

**IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PA**

HUGH J. BUBB and OLIVE G. BUBB,	:	
his wife, and JEAN G. BERTHOLD,	:	
Petitioners	:	
	:	
v.	:	No. 98-01,753
	:	
LOYALSOCK TOWNSHIP, a	:	
Municipal Corporation, Its Board of	:	
Supervisors to wit: R.C. HAAS, RUTH J.	:	
WHEELAND, DONALD L. GARVER,	:	
WILLIAM C. REIGHARD, AND	:	
LYNN C. WOMER, JR.	:	
Respondents	:	

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H. RUSSELL BLANCHARD, JR.	:	
RALPH E. BLANCHARD and	:	
CHARLENE S. BLANCHARD,	:	
Petitioners	:	
	:	
v.	:	No. 98-01,753
	:	
LOYALSOCK TOWNSHIP, a	:	
Municipal Corporation, Its Board of	:	
Supervisors to wit: R.C. HAAS, RUTH J.	:	
WHEELAND, DONALD L. GARVER,	:	
WILLIAM C. REIGHARD, AND	:	
LYNN C. WOMER, JR.	:	
Respondents	:	

**OPINION and ORDER**

In this case the court has been asked to decide what standard of review, if any, a Board of View and court should use in reviewing a challenged ordinance affecting a public road. The revised statute governing this issue deleted the former standard of necessity and gives no guidance as to which standard should now be used.

This matter came before the court when the petitioners filed a Petition for Review of

Loyalsock Township Ordinance No. 275, which vacated a portion of Grammar Road, T-502. The Loyalsock Township Board of Supervisors passed the ordinance after local residents petitioned the Board to vacate the road.<sup>1</sup> Pursuant to 53 P.S. § 67305(c), the court appointed a Board of View to review the ordinance and the exceptions. Loyalsock Township then filed a motion in limine asserting that 53 P.S. § 67304(a) does not permit the Board of View to determine whether vacating the road is necessary. The Township requests this court to limit the authority of the Board of View to examine only the issue of damages. For the reasons stated in this opinion, the motion will be granted in part and denied in part.

### **Discussion**

In 1995, the General Assembly recodified the Second Class Township Code and revised many of its provisions, including those governing the power of township supervisors to act upon public roads. The former statute, 53 P.S. § 66101, contained a standard of necessity:

The township supervisors may by ordinance enact, ordain, survey, lay out, open, widen, straighten, vacate and relay all roads and parts thereof which are wholly within the township, upon the petition of interested citizens, or without petition if in the judgment of the supervisors, it is necessary.

The applicable provision currently in effect, 53 P.S. § 67304(a),<sup>2</sup> provides:

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<sup>1</sup> A hearing on the proposed ordinance was held on 8 September 1998. Several residents attended and commented on the proposed vacation. The ordinance was passed by the Board on 13 October 1998.

<sup>2</sup> Section 67304(c) is not applicable because it applies only when the supervisors have denied a petition of residents or have failed to act on a petition in 60 days and the residents have then petitioned the court of common pleas. Ordinances that have been

The board of supervisors may by ordinance enact, ordain, survey, lay out, open, widen, straighten, vacate and relay all roads and bridges and parts thereof which are located wholly or partially within the township.

The Township contends that the General Assembly intentionally removed the necessity requirement when it recodified the Township Code.<sup>3</sup> The Township is thus asking this court to conclude that the Board of View has no authority to review the ordinance and that its only function is to assess damages. The petitioners argue that the legislature could not have intended to eliminate all review of public road ordinances, thus giving the supervisors unfettered discretion to open, close, alter, and vacate roads upon their slightest whim. The petitioners are essentially asserting that the legislature mistakenly neglected to include the necessity requirement when it enacted the new Township Code. They are, in effect, asking this court to re-write the statute to include the necessity standard.

After consideration of the arguments of all parties, the court concludes that both assertions are wrong. We cannot accept the petitioners' position because it breaks several rules of statutory construction and violates the separation of powers doctrine inherent in the Pennsylvania Constitution. We cannot accept the Township's position either, because it upsets the system of checks and balances essential to our government and flies in the face of

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passed—whether *sua sponte* or upon petition of local residents—fall within § 67304(a).

