Cases Interpreting Pennsylvania's Clean and Green Act

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Introduction

The Pennsylvania Farmland and Forest Land Assessment Act of 1974 (Clean and Green), codified at 72 P.S. § 5490.1 et seq., is an important preferential tax assessment statute that affects the rights of Pennsylvania landowners. The Agricultural Law Research and Education Center has maintained a comprehensive article on Pennsylvania's Clean and Green statute, and this article was most recently revised in the fall of 2001. Landowners, courts, and practitioners alike may find these recent cases of interest.

***Moyer v. Berks County Board of Assessment Appeals*, 803 A2d. 833 (2002), appeal denied by Pennsylvania Supreme Court, December 5, 2002**
Commonwealth Court addresses split-offs and separations, the preferential status of remaining land after a split-off, and the requirement of prior notice to the tax assessor.

Prior to June 28, 2000, Ray and Clara Moyer had three tracts of land enrolled in Pennsylvania's Clean and Green program. Two of the tracts, known as the Moyer Farm and the Woodland Tract, were enrolled in the Clean and Green program through a single application. The third tract, known as the Christman Farm, had been originally enrolled by a previous owner and continued to be enrolled after the Moyers acquired the property. The Court recited these facts:

On January 14, 2000, Landowners obtained approval of a subdivision plan to establish a residential use for 5.362 acres of the Christman Farm located on the east side of Pearl Road. Because the local township zoning ordinance requires agricultural lots to be a minimum of 25 acres, Landowners' subdivision plan also had the Christman Farm annex 2.789 contiguous acres from the Moyer Farm. The newly configured Christman Farm of 25.06 acres was now located entirely on the west side of Pearl Road. On June 25, 2000, Landowners conveyed the Christman Farm to themselves; this conveyance did not include the subdivision of 5.362 acres on the east side of Pearl Road. The Christman Farm deed was recorded in the Berks County Recorder of Deeds office on July 5, 2000.

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The parties agreed that the change in the use of the 5.362 acres from agricultural to residential constituted a split-off under the Clean and Green Act, triggering the imposition of roll-back taxes on the Christman Farm. However, the Chief Assessor of Berks County determined that the annexation of the 2.789 acres of the Moyer Farm to the Christman Farm **also** constituted a split-off under the Act. Because of this, the assessor terminated the preferential use assessment for all three of the farms (the Christman Farm, the Moyer Farm, and the Woodland Tract) and ordered roll-back taxes, with interest, to be paid on all three properties. His inclusion of the Woodland Tract, even though that tract was not part of the subdivision plan, was based on the fact that the Woodland Tract was included on the same application as the Moyer Farm.

The Moyers challenged the assessor's action. The Board affirmed the decision of the Chief Assessor and the Moyers appealed to the trial court. The trial court affirmed the decision of the Board and upheld the imposition of roll-back taxes for all three of the Moyer's properties. The Moyers then appealed the case to the Commonwealth Court of Pennsylvania. The issues on appeal were as follows: 1) whether the transfer of 2.789 acres from the Moyer Farm to the Christman Farm constituted a "separation" or a "split-off" as those terms are used in the Clean and Green Act; 2) whether including two separate properties on a Clean and Green application means that both properties lose their preferential status when one tract changes use; 3) whether the sanctions for a split-off include not only roll-back taxes but also the loss of a preferential use assessment for property remaining in farmland; 4) whether the Board's failure to follow the notice requirement in the statute exonerated the Landowners from any roll-back tax liability; and 5) whether the trial court should have applied the Department of Agriculture's statement of policy, not the regulation, when calculating the Landowner's tax liability. Each of these five issues will be discussed in turn.

