[J-127-2008][M.O. - Castille, C.J.]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

CASTILLE, C.J., SAYLOR, EAKIN, BAER, TODD, McCAFFERY, JJ.

HSP GAMING, L.P.,	:	No. 28 EM 2008
	:	
Petitioner	:	Petition for Review
	:	
	:	
v.	:	
	:	
	:	
CITY OF PHILADELPHIA,	:	
	:	
Respondent	:	

DISSENTING OPINION

MR. JUSTICE SAYLOR **DECIDED: AUGUST 22, 2008**

Because I believe that the City's relevant authority under Act 321 was extinguished by the general repealer clause of the Dam Safety and Encroachments Act of 1978 -- and indeed, never included within its scope encroachment into the Delaware River for facilities other than wharves, piers, and similar harbor structures -- I would find that the City lacked the power to issue the disputed license in the first instance. Accordingly, I respectfully dissent.

To support its central argument that the City was authorized by the General Assembly to grant it a license to encroach into the Delaware River, HSP relies on Act 321 of 1907. As noted by the majority, however, shortly after the Attorney General issued his Opinion stating that the City retained such authority, the Legislature passed the Dam Safety

and Encroachments Act of 1978 (the "Dam Safety Act").[1] In my opinion, that enactment had the effect of removing from the City any authority that it had as referenced in the Opinion of the Attorney General.

According to its express terms, the Dam Safety Act's purposes are to provide for state regulation of all water obstructions and encroachments in the Commonwealth in order to protect the health, safety, and welfare of the people and property; to protect the natural resources and environmental rights secured by the state Constitution and conserve the water quality, natural regime and carrying capacity of watercourses; and to assure proper planning, design, construction, maintenance, and monitoring of water obstructions and encroachments, in order to prevent unreasonable interference with water-flow and protect navigation. See 32 P.S. §693.2. Its scope is broadly delineated to include "[a]ll water obstructions and encroachments . . . located in, along, across or projecting into any watercourse, floodway or body of water, whether temporary or permanent," id., §693.4 (emphasis added); see also id., §693.3 (defining watercourse as any "channel of conveyance or surface water having a defined bed and banks . . ."), and its state-level permitting requirements apply in an equally comprehensive fashion. See id., 693.6 (a) ("No person shall construct, operate, maintain, modify, enlarge or abandon any dam, water obstruction or encroachment without the prior written permit of the [Pennsylvania Department of Environmental Protection]."); id., §693.3 (defining water obstruction to include any pier, wharf, abutment or any other structure located in, along, across, or projecting into any watercourse). Thus, the General Assembly enacted the Dam Safety Act to provide for a uniform system by which encroachments into all waterways of the Commonwealth are to be overseen and regulated at the state level.

[1] Act of Nov. 26, 1978, P.L. 1375, No. 325 (as amended, 32 P.S. §§693.1-693.27).

Indeed, the act was passed a mere three months after the issuance of the Opinion of the Attorney General, making it reasonable to suppose that it represented a reaction to that opinion designed to provide for a comprehensive state-wide system of regulation of water encroachments throughout the Commonwealth. Not only did it absolutely repeal Sections 7 and 8 of Act 322, see 32 P.S. §693.27(a), it also expressly reserved to the Commonwealth the sole authority for the occupation of submerged lands:

> No title, easement, right-of-way or other interest in submerged lands or other real estate of the Commonwealth may be granted except as expressly provided by this section or other specific authority from the General Assembly.

32 P.S. §693.15. This reservation of authority is consistent with the legislative objectives of the act as outlined above.

The majority observes that the Dam Safety Act repeals portions of Act 322 absolutely, but does not similarly repeal Act 321. The majority concludes from this that the Legislature intended to leave Act 321 completely unaffected. See Majority Opinion, slip op. at 36 ("We deem the absence of an express repeal of the City's authority under Act 321 to be a reflection that the General Assembly intended that its settled, existing delegation of authority to the City remain intact."). However, the general repealer clause contained in the Dam Safety Act states that "[a]ll other acts or parts of acts inconsistent herewith are hereby repealed to the extent of such inconsistency." 32 P.S. §693.27(b). It seems evident (to me anyway) that Act 321 is inconsistent with Section 6(a) of the Dam Safety Act, at least to the extent Act 321 would otherwise allow the City unilaterally to license HSP to build out into the Delaware River beyond the low-water mark. See id., §693.6(a) (prohibiting any person from constructing, operating, maintaining, modifying, enlarging, or abandoning any water obstruction or encroachment without the prior written permission of the state Department of Environmental Protection). Therefore, Act 321 was nullified by the general repealer clause at least to this extent. The majority notes that, under the Dam Safety Act, Act

