

**[J-127-2008] [MO: Castille, C.J.]  
IN THE SUPREME COURT OF PENNSYLVANIA  
EASTERN DISTRICT**

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

**DISSENTING OPINION**

**MR. JUSTICE McCAFFERY**

**DECIDED: AUGUST 22, 2008**

I respectfully dissent from the majority’s holdings that Act 321 was not repealed by the Dam Safety and Encroachments Act of 1978, as amended effective October 23, 1979, (“Dam Safety Act”)<sup>1</sup> and that the City of Philadelphia acted without authority in its revocation of the license issued to Petitioner on November 27, 2007. Rather, because I believe that the provisions of Act 321 providing for the City of Philadelphia to exercise authority over the submerged lands of the Delaware River in Philadelphia are irreconcilable and inconsistent with the Dam Safety Act, I conclude it is the Commonwealth that has sole authority to grant permission to use those submerged lands. In addition, I believe that the City acted properly in revoking a license which it had no authority to have conferred.

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<sup>1</sup> 32 P.S. §§ 693.1-693.27.

Where two statutes are irreconcilable, the latter statute shall be construed to repeal the earlier statute. 1 Pa.C.S. § 1971(c).<sup>2</sup> While the majority recognizes this statutory mandate and concludes that Act 321 and the Dam Safety Act are not irreconcilable, it does not support its conclusion with a persuasive analysis. Rather, the majority determines that the two acts are not irreconcilable largely on the basis of its observation that the Dam Safety Act expressly repealed Act 322 and did not expressly repeal Act 321. See Majority Opinion, slip op. at 29, 32. However, the majority fails to adequately take account of the express language of the Dam Safety Act, which demonstrates in the clearest of terms that the General Assembly intended to establish itself, and other Commonwealth entities, as possessing the sole authority to grant use of the submerged lands in the Delaware River in Philadelphia.<sup>3</sup>

The Dam Safety Act applies to all encroachments located in, along, across, or projecting into any watercourse within the Commonwealth. 32 P.S. § 693.4. The Dam Safety Act mandates that no person shall construct an encroachment without a prior written

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<sup>2</sup> In addition, in determining legislative intent, all sections of a statute are to be read “together and in conjunction with each other” and are to be construed “with reference to the entire statute,” giving effect to all the statutory provisions. 1 Pa.C.S. § 1921(a); Housing Authority of the County of Chester v. Pennsylvania State Civil Service Commission, 730 A.2d 935, 945 (Pa. 1999). If possible, we avoid a reading that would lead to a conflict between different statutes or between individual parts of a statute. Id. at 946.

<sup>3</sup> This omission is particularly incongruous in light of the majority’s determination, albeit a correct one, that Section 1506 of the Gaming Act vests this Court with exclusive appellate jurisdiction over this appeal. See Majority Opinion, slip op. at 21. The majority refuses to apply Section 19 of Act 321, which vests in the courts of common pleas jurisdiction over appeals from city licensure decisions, in holding that Section 1506 vests this Court with such jurisdiction where a licensed gaming facility is involved. I fail to discern how we may properly reject Act 321’s appeal provision on the basis of Section 1506 of the Gaming Act, and yet conclude that Act 321 retains intact its licensing authority provision primarily on the basis that the Dam Safety Act does not expressly repeal Act 321. Section 1506 does not expressly repeal Act 321 either.

permit of the Department of Environmental Protection of the Commonwealth of Pennsylvania (“DEP”). Id., § 693.6. The Dam Safety Act enjoins the issuance of a permit for any project to occupy submerged lands of the Commonwealth in any navigable river unless the applicant has obtained an easement, right-of-way, license or lease pursuant to the Dam Safety Act, or unless the applicant holds an estate or interest in the submerged lands pursuant to “other specific authority” from the General Assembly. Id., § 693.15(a). No one can obtain a title, easement, right-of-way or other interest in the submerged lands of the Commonwealth except as specifically provided by Section 693.15 of the Dam Safety Act or by “other specific authority” from the General Assembly. Id., § 693.15(e). The Dam Safety Act further provides that all encroachments in the navigable waters of the Delaware River are subject to the approval of the Navigation Commission for the Delaware River, a Commonwealth entity. Id., § 693.12.

Read in conjunction with each other, the provisions of the Dam Safety Act require any person or entity who or which desires to erect an encroachment in the submerged lands in the Delaware River in Philadelphia to 1) obtain an easement, right-of-way, license or lease from the DEP under Section 693.15(b) or pursuant to other specific authority from the General Assembly;<sup>4</sup> and 2) obtain a permit from the DEP authorized by the Navigation Commission. In my view, these mandates of the Dam Safety Act are irreconcilable with the authority granted to the Philadelphia Director of Commerce in Act 321 to issue a license or permit to a person who desires to construct a harbor structure which will encroach upon the Delaware River. See 53 P.S. § 14199.

