

THE EXERCISE OF EMINENT DOMAIN BY SECOND-CLASS
TOWNSHIPS IN PENNSYLVANIA: A SURVEY OF
MIDDLETOWN TOWNSHIP V. LANDS OF STONE

I. INTRODUCTION

The Supreme Court of Pennsylvania's decision in *Middletown Township v. Lands of Stone* presents an up-to-date analysis on the ability of second-class townships to exercise eminent domain in Pennsylvania. The decision also makes an important distinction between two overlapping statutes relating to the authority of townships to condemn property for recreation and open space purposes. Although the court provides some clarification and direction to Pennsylvania second-class townships that are contemplating taking land, the court may have created a loophole for townships intending to preserve open space lands pursuant to the Open Space Lands Act.

Part II of this Survey discusses a few cases that have addressed how the Supreme Court of Pennsylvania has refined the limited authority of second-class townships to exercise eminent domain. Part III analyzes the Supreme Court of Pennsylvania's majority and dissenting opinions in *Middletown Township v. Lands of Stone*.¹ Part IV critiques the court's interpretation of the Township Code and the Open Space Lands Act. Part V provides a brief summary of the points raised.

¹ *Middletown Twp. v. Lands of Stone*, 939 A.2d 331 (Pa. 2007).

II. BACKGROUND

The primary focus in *Middletown Township v. Lands of Stone* concerned the interplay of two statutes, the Second Class Township Code ("Township Code")² and the Open Space Lands Act ("Lands Act"),³ and how they affected a second-class township attempting to exercise its power of eminent domain. First, the court determined that the Township Code was the controlling statute in this case, despite the restrictions imposed by the Lands Act on second-class townships attempting to condemn land.⁴ The court then addressed whether Middletown Township properly exercised its authority under the Township Code by invoking recreation as its true purpose. The true purpose for a second-class township condemnation must be supported by evidence of a well-developed plan or otherwise informed and intelligent judgment and cannot be a post hoc or retroactive judgment.⁵ The court concluded that the Township exceeded its authority to condemn property under the Township Code because the record did not demonstrate that recreation was the Township's true purpose for taking the property at issue.⁶

In its analysis, the court relied significantly on case law. For example, in *Winger v. Aires*,⁷ the Supreme Court of Pennsylvania held that authority to exercise eminent domain "is to be strictly construed: What is not granted is not to be exercised."⁸ Moreover, in that case the court held that "a plan to take must be tailored to the actual purpose or it will be overturned as excessive."⁹ This is important because Justice Baer's concurring opinion in *Lands of*

² 53 PA. CONS. STAT. ANN. § 67201 (West 1995) ("The board of supervisors may . . . acquire lands or buildings by . . . the exercise of the right of eminent domain for recreational purposes . . .").

³ 32 PA. CONS. STAT. ANN. § 5001 (West 1997) ("It is the purpose of this act to clarify and broaden the existing methods by which . . . local government units may preserve land in or acquire land for open space uses.").

⁴ *Lands of Stone*, 939 A.2d at 337-38.

⁵ *See id.*

⁶ *Id.* at 338.

⁷ *Winger v. Aires*, 89 A.2d 521 (Pa. 1952).

⁸ *Id.* at 523.

⁹ *Id.*

Stone averred that the majority interpreted the Township Code too broadly.¹⁰

The court also looked to *Winger* in the instant case when it stated, "Clearly, evidence of a well-developed plan of proper scope is significant proof that an authorized purpose truly motivates a taking."¹¹ In applying this standard, the court also cited *Pidstawski v. South Whitehall Township*,¹² *Kelo v. City of New London*,¹³ and *In re Condemnation by the School District of Pittsburgh*.¹⁴ Collectively, these cases emphasized the importance and necessity of a carefully developed and well thought-out plan, which effectuates the stated purpose of the taking before condemning privately owned property.

III. ANALYSIS OF MAJORITY AND DISSENTING OPINIONS OF CASE BEING SURVEYED

A. Holding

In *Middletown Township v. Lands of Stone*, the Supreme Court of Pennsylvania held that "as a matter of law, a second-class township does have the authority to condemn property under the Township Code for any legitimate recreational purpose."¹⁵ However, the Lands Act prohibits a second-class township from condemning property for the purpose of preserving land as open space.¹⁶ Thus, the court in *Lands of Stone* found that Middletown Township, a second-class township, illegally exercised its power of

¹⁰ *Lands of Stone*, 939 A.2d at 342 (Baer, J., concurring).