322 licensees (but not Act 321 licensees) may dispense with the Section 693(a) permit requirement. The majority concludes that this reflects a legislative intent not to "eviscerate" Act 321. See Majority Opinion, slip op. at 36-38. I do not agree, however, that this conclusion follows from the premise. Specifically, Section 693.6(a) requires all persons who "construct . . . any . . . water obstruction or encroachment" anywhere in the Commonwealth to obtain a departmental permit, a precondition of which is that such person hold an interest in the subject property issued pursuant to either the Dam Safety Act, or some "other specific authority from the General Assembly." 32 P.S. 693.15(a). The mere fact that Act 322 licensees are deemed to already hold such a permit seems irrelevant to the question of whether Act 321 survived the Dam Safety Act, or otherwise constituted "other specific authority" from the General Assembly, such that Act 321 licensees would be eligible to receive a Section 693.6(a) permit. (On this point, moreover, I agree with Mr. Justice McCaffery that Act 321 is general, not specific, authority, as it does not designate any particular tract of land for licensing.)

This raises the question of why the Legislature did not elect to repeal Act 321 "absolutely," as it did parts of Act 322. The answer emerges upon a reading of the entirety of Act 321, which grants powers to the City that are unrelated to encroachments into navigable waterways. Section 9 of that statute, for example, authorizes the Director of Wharves, Docks, and Ferries (now the Director of Commerce) to acquire unimproved, but reclaimable, marshlands that lie wholly within the City "between the low-water line and the high-water shore-line of" such waterways. 53 P.S. 14197. The act also empowers the director to demand that the owners of harbor structures keep their facilities clean and free of obstructions -- or, alternatively, to hire others to clean and clear them and charge the cost back to the owners. See id., §14196. There are also reporting requirements, and any number of other provisions in Act 321 that are beneficial in themselves and are entirely consistent with the Legislature's decision to repose all licensing and permitting power within

the Commonwealth government for the building of encroachments into the river in the first instance. The General Assembly could reasonably have found it salutary to leave these measures in place by not repealing Act 321 in toto, but only to the extent of its inconsistency with the Dam Safety Act -- a goal evidently accomplished through the wording of the general repealer clause. Hence, I do not share the majority's view that the mere failure to expressly repeal Act 321 in the same manner as Act 322 evidences an intent to leave it completely unaffected. To the extent there is any doubt on this subject, moreover, it must be resolved against the existence of the City's authority to issue the license in question. See Denbow v. Borough of Leetsdale, 556 Pa. 567, 576-77, 729 A.2d 1113, 1118 (Pa. 1999) ("Municipal corporations have no inherent powers and may do only those things which the Legislature has expressly or by necessary implication placed within their power to do. . . . Any fair, reasonable doubt as to the existence of power in a municipality is resolved by the courts against its existence." (emphasis added)); accord Kline v. City of Harrisburg, 362 Pa. 438, 443, 68 A.2d 182, 184-85 (1949).[2]

[2] I would find that the provisions of the Dam Safety Act, at a minimum, give rise to a substantial doubt that the portions of Act 321 at issue remained in effect at the time the license was granted to HSP. (Indeed, I have difficulty envisioning how the Legislature could have been more explicit in the intended comprehensive scope than to do precisely what it did -- i.e., specify that the Dam Safety Act applies to all navigable waters in the Commonwealth, including the Delaware River. See 32 P.S. §693.4, 693.12(a).) As to such uncertainty, the majority emphasizes the principle of statutory construction disfavoring implied repeals. It should be noted, however, that -- as is often the case -- there are multiple competing principles of construction involved here. The Legislature is presumed to intend to retain its power as against municipalities, thus giving rise to the rule noted above that doubts about municipal authority are resolved against their existence. In this regard, although the majority references Pennsylvania Turnpike Comm'n v. Sanders & Thomas, 461 Pa. 420, 336 A.2d 609 (1975), to support its determination that principles regarding implied repeals control here, that case did not involve any competition between state and local power, and thus, did not provide an occasion for this Court to weigh these two rules of construction against each other. As between these two areas of concern with regard to legislative intent, I believe that the one pertaining to the protection of the General (continued…)