Issues One and Two

As to the first issue on appeal, the Moyers argued that the annexation of 2.789 acres from the Moyer Farm to the Christman Farm constituted a "separation" under the Act because each farm, before and after annexation, remained in agricultural use and exceeded 10 acres in size. The Moyers described the transaction as a change in boundary lines between two parcels of farmland that should not have triggered penalties under Clean and Green. After analyzing the relevant portions of the Clean and Green Act, the court determined that two tracts "formed" after the annexation of the land created a somewhat smaller Moyer Farm and a somewhat larger Christman Farm, each of which exceeded 10 acres. Neither the subdivision plan nor the revision of the boundary between the two farms created a new tract of 2.789 acres. Therefore, under 72 P.S. §5490.2, the Moyers' action with respect to the Moyer and Christman Farms constituted a separation, not a split-off. Under Clean and Green, a valid separation does not trigger the imposition of roll-back taxes. Thus the Moyer Farm should not have been subjected to roll-back taxes. This conclusion relieved the Court of the need to address issue two. Nevertheless, the Court noted that it failed to find supporting language in the Act for sanctioning both tracts simply because they were included in one application.

Issue Three

Pursuant to the third issue on appeal, the Moyers argued that the reconfigured Christman Farm of 25.06 acres should be allowed to retain its preferential use assessment status even though a split-off occurred with respect to the 5.632 acre parcel. One should note that all parties agreed that roll-back taxes were due on the entire tract. The issue simply addressed the ongoing tax treatment of the land remaining in agricultural use. The Court agreed with the Moyers, citing 72 P.S. 5490.6(a.1)(3) which states, "a split-off of a tract of land . . . *shall not invalidate the preferential assessment on any land* retained by the landowner which continues to meet the provisions of section 3." Because the reconfigured Christman Farm continues to be used for agricultural use and is larger than 10 acres, it "continues to meet the provisions of Section 3." Because of this, the court held that the trial court erred in permitting the Board to revoke the Christman Farm's preferential use assessment.

Issue Four

The next issue on appeal was whether the Board should be barred from imposing roll-back taxes on any of the Moyer's property because the Chief Assessor did not calculate the roll-back taxes due within five days after receipt of the deed in its office as required by the Clean and Green Act. The court found that it was undisputed that the Chief Assessor mailed the breach letter more than 5 days after receipt of the deed in his office. However, the court stated that the Moyer's focus on this issue was misplaced. Under Clean and Green, the county assessor's obligation to give notice and to calculate roll-back taxes is triggered by the notice generated by the property owner. The relevant portion of the Act states:

A landowner receiving preferential assessment under this Act *shall submit 30 day's notice to the county assessor of a **proposed** change* in use of the land, a change in ownership of any portion of the land, *or any type of division or conveyance of the land*.

Because the Moyers filed only a deed with the county assessor, the court determined that this did not satisfy the above quoted statutory language and the Tax Assessor was free to assess roll-back taxes.

Practitioners should note that the Court emphasized that a landowner is required to give the tax assessor 30 days *advance written* notice of a change in use, a change in ownership or any type of division or conveyance of enrolled land.

Issue Five

The fifth issue on appeal in this case concerned the proper calculation of the roll-back taxes owed by the Moyers. The court in this part of the case went into a fairly complicated analysis of tax law that ultimately concluded in the court's affirming the trial

court's use of simple interest but reversing the trial court's pro-ration of the tax liability to the date of the split-off.

Summary

While this case is very fact specific, it does give landowners (and courts) guidance as to the difference between split-offs and separations and affirms the continuing eligibility of the land remaining in agricultural use for preferential treatment after a split-off. In addition, practitioners should note the court's emphasis on the 30 day **advance notice** provision.

Bowman v. Berks County Board of Assessment Appeals, 54 D.&C. 4th 544 (2001)
Berks County Court interprets the 10% limitation rule for split-offs

In this case, Richard C. Bowman and Judith A. Bowman appealed from a decision of the Berks County Board of Assessment Appeals, directing a rollback from the preferential use assessment under Clean and Green to full market value assessment of their real estate because the Bowmans had conveyed more than 10 percent of their total Clean and Green acreage. By written notice the Berks County Board of Assessment Appeals told the Bowmans that because of this violation their land no longer qualified under Clean and Green. However, because the Board of Assessment Appeals did not notify the Bowmans of their right to appeal the Board's decision, the Court of Common Pleas of Berks County ruled in favor of the Bowmans and reinstated their land into the program.