¹¹ *Id.*

¹² *Pidstawski v. S. Whitehall Twp.*, 380 A.2d 1322, 1324 (Pa. Commw. Ct. 1977) (finding that the township's taking was upheld because the record showed it was "carefully planned and painstakingly thought out with a view toward present and future requirements").

¹³ *Kelo v. City of New London*, 545 U.S. 469, 478 (2005) (demonstrating that the Supreme Court of the United States placed great weight on existence of "carefully considered" development plan).

¹⁴ *In re Condemnation by the Sch. Dist. of Pittsburgh*, 244 A.2d 42, 46 (Pa. 1968) (finding that condemnation is invalid unless for authorized public use and "after a suitable investigation leading to an intelligent, informed judgment by the condemnor.").

¹⁵ *Lands of Stone*, 939 A.2d at 337.

¹⁶ *Id.*

eminent domain under the Township Code when the Township condemned the Stone farm "for recreation *and* open space purposes."¹⁷ The court further held that in order to uphold a taking under the Township Code, "[r]ecreational use must be the true purpose behind the taking or else the Township simply did not have the authority to act, and the taking was void *ab initio*."¹⁸

The Township cited several reasons for condemning the farm, but the court found that the record did not support the trial court's conclusion that the fundamental purpose for the Township's taking was recreation.¹⁹ The Supreme Court of Pennsylvania therefore reversed the decision of the commonwealth court and remanded to the trial level for further proceedings.

B. Facts

The property at issue was a 175-acre farm owned by the Stone family which had been partitioned into four sections in 1998.²⁰ The Middletown Board of Supervisors, concerned that one parcel of the farm was to be developed, authorized the Township to condemn the property in 2000.²¹ In its declaration of taking, Middletown Township cited its authority under the Township Code,²² stating that the purpose of the taking was "for recreation and open space purposes," as well as to prevent the property from being developed.²³ The chairman of the Board of Supervisors told the local newspaper that the Township was taking the land in order to preserve it as open space.²⁴ Josef Stone, the owner of the farm,

¹⁷ *Lands of Stone*, 939 A.2d at 333 (emphasis added).

¹⁸ *Id.* at 337-38.

¹⁹ *Id.* at 333.

²⁰ *Id.*

²¹ *Id.*

²² Second Class Township Code, 53 PA. CONS. STAT. ANN. § 67201 (West 1995). "[A] second-class township . . . is limited in its power to take in that it has been authorized by statute to exercise eminent domain only for a single public purpose, that of recreation." *Lands of Stone*, 939 A.2d at 337 (citing § 67201).

²³ *Lands of Stone*, 939 A.2d at 333 (internal quotation marks omitted) (quoting the Township's Declaration of Taking).

²⁴ *Id.* Mel Kardos, the chairman of the Middletown Board of Supervisors, told the *Bucks County Courier Times*, "We don't want to kick Joe Stone off the farm or anything like that. If we're successful in acquiring the farm, he can keep

objected to the taking, citing the Lands Act,²⁵ which prohibits local governments from condemning property for the purpose of preserving open space.²⁶

C. Procedural History

The trial court, relying on the record rather than a hearing, held for the Township, concluding that its taking of the farm was for recreational purposes.²⁷ The trial court supported its conclusion by finding that although the Township had no specific plans for the farm, the Township's "Recreation, Parks and Open Space Plan" ("Plan") considered several options for the farm, including: (1) allowing the Stones to continue farming part of the land; (2) using the land for passive recreational purposes; and (3) reinstating the local "Celebration of Lights" ceremony and using part of the farm as a site for the ceremony.²⁸ Significantly, the trial court held that "although the condemnation of the property for the intended recreational purposes may have the inevitable consequence of preservation [of open space by preventing development], this does not invalidate the taking."²⁹ Thus, because the Township intended to use the land for recreational purposes, it was irrelevant that the taking also served the purpose of preserving open space.

On appeal, the commonwealth court affirmed, holding that the Lands Act did not apply because the Township only asserted its authority under the Township Code and did not purport to act under the authority of the Lands Act.³⁰ The commonwealth court

doing whatever he is doing on it. We just don't want it to go to developers." *Lands of Stone*, 939 A.2d at 333 (internal quotation marks omitted) (quoting an exhibit of Mel Kardos's deposition).