I consider the majority’s suggestion that the City of Philadelphia and the General Assembly each has authority to grant use of the submerged lands in the Delaware River in

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<sup>4</sup> There is no dispute that the General Assembly has not exercised its authority to specifically allow Petitioner to encroach upon the submerged lands in the Delaware River for the development of its gambling establishment.

Philadelphia to be untenable. See Majority Opinion, slip op. at 36, n.21. I believe it is self-evident that either the City or the Commonwealth, but not both, has authority over a specific, finite piece of submerged real estate. To posit that both the City and the Commonwealth have the authority to grant a license for use of a single, definable portion of a river's submerged lands is to allow for the possibility that two separate licensees may obtain encroachment rights over the same stretch of river. I view such a circumstance as an invitation to wreak havoc through the creation of antagonistic, mutually excludable possessory interests.

In addition, I am in agreement with Mr. Justice Saylor that the general repealer provision of the Dam Safety Act, 32 P.S. § 693.27(b), repealed Act 321 and vested the Commonwealth with the sole authority to grant permission to use submerged lands in the Delaware River in Philadelphia. The broad scope of the Dam Safety Act, coupled with the general repealer clause which repealed all other acts or parts of acts inconsistent with the provisions of the Dam Safety Act, compels the conclusion that the sole authority to grant use of the submerged lands in the Delaware River in Philadelphia lies with the Commonwealth. Further, I am persuaded by Justice Saylor's observation that the principle of statutory construction that favors the General Assembly's protection of its own authority should take precedence over the general principle of disfavoring implied repeals. See Dissenting Opinion by Saylor, J., slip op. at 5 n.2.

The actions of the General Assembly in granting leases to lands within the bed of the Delaware River in Philadelphia subsequent to the passage of the Dam Safety Act 1979 amendments reinforces my conclusion that Act 321 and the Dam Safety Act are irreconcilable. To wit, the following acts are examples of the exercise of the General Assembly's authority:

1. Act of December 9, 1980, 1980 Pa. Laws 201 --  
Reciting that the Commonwealth owns the lands within the bed

of the Delaware River between the bulkhead and pierhead lines and **leasing a portion of the bed of the river in Penn's Landing to the City of Philadelphia** for the purposes of development for residential, office, commercial, condominium, or other uses;

2. Act of July 13, 1988, 1988 Pa. Laws 89 -- Reciting that the Commonwealth owns the lands within the bed of the Delaware River and providing for the **leasing of Pier Numbers 28 South, 30 South, 34 South, 35 South, and 36 South to the City of Philadelphia** for the purposes of development for residential, office, commercial, condominium, hotel, marina or other uses;

3. Act of December 20, 1989, 1989 Pa. Laws 76, amending the Act of December 9, 1980 -- Reciting that the Commonwealth owns the lands within the bed of the Delaware River and providing for the **leasing of Pier Numbers 3 and 5 to the City of Philadelphia** for the purposes of development for residential, office, commercial, condominium, hotel, marina or other uses;

4. Act of December 21, 1998, 1998 Pa. Laws 137 -- Reciting that the Commonwealth owns the lands within the bed of the Delaware River and providing for the leasing of Pier Numbers 12 North, 13 North, 15 North, 19 North, and 24 North in Philadelphia for the purposes of development for residential, office, commercial, condominium, hotel, marina or other uses;

5. Act of February 5, 2004, 2004 Pa. Laws 4 -- Reciting that the Commonwealth owns the lands within the bed of the Delaware River and providing for the leasing of Pier Numbers 36 North, 37 North, 38 North, and 39 North in Philadelphia to Isle of Capri Associates for the purposes of development of a condominium community;

6. Act of July 5, 2005, 2005 Pa. Laws 34 -- Reciting that the Commonwealth owns the lands within the bed of the Delaware River and providing for the leasing of Pier Number 25 North and the boat slip located south of it to Pier 25 North Associates for the purposes of development of a condominium community;

7. Act of February 22, 2008, 2008 Pa. Laws 4 -- Reciting that the Commonwealth owns the lands within the bed of the Delaware River and providing for the leasing of Pier Number 35 1/2 North to VTE Philadelphia, LP, for the purposes of development of a condominium community. The Act provides that no portion of the leased parcel shall be used as a "licensed facility," i.e., the physical land-based location at which a licensed gaming entity is authorized to place and operate slot machines. The Act further provides:

The General Assembly hereby affirms its existing, sole and exclusive authority to consider and specifically authorize the conveyance of any title, easement, right-of-way or other interest in Commonwealth-owned lands, such as those set forth herein pursuant to the act of April 9, 1929 (P.L.177, No.175), known as The Administrative Code of 1929, and the act of November 26, 1978 (P.L.1375, No.325), known as the Dam Safety and Encroachments Act.