<sup>3</sup> The Township also points out that even under the former law the necessity requirement applied only to ordinances enacted by the supervisors *sua sponte*, rather than upon the petition of residents. This appears to be the case. If so, the necessary requirement has not been *deleted* for ordinances initiated by petition because it never actually applied to them. However, deletion is still an issue because under the former law necessity did apply to ordinances enacted *sua sponte*, which is now addressed in § 67404(a) along with ordinances initiated by petition. Therefore, the court felt it necessary to address this issue, which has also been fully addressed by the Township in its briefs and at argument.

standard constitutional jurisprudence. Instead, we hold that with the deletion of the more demanding standard of necessity, the court must rely on standard constitutional jurisprudence to determine the appropriate standard of review. That standard is the rational basis test, which courts have long used to review the vast majority of laws.

## **I. Elimination of Necessity Standard**

### **A. The Language of the Statute**

The object of all statutory interpretation is to ascertain and effectuate the intention of the General Assembly. 1 Pa.C.S.A. § 1921(a). See Pennsylvania Financial Responsibility Assigned Claims Plan v. English, 541 Pa. 423, 664 A.2d 84 (1995). In interpreting the statute at issue the court is guided by the following rules of statutory construction.

When the words of a statute are clear and free from all ambiguity, a court may not disregard the language of a statute under the pretext of pursuing its spirit. 1 Pa.C.S.A. § 1921(b). See Armco, Inc. v. W.C.A.B. (Mattern), 542 Pa. 364, 667 A.2d 710 (1995).

When the words of a later statute differ from the language of a previous one on the same subject, a court must presume the legislature intended a different construction. Com. v. Buzak, 197 Pa. Super. 514, 179 A.2d 248 (1962). When certain things are specifically designated in a statute, all omissions should be understood as exclusions. Latella v. Com. Unemployment Compensation Bd. Of Review, 74 Pa. Cmwlth. 14, 459 A.2d 464 (1983).

These rules of statutory construction exist to protect the separation of powers doctrine that is so important to our system of government. Under the Pennsylvania Constitution the legislature has been granted the power to enact laws. The judiciary may

not interfere with that power unless the legislature oversteps its authority by passing an unconstitutional law. Com. ex rel. Kelley v. Clark, 327 Pa. 181, 193 A. 634, (1937). Courts absolutely may not substitute their own judgment for that of the General Assembly. Com. v. James J. Cochran Post No. 251 of V.F.W. of U.S., 350 Pa. 111, 38 A.2d 250 (1944). Such an usurpation of power would violate the separation of powers doctrine and would constitute a blatant violation of the Pennsylvania Constitution. A court may not, under the guise of its power of judicial review, insert words into a statute--particularly where it appears the matter may have been intentionally omitted. Panik v. Didra, 370 Pa. 488, 88 A.2d 730 (1952). The inescapable conclusion from these rules is that the court cannot alter 53 P.S. § 67304(a) by inserting the requirement of necessity.

The petitioners attempt to avoid this conclusion by pointing to 1 Pa.C.S.A. § 1921(c)(5), which states that in construing a statute a court may consider the former law on the subject. They then correctly state that the standard of necessity has been used in the past for reviewing actions affecting public roads.

What the petitioners neglect to point out, however, is that while courts may consider former laws, they may only do so when “the words of the statute are not explicit.” 1 Pa.C.S.A. § 1921(c)(6). The language of 53 P.S. § 67304(a), however, is clear and unambiguous. We therefore cannot impose the requirement of necessity.

