cannot do so in derogation of the easement already given the County, but the County has no ability to demand its consent unless their easement specifically includes the ability to deny, preemptively, the owners' grant of other easements. The County's easement does not award it that ability.

The owner of land can grant such rights as they have without the approval of an easement holder — they may give, grant, bargain, sell, alienate, enfeoff, convey, confirm, warrant, pledge, assign, and hypothecate whatever they have. They may or may not have all the rights the current parties wish to obtain, they may purport to grant more than they have, but the owners cannot be denied the right to give such rights as they have absent consent of the County. The County may object after the fact, if such action infringes on its easement. It might intervene or prevent or limit the grant if it impedes its easement, but this is not the equivalent of having a right to demand consent to the owners' grant in the first place.

As the majority finds such a veto power, I cannot join. The majority broadly interprets § 5011(a) to apply to acquisitions of open space property interests owned by the Commonwealth or a local government unit. I read § 5011(a)'s plain language to describe the formalized process for obtaining a right-of-way from the Commonwealth or a local government unit, not fee simple owners. See 32 P.S. § 5011(a). Section 5011 is not designed to alter traditional property notions.

In granting the County the original easement over their property, the fee simple, servient owners here retained the right to use their property in any manner not impairing the easement's open space and agricultural character; the easement is non-exclusive. This right includes the right to grant additional easements in the same land to other

persons or entities, provided the first easement holder's interests remain unimpaired. See Puleo v. Bearoff, et al., 103 A.2d 759, 761 (Pa. 1954); Restatement (Third) of Property, Servitudes § 4.9 comments c, e (2000).

The County may have the authority to refuse an acquisition of property it owns, but this is not tantamount to the authority to refuse an acquisition of property it does not own. I find no authority giving the County the same status as a fee simple owner when it comes to granting another right-of-way on this property. The County may object if the grant impedes its rights; it may protect what it has, but it may not demand consent when it does not possess the right to do so. Accordingly, I would affirm the Commonwealth Court's ruling the School District is not required to obtain County approval to acquire a right-of-way from a private landowner.