²⁵ Pennsylvania Open Space Lands Act, 32 PA. CONS. STAT. ANN. § 5008 (West 1997). "[L]ocal government units other than counties or county authorities may not exercise the power of eminent domain in carrying out the provisions of this act," which permits the acquisition of property for the purpose of, *inter alia*, preserving open space. *Id.*

²⁶ *Lands of Stone*, 939 A.2d at 333.

²⁷ *Id.* at 334.

²⁸ *Id.*

²⁹ *Id.* (alteration in original).

³⁰ *Id.* The "Lands Act merely forbids the Township from exercising eminent domain 'in carrying out the provisions of this act,' and the Township did not purport to act under authority of the Lands Act, but rather, purported to take

first noted that, in Pennsylvania, a public park constitutes a recreational use of land, and the evidence supported the trial court's finding that the Township took the land for recreational purposes.³¹ Next, the court held that while the conservation of open space was one of the purposes listed in the Township's declaration of taking, this did not implicate the Lands Act because the Township was only purporting to act under the Township Code and that the statute expressly permits taking for recreational purposes.³²

D. The Supreme Court of Pennsylvania's Decision

On appeal to the Supreme Court of Pennsylvania, the appellant argued that the Township was not authorized to condemn the farm, even under the purported authority of the Township Code, "because the true purpose of the taking was to prevent development and to conserve open spaces."³³ This purpose was reflected both on the face of the declaration of taking and in the depositions of the members of the Board of Supervisors.³⁴ The appellant further argued that the Township exceeded its authority by taking the farm before any plans were made for its use: "[T]here is no evidence that the Township ever instituted or even discussed recreational uses of the property," and even though the Township mentioned using part of the land for the Celebration of Light ceremony, "the scope of the taking would then far exceed the after-proposed recreational use."³⁵ Finally, if the Township permitted the appellant to continue farming the land, this would have constituted a taking for a private rather than public use of the land, in violation of the Fifth Amendment to the United States Constitution.³⁶

under the Township Code, which expressly grants that power for recreational purposes." *Lands of Stone*, 939 A.2d at 334 (quoting *Middletown Twp. v. Lands of Stone*, 882 A.2d 1066, 1072-73 (Pa. Commw. Ct. 2005)).

³¹ *Id.*

³² *Id.*

³³ *Id.* at 336.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Lands of Stone*, 939 A.2d at 336. "[W]ithout a public purpose, there is no authority to take property from private owners." *Id.* at 337.

The Township averred that it did not take the farm to prevent its development but rather as part of a long-term plan laid out in the Plan under the authorization of the Township Code.³⁷ Further, the Township maintained that it "never purported to act under the Lands Act," and that the act only applied when a local government exercises eminent domain in carrying out that act's provisions.³⁸ Finally, the Township argued that the preservation of open space has been consistently recognized as serving a recreational purpose under Pennsylvania law.³⁹

The Supreme Court of Pennsylvania addressed whether the lower courts were correct in finding that the Township's true purpose for the taking was for recreation and whether the Township properly invoked this purpose in exercising its power to take the farm.⁴⁰ The court began by holding that under the Township Code, a second-class township does have the power to take property for any legitimate recreational purpose.⁴¹ In its interpretation of the two statutes, the court held that the language is clear and free from ambiguity and that the two statutes do not conflict: "The fact that the Open Space Lands Act exempts second-class townships from eminent domain powers to further the purposes enumerated under the Lands Act . . . has no effect on the ability of a second-class township to take for recreational purposes under the Township Code."⁴²

Next, the court addressed whether the Township acted properly within its scope of authority under the Township Code. Citing several cases, the court said that it would look for the "real and fundamental purpose" behind the Township's exercise of eminent domain rather than adhering to "mere lip service" or retroactive justification of its purpose.⁴³ One way to prove that an authorized purpose truly motivated the taking is through evidence of a "well-developed plan of proper scope."⁴⁴ Thus, in order for the

³⁷ *Lands of Stone*, 939 A.2d at 336.

³⁸ *Id.*

³⁹ *Id.* at 337.

⁴⁰ *Id.* at 338.

⁴¹ *Id.* at 337.

⁴² *Id.* (citation omitted).

⁴³ *Lands of Stone*, 939 A.2d at 338.