The Bowmans purchased a tract of property in Berks County in August of 1976 consisting of 39.394 acres. The Bowmans constructed a home, a pool, a barn and several outbuildings on the property. In addition, the Bowmans kept livestock on the property and the remainder of the land was a mixture of woodland with some pasture areas.

In 1993, the Bowmans obtained a preferential assessment for their property pursuant to the provisions of Pennsylvania's Clean and Green Act. One acre of the land was designated as a home site and 38 acres and 63 perches were designated as forest for purposes of the tax assessment. In May 2000, the Pennsylvania Department of Transportation (PENN DOT) condemned .019 acres of the Bowmans' land for use in a highway construction project. The Bowmans later subdivided their property and granted two two-acre lots to family members and farm helpers.

The Berks County Assessment Office notified the Bowmans that because more than 10 percent of their total acreage had been sold off, the property no longer qualified for Clean and Green preferential assessment. However, the notice received by the Bowmans did not inform them that they were entitled to a hearing under §5490.9 of the Clean and Green Act. The assessment office removed all of the Bowmans' property from the Clean and Green program and assessed a tax rollback penalty of over $21,000. The Bowmans later

filed an assessment appeal, and the county assessment appeals board upheld the roll-back penalty.

On July 11, 2001, the Bowmans filed an appeal of the matter with the Court of Common Pleas of Berks County. The Bowmans raised two issues before the court on appeal. First, they contended that they were always in compliance with the Clean and Green Act, and secondly, they argued that the notice sent to them by the Berks County Assessment Office was deficient in that it failed to advise them that they could request a hearing on the determination by the tax assessment office that a Clean and Green breach had occurred.

On the first issue, the court found that the Bowmans were not in fact in compliance with the Clean and Green Act. The Bowmans argued that neither conveyance exceeded ten percent of their acreage, that is, that two acres is less than ten percent of 39.285 acres. However, the court interpreted the ten percent limitation of §5490.6(a.1)(1)(i) as meaning the **aggregate** of the split-offs. The court reasoned that it was irrelevant that each of the two separate split-offs represented less than 10 percent of the total because the total split-off of four acres was greater than 10 percent of the total 39.285 acres. The court stated that:

The 10 percent condition must be read in the cumulative sense. When considering whether 10 percent of the original tract was split-off, both conveyances must be added together…the language of the Act requires this interpretation. The legislature would not have included the requirement that the split-off cannot exceed 10 acres if the split-off were not to be considered in the aggregate, because the first condition requires that only two acres can be split-off annually. The 10 percent requirement must be read in conjunction with the 10-acre requirement and be held to be in the same context.

The second argument made by the Bowmans was that the county assessment office did not comply with 72 P.S. §5490.3(d)(2) in that the Bowmans were not provided with notice of an opportunity for a hearing. The county assessment office argued that the Bowmans should not be permitted to rely on this section even if the notice was deficient because the Bowmans suffered no prejudice. The court agreed that no prejudice had been suffered by the Bowmans because they timely perfected an appeal to the Board. However, the court ultimately concluded that the failure of the assessment office to provide notice to the Bowmans of an opportunity for a hearing was fatal to the Board's position. The court reasoned that to hold otherwise would "permit the assessment office to disregard the plain language of the provision" and that "mere lack of prejudice does not adequately address the concerns [in this case]."

After adding that taxation statutes deserve a most stringent judicial construction, the court held that the Bowmans had sustained their burden of showing that the Board of Assessment Appeals should not have terminated the preferential assessment of the land in this case. Because §5490.3(d) provides that a preferential assessment of land *may not be terminated without written notice*, the court ordered that the Bowmans' land be re-instated into the Clean and Green program and further ordered that the Bowmans were not liable

for the roll-back penalty levied against them.

***Allegheny Partners v. McKean County Board of Assessment Appeals*, McKean County Court of Common Pleas, July 2002**
McKean County Court disqualifies forest land leased for hunting

This case concerns 36,500 acres of land owned and managed by Allegheny Partners, L.P. ("Allegheny"). The land has been enrolled in the Clean and Green program since 1992, and Allegheny utilizes the land for the purpose of selling timber through stumpage contracts to various wood and wood fiber users. In January of 1999, the McKean County Board of Assessment Appeals ("Board") notified Allegheny that it was terminating Allegheny's Clean and Green preferential use assessment and filing liens with the County Tax Claim Bureau for seven years of roll-back taxes in the total amount of $1,225,953.81. The Board claimed that Allegheny was "utilizing the land in an ineligible manner" because for many years this particular property had been leased to hunt clubs who hunted deer and other game on the land. Allegheny made a significant amount of money through the leases, some estimates putting the figure at close to $100,000 per year in lease revenue.