Additionally, I differ with the majority's treatment of the statements of the Department of Environmental Protection. Although the amicus brief submitted by that agency indicates that it would not be in a position to convey an interest in the submerged lands in question in the form of an "easement, right-of-way, license or lease," 32 P.S. §693.15(a), the Department does not purport to predicate this limitation on the geographical location of the SugarHouse casino. Nor does the Department address the question of whether the City retained authority under the then-existing statutory scheme to grant an "estate or interest" in the submerged lands sought by HSP, which is a precondition to the issuance of a departmental permit. See 32 P.S. §693.15(a) ("No permit shall be granted pursuant to this act for any project to occupy submerged lands of the Commonwealth . . . unless the applicant has obtained an easement, right-of-way, license or lease pursuant to this act, or holds an estate or interest in such submerged lands pursuant to other specific authority from the General Assembly."). In fact, the Department clarifies that the reason it would not be empowered to grant a license in this case pertains to its view that the project does not conform to the provisions of Sections 693.15(b) and (c) of the act, see Brief at 9 n.4, which require that the project occupy no more than 25 acres, see 32 P.S. §693.15(c),[3] and that it be undertaken for one of a set of specified purposes not relevant here. See 32 P.S.

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Assembly's legislative authority should take precedence. Thus, I depart from the majority's decision to elevate the precept that implied repeals are disfavored as the only controlling principle for resolving doubts concerning the City's remaining authority under Act 321.

[3] HSP describes the project as encompassing a proposed site of 22 acres plus submerged lands of 12 acres immediately adjoining that site. See Exhibits to HSP's Petition for Review at 9 (Vol. I). Even if this description is construed to mean that the 12 acres are part of the existing 22-acre site, the plan reflects an additional 3.23 acres of newly created greenway, as well as waters between the mainland and a proposed longitudinal pier connected to the mainland by a narrow walkway, see id. at 14, for a total of more than 25 acres.

§693.15(b).[4] Although the Department recognizes that it does not hold exclusive licensing authority under Section 693.15 for the above reasons, this, in my view, does not support an interpretation favoring the vitality of Act 321, as the majority suggests. See Majority Opinion, slip op. at 35. The Department simply does not address the question of which entity, as between the General Assembly and the City, has the relevant licensing authority otherwise, and its submission to this Court is specifically designed to preserve its own licensing authority in its area of statutory empowerment. See Brief at 6-7. In this regard, moreover, the Department emphasizes that it is charged with regulating water encroachments in "all waters of the Commonwealth," Brief at 7 (emphasis in original), an assertion that accords with the plain text of the Dam Safety Act, which, by its terms, applies to "all" Commonwealth waterways, 32 P.S. §693.4, including those of the "navigable waters of the Delaware River." Id., §693.12(a).

Even assuming, arguendo, that the relevant portion of Act 321 were still in effect, it would not grant the City the authority to license the use of submerged lands for facilities unrelated to boating or shipping. The critical passage, found in Section 10 of the act, states, in relevant part:

> Whenever any person . . . shall desire to construct, extend, alter, improve or repair any wharf, or other building in the nature of a wharf, or bridge, or other harbor structures, situate wholly within any city of the first class, such person or persons shall make application to the director, stating in writing the nature and extent of such proposed structure, extension, alteration, improvement or repair . . .[,] whereupon, if such proposed structure, extension, alteration, improvement or repair will encroach upon the waterway, the director shall give

[4] These purposes include: improving navigation or public transportation; recreation, fishing, or other public trust purposes; protecting public safety or the environment; providing water supply, energy production, or waste treatment; providing a public utility service by a government agency or subdivision, or public utility or electric cooperative; or other activities which require access to water.

> notice of the time and place of hearing such application, to all parties interested . . . and if the director . . . shall approve such proposed structure, extension, alteration, improvement or repair, and the plans and specification submitted therefor, he shall give his assent to, and issue a license or permit for, the erection and making thereof . . ..