⁴⁴ *Id.*

taking to be valid in this case, the Township would have had to show that recreational use was the true purpose behind the taking.⁴⁵

The court held that, as a matter of law, the evidence in the record failed to support a finding that the true purpose of the taking was for recreational purposes.⁴⁶ For one, the Township's Plan "specifically discusses the acquisition of property for the purpose of preserving open space, whereas recreation is contemplated only for *existing* parks and facilities."⁴⁷ Next, among the various uses contemplated for the property was one permitting appellant to continue farming the land for profit.⁴⁸ The court concluded that this would violate the Fifth Amendment to the United States Constitution because the condemnation would be serving a purely private, rather than public, interest.⁴⁹ Another option contemplated by the Township was to use part of the property to provide an alternative entrance to the Celebration of Lights ceremony, which takes place in a neighboring park. The problem with this option was that the Township had condemned more property than necessary to carry out this plan, thereby exceeding the scope of its authority to condemn property.⁵⁰ Another possible option for the farm was to use it for passive recreation. However, the record was devoid of any indication that the Township had developed any plans for this use.⁵¹

At the time the Township exercised its eminent domain power, the Township supervisors did not cite their authority to do so, nor did they discuss recreation as the primary purpose for their action.⁵² Therefore, the Supreme Court of Pennsylvania concluded that Middletown Township acted outside its authority in condemning the Stone farm, and the taking was therefore invalid.⁵³

⁴⁵ *Lands of Stone*, 939 A.2d at 338.

⁴⁶ *Id.*

⁴⁷ *Id.* at 338-39.

⁴⁸ *Id.* at 339.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Lands of Stone*, 939 A.2d at 339.

⁵² *Id.* at 339-40.

⁵³ *Id.* at 340.

The decision of the commonwealth court was reversed and the case was remanded to the trial court for further proceedings.⁵⁴

E. Dissenting Opinion

Justice Eakin dissented from the majority of the court with respect to the application of the scope of review to the lower court's factual findings.⁵⁵ The standard of review was an abuse of discretion, meaning that "if the [lower] court's findings are supported by the record, they should not be disturbed."⁵⁶ Justice Eakin argued, "Whether this Court, having heard none of the witnesses, believes the Township's declaration of taking was a ploy to carry out the prevention of development is irrelevant; the only relevant inquiry is whether the record supports the trial court's conclusion."⁵⁷

Justice Eakin argued that under the correct standard and scope of review, the facts in the record were "more than sufficient to support the trial court's factual and legal conclusion that the central and defining purpose of the condemnation was recreational."⁵⁸ Therefore, because the appellant bears a heavy burden in proving that the trial court abused its discretion, and the record was sufficient to support the trial court's factual and legal findings that the purpose of the taking was recreational, Justice Eakin would have affirmed the lower court's decision.⁵⁹

IV. EVALUATION

The majority held that the Township Code authorizes a second-class township to take property by eminent domain for any legitimate recreational purpose, despite the restrictions imposed by the Lands Act.⁶⁰ The majority cited the Statutory Construction Act⁶¹ to support its holding that the words of the Township Code

⁵⁴ *Lands of Stone*, 939 A.2d at 340.

⁵⁵ *Id.* at 342-43 (Eakin, J., dissenting).

⁵⁶ *Id.* at 342-43 n.1.

⁵⁷ *Id.* at 343.

⁵⁸ *Id.* at 342-43.

⁵⁹ *Id.* at 343.

⁶⁰ *Lands of Stone*, 939 A.2d at 337.

⁶¹ 1 PA. CONS. STAT. ANN. § 1921 (West 2008).

and the Lands Act were clear and free from all ambiguity, and therefore, the court need not look beyond the words of the statutes in determining their meaning.⁶² The court reasoned: "Here the language is clear. The Township Code gives power to second-class townships to condemn land for recreational purposes. The Lands Act withholds power from second-class townships to condemn land for open space purposes. The two statutes do not conflict."⁶³ Significantly, the majority does not cite any authority in making this determination.⁶⁴

In practice, it is likely that the meaning of "recreational purposes" and "open space purposes" will frequently coincide. In such cases, the application of this holding will be tricky and the validity of a condemnation will rely heavily on the specific wording of the stated purpose. While for practical purposes it may not be natural to draw a sharp distinction between recreational and open space purposes, this difference will matter greatly when it comes to evaluating the specific wording of the taking declaration to determine whether a taking is valid. If a taking is to survive in the context of this holding, the stated purpose must be explicitly recreational and there must be no indication that the purpose for the taking is to preserve open space land.