Allegheny filed a timely appeal with the Board, but the Board upheld its earlier decision to rescind Allegheny's preferential use assessment and levy a tax penalty against the partnership. Allegheny filed a timely appeal with the Court of Common Pleas of McKean County and three issues were raised on appeal. First, Allegheny averred that the Board should be equitably estopped from terminating Allegheny's Clean and Green status because the previous tax assessor had informed the previous owners of the land that leasing for revenue did not violate the Clean and Green Act; second, Allegheny argued that the Board's failure to provide notice of the opportunity for a hearing renders the assessment invalid; and third, Allegheny argued that its leasing program has always been consistent with the Clean and Green Act.

First Issue

The Court, applying the rules for equitable estoppel, noted that the Commonwealth agency must misrepresent a material fact. It found that the actions of the prior assessor merely conveyed his opinion of the meaning of the Clean and Green law and that this was not a "material fact." The Court also concluded that there could have been no justifiable reliance because the law was equally available to all parties. Thus the tax assessor was not equitably estopped.

Second Issue

The second issue raised on appeal in this case is very interesting in light of the *Bowman* case discussed above. Recall that in *Bowman,* the Court of Common Pleas of Berks

County ordered that the Bowman's land be reinstated into the Clean and Green program and that the Bowmans did not owe the county any roll-back taxes. This holding was based upon the fact that the county assessor had failed to provide notice to the Bowmans that they had a right to appeal the decision and even though the lack of notice had not prejudiced their rights. Interestingly, however, the Court of Common Pleas of McKean County held that the fact that the Board did not notify Allegheny in writing of Allegheny's right to appeal in no way invalidated the revocation of Allegheny's land from Clean and Green and the resulting tax penalties assessed against them. The court stated that it did not find this error [of the Board] in any way fatal, and further stated that "It elevates form far beyond substance to invalidate the Board's decision based on a lack of notice when Allegheny has never been deprived of its rights, and has exercised every opportunity to assert its rights." In other words, the court reasoned that because Allegheny had filed a timely appeal in this matter, they were not in any way prejudiced by the Board's failure to notify them of their right to appeal. Thus the Courts of Common Pleas of Berks and McKean counties have reached polar opposite decisions on this particular point of law.

Third Issue

The third issue in this case was whether or not Allegheny's practice of leasing its land to hunting clubs was an inconsistent use under the provisions of the Clean and Green Act. The court cited to 72 P.S. §5490.3(a) and §5490.2 and found that because Allegheny's land was enrolled under Clean and Green as *forest reserve* land, the only land use specifically authorized by the legislature is "producing timber or other wood products." While Allegheny's recreational leasing program did not change the land's ability to produce timber and other wood products, and, in fact, enhanced its capability, the court found that Allegheny had created a new use that was not recognized by the Clean and Green Act. On this basis, the court upheld the Board's decisions.

However, it was ultimately decided by the court that Allegheny did not owe roll-back taxes to the Board because of the fact that at the time Allegheny enrolled the property under Clean and Green, the land was already being leased to several hunting clubs. This fact was critical because 7 Pa. Code §137b.52(f) states that "If the use of the land was not an eligible use at the time it was enrolled, and preferential assessment is terminated for that reason, no roll-back taxes shall be due from the landowner as a result." Accordingly, when the land does not fall within one of the Act's land use categories at the time the particular county grants an application for preferential assessment, the landowner will not be required to pay roll-back taxes when the county revokes the preferential status. Because Allegheny was leasing its land to hunt clubs at the time it enrolled the land into Clean and Green, the Court held that the Board had no right to levy roll-back tax penalties against Allegheny when it terminated its preferential use assessment.