53 P.S. §14199 (emphasis added); see Majority Opinion, slip op. at 3-4 (quoting the provision in full). Although the above, while it was in effect, does appear to have authorized the City's Commerce Department to convey a property interest in the submerged lands of the river, such authority only existed relative to wharves, bridges, and "other harbor structures." As stated in Act 321's preamble, the statute was enacted in recognition of the growing commerce of Pennsylvania, and the substantial improvements in the channel-ways of the Commonwealth's rivers and harbors. Thus, the Legislature authorized the City Department of Wharves, Docks, and Ferries (the predecessor to the City Commerce Department) to regulate the development of "wharves, piers, bulkheads, docks, slips and basins." Act 321, §6; see 53 P.S. §14191 (giving the director power to regulate "bulkhead and pierhead lines," "the distance between piers," and the development of "wharves, piers, bulkheads, docks, slips, and basins" within Philadelphia city limits). This limited scope of authority also obtains in Section 10 of the act, as quoted above. According to HSP's site plan, the facilities that will encroach beyond the established bulkhead of the Delaware River into Commonwealth-owned lands include such features as a slots venue, hotel, parking garage, retail space, and restaurants. A slots casino, together with all of its surrounding commercial entities, can be located inland and has no inherent connection to water travel or water-related commerce. Therefore, regardless of how beneficial these items may appear to the City, they are not in the nature of a wharf, bridge, or any other harbor structure.[5] Accordingly, the construction of such facilities upon submerged lands does not

[5] Under the maxim of ejusdem generis, general terms in a statute take their meaning from the preceding particular ones. See Independent Oil & Gas Ass'n of Pa. v. Board of (continued…)

appear to have been contemplated by Section 10 of Act 321,[6] and, again, any doubt on the question must be resolved against the existence of the City's authority.

Finally, the majority predicates its finding that the revocation of the license was invalid on a "reliance interest" in favor of HSP, stating that "the record is replete with evidence of reliance." Majority Opinion, slip op. at 43-44. However, it does not reference any authority to support the existence of such an interest as a legal matter, and there is no evidentiary record that could show actual reliance, as no hearing has taken place on the factual question of whether HSP reasonably and detrimentally relied on the license.[7] In this respect, moreover, although the revocation of a license by a newly installed city administration may raise concerns relative to the stability of property rights, see generally Borough of Malvern v. Agnew, 314 A.2d 52, 53 (Pa. Cmwlth. 1973), countervailing policy considerations arise where, as here, the mayoral election occurred before the license was issued, and the views of the incoming mayor on the subject were well known. More particularly, it appears that the outgoing administration sought, by issuing the license in its

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Assessment Appeals of Fayette County, 572 Pa. 240, 246, 814 A.2d 180, 184 (2002). Here, "other harbor structure" must be understood within the context of the preceding examples, namely, wharf, other building in the nature of a wharf, and bridge. Additionally, the other facilities addressed by the statute (piers, bulkheads, docks, slips, and basins), are specifically related to the waterfront as such. It would be unreasonable to assert that a slots casino is a "harbor structure" simply because its owner decides to place it adjacent to a river. Likewise, even to the extent HSP's overall plan contains water-related components as ancillary uses, under Act 321 the City's encroachment authority could only extend to those components.

[6] In this regard, it is noteworthy that the 1978 Opinion of the Attorney General speaks generally of "facilities,", and does not address the separate topic of whether the legislation in question was intended to authorize riparian licenses for casinos or other non-harbor-related structures.

[7] Even if such reliance has occurred, it is unclear why monetary compensation by the City would not constitute a legally sufficient remedy.

waning days, to bind the successor administration regarding a topic of substantial local public importance on which they disagreed. Cf. Program Admin. Svcs., Inc. v. Dauphin County Gen'l Auth., 593 Pa. 184, 196-97, 928 A.2d 1013, 1020 (2007) (recognizing that contracts pertaining to government functions may be rescinded by a successor municipal governing body to avoid "bad faith efforts on the part of lame duck administrations to handcuff their successors." (internal quotation marks omitted)).

Because I would find that the City did not possess the legal authority to issue the license in the first place, I would deny HSP's request to have the City's revocation of that license declared invalid.