The majority explained that so long as a second-class township does not attempt to invoke the Lands Act in exercising eminent domain, the Lands Act does not apply to that township's action.⁶⁵ For example, in the instant case, because Middletown Township was not attempting to condemn land under the Lands Act, that statute was not relevant, and the court only had to examine the Township's taking under the Township Code. Thus, it is of great importance that second-class townships in Pennsylvania seeking to condemn land invoke authority to do so under the correct statute.

Further, the court may have created a loophole through which second-class townships could condemn land for the purpose of preserving open spaces, so long as the township does not invoke

⁶² *Lands of Stone*, 939 A.2d at 337 (citing § 1921(a)).

⁶³ *Id.*

⁶⁴ *See id.*

⁶⁵ *Id.*

the authority of the Lands Act. For example, a township could invoke authority to condemn property under the Township Code, thereby serving recreational purposes by way of a large public park and simultaneously achieving open space purposes by preserving forests, water resources, and natural and scenic resources.⁶⁶ A township simply needs a "carefully developed plan which effectuates the stated purpose,"⁶⁷ that is, that the land is to serve for recreation, while in reality the taking serves the open space purposes of the Lands Act. Thus it is possible for a second-class township to surreptitiously skirt the limitations of the Lands Act, but still achieve the preservation of open spaces, by invoking authority for its taking under the Township Code and for purposes of recreation. Therefore, the court may have drawn a distinction between recreation and open spaces which has significant implications regarding the particular wording of the taking declaration, but in all practical effect, this distinction is rather meaningless.

Perhaps rather than interpreting the two statutes as clear, unambiguous, and separate laws, the majority should have interpreted "recreational purposes" under the Township Code more narrowly so that it would not overlap with "open space purposes."⁶⁸ For example, as the concurring opinion suggested, the court could have held that a township's authority to exercise eminent domain for recreational purposes would only apply to purposes outside the scope of the Lands Act. Thus, in this case, because the Township condemned the property for open space purposes, the land at issue would have fallen outside the power granted by the Township Code, and the Township simply would not have had the legal authority to take the land. Such an interpretation would have achieved the same result, and it would

⁶⁶ See *Lands of Stone*, 939 A.2d at 341.

⁶⁷ *Id.* at 340; see *Pidstawski v. S. Whitehall Twp.*, 380 A.2d 1322, 1324 (Pa. Commw. Ct. 1977).

⁶⁸ *Lands of Stone*, 939 A.2d at 342 (Baer, J., concurring). The concurring opinion suggests that because statutes granting the power of eminent domain are to be construed narrowly in order to protect public interest, the interpretation of the Township Code's any legitimate "recreational purposes" should likewise be construed narrowly, as a "subset of generic recreational purposes that do not overlap with open space purposes." *Id.*

be easier to apply in practice. It would also be easier for a court to determine the "true purpose" behind the condemnation because a township would not be able to get around the Lands Act by merely adjusting the wording in its stated purpose. The validity of the taking would then turn on whether the township was acting properly within its authority, rather than whether the township was wary of exactly how its taking declaration was to be worded.

Finally, even if the majority correctly assessed the two statutes as clear and unambiguous, the majority still overstepped its scope of review. If the two statutes are indeed separate and not overlapping, then the Lands Act should have been rendered irrelevant because the Township did not purport to act under its authority, and the trial court's factual findings should have been upheld as reasonable factual and legal findings based on the record before it.

V. CONCLUSION

In conclusion, although the Supreme Court of Pennsylvania drew a seemingly clear distinction between the Township Code and the Lands Act, it is possible that townships wishing to condemn land for the purpose of preservation of open space may still be able to do so under a guise of "recreational purposes." The court made it clear that in reviewing eminent domain cases, it will be looking for a carefully thought-out plan that details the purpose for the taking and what public purpose the land is to serve. A township cannot condemn land simply to prevent its development, nor can it do so for the stated purpose of preserving the land in its natural state.

However, if a township desires to serve exactly these purposes, it may be able to do so under the authority of the Township Code if the proper purposes are listed in a carefully detailed plan. For example, under the Township Code, it is possible for a second-class township to take private property for the purpose of creating a public park, when in reality the land will remain largely in its natural state with very little development or changes made to the land. In this way, a township can act under the authority of the Township Code while serving the purposes of the Lands Act, rendering the court's distinction between the two

statutes effectively meaningless. If a loophole does exist, either the legislature will have to address it by clarifying the two statutes or the court may have to address the issue again in the future.

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