**B. The General Road Law**

The petitioners also assert that the requirement of necessity should be applied because it is inherent in the General Road Law, 36 P.S. §§ 1761-3588, which still applies

to some extent.<sup>4</sup> The petitioners point to In re Vacation of Portion of Tp. Road 164, 102 Pa. Commw. 80, 518 A.2d 2, 4 (1986), which states that the Second Class Township Code supersedes the General Road Law only to a limited extent. In that case, the Commonwealth Court explained that while the Code divests the courts of original jurisdiction over public roads, procedures subsequent to the filing of the ordinance and appointment of a board of view are still governed by the General Road Law. However, it is clear from Matter of Jackson Tp. Ordinance 91-103, 164 Pa. Commw. 135, 642 A.2d 564 (1994), that the *type* of review is governed by the Code. Id at 566. The current Code not only contains no mention of necessity, but appears to have deliberately deleted that requirement.

It is true that under 53 P.S. § 67304(c), if residents present a petition to the supervisors in regard to a public road and the supervisors *fail to act* or *deny* the petition, the proceedings “shall be taken under the General Road Law,” which allows individuals to then petition the courts of common pleas to act on public roads.<sup>5</sup> The General Road Law, then, sets forth the standards imposed when *courts* act affirmatively in regard to a public road. It makes perfect sense to hold courts to the standard of necessity while eliminating that requirement for township supervisors, because the supervisors are acting as a legislative body, which is more directly and immediately accountable to the public.

Moreover, these types of ordinances are passed only after the affected residents

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<sup>4</sup> The General Road Law, Act of June 13, 1836, P.L. 551, and its supplemental acts, *as amended*, 36 P.S. §§ 1761-3588, vested the courts of common pleas with original jurisdiction over public road matters.

<sup>5</sup> As mentioned above, this provision does not apply to the case before the court because the supervisors passed the ordinance in response to a petition by local residents.

have had notice and an opportunity to be heard at a public meeting. In addition, when courts review the supervisors' failure to act on a petition or denial of a petition they are conducting judicial review of the legislative branch, which involves deference to legislative judgment, especially on matters that do not involve fundamental rights. Therefore, it is not surprising that the General Assembly would allow courts to overturn a township's refusal to grant or act on a petition only by a showing that the action requested in the petition is necessary. For the same reasons, it is not surprising that the General Assembly would eliminate the requirement of necessity for supervisors' actions. In both cases, the courts must defer to the judgment of the supervisors, who are acting in their legislative capacity.

**C. Recent Case Law**

The petitioners also argue that the requirement of necessity was sanctioned by the Commonwealth Court after the new statute was enacted. While it is true that the Commonwealth Court held the Board of View had the authority to conduct a *de novo* hearing on necessity in Codorus Stone & Supply Co., Inc. v. Kingston, 89 Pa. Commw. 79, 711 A.2d 563 (1998), that case is not relevant because the Board of View was apparently appointed in January 1995--well before the effective date of the new statute, which was passed on 9 November 1995 and which took effect 180 days later.

**II. Applicable Standard**

Although we are constrained to hold there is no longer a requirement of necessity when township supervisors pass an ordinance affecting public roads, we cannot find that

there is *no review* of these ordinances, for two reasons. First, 53 P.S. § 67305(c) unequivocally provides for a review:

Any resident or property owner affected by the ordinance may within thirty days after enactment of the ordinance of the board of supervisors, upon entering in the court sufficient surety to indemnify the board of supervisors for all costs incurred in the proceedings, file exceptions to the ordinance together with a petition for review. Upon receipt of the exception and surety, the court of common pleas shall appoint viewers from the county board of viewers for the purpose of reviewing the ordinance and exceptions thereto.

This passage indicates there is *some sort of review* that may be conducted by the Board of View and ultimately by the court.<sup>6</sup> Counsel for the Township has stated he has no idea what this provision could refer to, and he apparently wants the court to ignore it. The court must decline that invitation. We have refused to declare that *eliminating* necessity was a mistake, and for the same reasons we must refuse to declare that *maintaining* 53 P.S. § 67305(c) was a mistake.