8. Act of February 22, 2008, 2008 Pa. Laws 5 -- Reciting that the Commonwealth owns the lands within the bed of the Delaware River and providing for the leasing of Pier Number 53 North to NCCB Associates for the purposes of development of a condominium community. The Act provides that no portion of the leased parcel shall be used as a "licensed facility," i.e., the physical land-based location at which a licensed gaming entity is authorized to place and operate slot machines. The Act further provides:

The General Assembly hereby affirms its existing, sole and exclusive authority to consider and specifically authorize the conveyance of any title, easement, right-of-way or other interest in Commonwealth-owned lands, such as those set forth herein pursuant to the act of April 9, 1929 (P.L.177, No.175), known as The Administrative Code of 1929, and the act of November 26, 1978 (P.L.1375, No.325), known as the Dam Safety and Encroachments Act.

By these legislative enactments, the General Assembly has consistently exhibited and exercised its authority to award use of the lands within the bed of the Delaware River in

Philadelphia to public and private lessees for development and renewal purposes. Most telling is the 1980 legislative act, by the **same legislative session** that passed the Dam Safety Act, that authorized the Commonwealth to enter into a lease with the **City itself**, for the development of Penn's Landing. Similarly, in 1988 and 1989, the Commonwealth leased submerged lands to the City for development. One is hard-pressed to conceive a reason for these leases to have been issued by the Commonwealth of Pennsylvania to the City of Philadelphia if the City, in fact, had retained authority itself, pursuant to Act 321, to award use of the lands in the bed of the Delaware subsequent to the passage of the Dam Safety Act amendments in 1979.

The recent affirmations in Acts 4 and 5, passed February 22, 2008, make explicit that which has been implicit since the repeal of Act 321 by the Dam Safety Act: because the Commonwealth owns the land within the Delaware River bed, it has the sole authority to authorize the conveyance of any interest whatsoever therein. Therefore, I conclude that the City did not have the authority in November 2007, to issue a license for development of the submerged lands in the bed of the Delaware River, and that the license it issued on November 27, 2007, was invalid.

I also disagree with the majority's conclusion that the City did not have the power to revoke the license once it was issued. Licenses for the use of submerged lands have been deemed revocable in this Commonwealth for centuries. See *Susquehanna Canal Company v. Wright*, 9 Watts & Serg. 9, (Pa. 1845) (stating that the license accorded to riparian owners to erect mill-dams in navigable streams was defeasible and subject to revocation when necessitated by the paramount interest of the public); *Barclay Railroad and Coal Co. v. Ingham*, 36 Pa. 194, 200 (1860) (emphasis supplied) ("When the Commonwealth, by its legislature, authorized riparian owners along [navigable] streams, to erect dams for their own convenience and profit, it was a sort of public license, like the fisheries and ferries, which, by numerous Acts of Assembly, were granted in all our public

rivers. And **being a mere license** to trespass on the public domain, without any consideration received therefore, **it had none of the indefeasibility of a contract, and might be revoked at the will of the sovereign**, or be granted to another.”); Rundle v. Delaware and Raritan Canal Co., 55 U.S. 80, 94 (1852) (emphasis supplied) (applying Pennsylvania law, “[T]he River Delaware is a public, navigable river, held by its joint sovereigns, in trust, for the public; **that riparian owners of land have no title to the river, or any right to divert its waters, unless by license from the State. That such license is revocable, and in subjection to the superior right of the State**, to divert the water for public improvements.”; and Philadelphia v. Commonwealth, 284 Pa. 225, 232, 130 A.491, 494 (1925) (stating that since “an early date,” licenses to holders of riparian rights to build piers were held revocable at will.). Compare Schechter v. Zoning Board of Adjustment of Township of Hampton, 395 Pa. 310, 316, 149 A.2d 28, 32 (1959) (emphasis in original) (holding that municipalities have a right to contest the issuance of a previously-issued permit “*if there be a question as to whether or not the permit or variance was properly and legally issued.*”).

In the instant case, I conclude that the City has advanced an eminently valid reason for the January 24, 2008 revocation, i.e., that the former director of commerce acted ultra vires and in contravention to state law in awarding the license. Any reliance Petitioner may have placed upon the City’s licensure decision would have been entirely unjustified in light of the timely appeal of that decision. Because Petitioner was on notice that the November 27, 2007 license was being challenged, the expenditure of funds, if any, in reliance upon the validity of that license was neither reasonable nor justified.

In sum, I would hold that Act 321 was repealed by the Dam Safety Act, that the City of Philadelphia had no authority to issue the November 27, 2007 license to the submerged lands of the Delaware River, and that the City did have the authority to revoke the license it had issued illegally. Therefore, I must respectfully dissent from the holding of the majority.