Moreover, under 1 Pa.C.S.A. § 1921(a), a statute must be construed, if possible, to give effect to all of its provisions. In addition, a statute must be construed, if possible, in a manner to avoid a conflict. In re Borough of Lemoyne, 176 Pa. Super. 38, 107 A.2d 149 (1954). Therefore, if the court can reconcile the deletion of the necessity standard with the inclusion of a review by the Board of View and the court, we must do so. Secondly, exempting ordinances from any type of challenge would surely violate the Due Process Clause of the United States Constitution, as applied to the states in the Fourteenth Amendment. This clause protects individuals from state action depriving them of life, liberty,

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<sup>6</sup> This review is in addition to an assessment of damages, which is provided for in 53 P.S. § 67305(d).



and property without due process of law. The founders of our country possessed a healthy cynicism toward human nature and since humans must run the government, the early Americans felt it necessary to build into our government a system of checks and balances to prevent each branch from overstepping its constitutional bounds. They were particularly leery of legislatures, whose members are especially susceptible to bribery, extortion, and political pressure from powerful individuals and groups, as well as simple lapses of good judgment. To protect the country from foolhardy, oppressive, or irrational laws passed in the heat of political passion, the courts have the power to review all laws for constitutional violations.<sup>7</sup> The standard of review depends upon the importance of the right at stake.

When, as in the case before the court, a statute does not implicate a fundamental or quasi-fundamental right, and when it does not involve discrimination against a suspect or quasi-suspect class of individuals, the standard of review is the rational basis test. Com. v. Burnsworth, 543 Pa. 18, 669 A.2d 883 (1995). This standard is highly deferential to the legislature. The court inquires only whether there is a rational relationship between the challenged statute and the legitimate state interest the legislature is attempting to effectuate. Com. v. Agnew, 411 Pa. Super. 63, 600 A.2d 1265 (1991). Courts are to uphold the statute and defer to legislative judgment unless it is without a plausible rational basis. Allegheny Housing Authority v. Morrissey, \_\_\_\_\_ Pa. Commw. \_\_\_\_\_, 651 A.2d 632 (1994). The purpose of this standard of review is to protect individuals from arbitrary government action. Com. v. Robinson, 497 Pa. 49, 438 A.2d 964 (1981).

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<sup>7</sup> Municipal ordinances constitute “state action” and therefore fall within the protection of the Due Process Clause of the Fourteenth Amendment. Com. ex rel. Hines v. Winfree, 408 Pa. 128, 182 A.2d 698 (1962).

Of course the people, through their elective representatives, may grant greater protection to certain rights than the protections granted under standard constitutional jurisprudence. The previous statute regarding vacation of roads did exactly that. When township supervisors acted *sua sponte* to affect a public road, the action had to be necessary. In 1995, however, the General Assembly apparently deleted that more demanding standard. The test therefore returns to the default standard, which is the rational basis test.

Thus instead of determining whether the ordinance is necessary, the Board of View is authorized to determine only whether the supervisors had a legitimate governmental purpose in mind when passing the ordinance, and whether they could reasonably have believed the ordinance would accomplish that purpose. Com. v. Burnsworth, 543 Pa. 18, 669 A.2d 883 (1995). It is not necessary to specifically conclude that the ordinance will be absolutely successful in accomplishing its objective. Rather, the ordinance must merely bear a rational relationship to the goal. Plowman v. Com., Dept. of Transp., Bureau of Driver Licensing, 535 Pa. 314, 635 A.2d 124 (1993).

### **Conclusion**

For all of these reasons, the court concludes that the Board of View--and also the court, upon appeal from a Board of View decision--is not authorized to review the necessity of the ordinance. The Board of View is limited to determining damages and to conducting a *de novo* review to decide whether the ordinance bears a rational relationship to a legitimate governmental purpose.

**ORDER**

AND NOW, this \_\_\_\_ day of February, 1999, the motion in limine filed by Loyalsock Township is granted in part and denied in part and it is ordered that the Board of View shall consider only whether the ordinance bears a rational relationship to a legitimate government purpose, and to assess damages. Upon receipt of this order, Matthew Patch, Esq., Chairman of the Board of View, is ordered to schedule a Board of View hearing on this matter.

BY THE COURT,

Clinton W. Smith, P.J.

cc: Dana Stuchell, Esq., Law Clerk  
Lester L. Greevy, Jr., Esq.  
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