[J-130-2005]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

CAPPY, C.J., CASTILLE, NEWMAN, SAYLOR, EAKIN, BAER, JJ.

GLEN-GERY CORPORATION,	:	No. 90 MAP 2005
	:	
Appellant	:	Appeal from the Order of the
	:	Commonwealth Court entered July 28,
	:	2004, at No. 155 CD 2004, which affirmed
v.	:	the Order of the Court of Common Pleas
	:	of York County, Civil Division, entered
	:	December 22, 2003, at No. 2003-SU-
ZONING HEARING BOARD OF DOVER	:	02356-08
TOWNSHIP, YORK COUNTY,	:	
PENNSYLVANIA AND DOVER	:	
TOWNSHIP,	:	
	:	ARGUED: December 5, 2005
Appellee	:	

DISSENTING OPINION

MR. JUSTICE SAYLOR **DECIDED: September 28, 2006**

As I read its opinion, the majority finds the amendment to Section 5571(c)(5) of the Judicial Code ineffective to accomplish the intended purpose of displacing the decisional law exemplified by Schadler v. Zoning Hearing Board of Weisenberg Township, 578 Pa. 177, 850 A.2d 619 (2004). See, e.g., Majority Opinion, slip op. at 19 ("The addition of the term 'intended' [in Section 5571(c)(5)] has no effect on the general reasoning of this Court in Schadler II[.]"). Further, the majority appears to deem the amendment unconstitutional as applied to defects in the process of enacting an ordinance that implicate due process interests of property owners and/or other constitutional rights and entitlements. See Majority Opinion, slip op. at 20.

On the first of these points, it is my position that, by prescribing that the thirty-day period runs from the intended effective date of the ordinance, rather than the actual effective date, the Legislature has effectively displaced the Shadler line of decisions.[1] In this regard, the amended statutory language seems to me to be plain on its face, with its intended effect, as well as the salutary purpose of establishing some reasonable limitation on procedural validity challenges, also being very clear. Therefore, I respectfully differ with the majority's criticisms of the Commonwealth Court's reading of amended Section 5571(c)(5), see Majority Opinion, slip op. at 15-16, 19-20, as I believe that the intermediate appellate court merely applied a plain-meaning approach.

I also do not believe that the Commonwealth Court should be faulted for failing to consider the limited question on which appeal was allowed, namely, whether the amendment to Section 5571(c)(5) violates due process, since that issue was not before the court. In the first instance, the due process challenge was not raised in Glen-Gery's statement of matters complained of on appeal filed under Rule of Appellate Procedure 1925(b). Under this Court's decisions in Commonwealth v. Lord, 553 Pa. 415, 719 A.2d 306 (1998), Commonwealth v. Castillo, 585 Pa. 395, 888 A.2d 775 (2005), and Commonwealth v. Schofield, 585 Pa. 389, 888 A.2d 771 (2005), this deficiency implicates a strict waiver rule.[2] The issue also did not appear within Glen-Gery's

---

[1] As the majority explains, the Schadler line of cases applied the rationale that a procedurally defective statute is void ab initio and, thus, has no effective date from which a thirty-day limitations period could run. See Schadler, 578 Pa. at 188-89, 850 A.2d at 626-27. Since, as amended, Section 5571(c)(5) now prescribes that the thirty-day period runs from the date on which an ordinance was intended to be effective, rather than its actual effective date, the above reasoning from Schadler no longer applies to Section 5571(c)(5).

[2] In Castillo and Schofield, I dissented, expressing the view that appellate review should be available per the discretion of the appellate court despite non-compliance with Rule 1925, at least where the court is able to conduct meaningful appellate review on the (continued . . .)

statements of the questions involved in its submissions to the Commonwealth Court, which also would have counseled against review. See Pa.R.A.P. 2116(a) (explaining that "ordinarily no point will be considered which is not set forth in the statement of questions involved or suggested thereby"). In this regard, two primary arguments pertaining to the amendment to Section 5571(c)(5) were developed in the body of Glen-Gery's briefs as the appellant in the Commonwealth Court. First, it contended that the amendment could not apply to the validity challenge to the Dover Township land use ordinance because Section 5571(c)(5) appears within the Judicial Code, and therefore, should not be read to apply to challenges arising under the Municipalities Planning Code. See Appellant's Brief at 11-12, Glen-Gery Corp. v. ZHB of Dover Twp., 856 A.2d 884 (Pa. Cmwlth. 2004) (155 CD 2004). Second, Glen-Gery argued that the amendment should not pertain, because it post-dated Glen-Gery's challenge to the land-use ordinance and should not be applied retroactively. Appellant's Supplemental Brief at 5-6, Glen-Gery Corp. v. ZHB of Dover Twp., 856 A.2d at 884. Neither of these contentions, however, fairly subsumed a constitutional due process challenge to the amendment to Section 5571(c)(5) based upon inadequate notice.[3]

(…continued)
record presented. See Castillo, 585 Pa. at 403-07, 888 A.2d at 780-83 (Saylor, J., dissenting); Schofield, 585 Pa. at 394-95, 888 A.2d at 775 (Saylor, J., dissenting). That position, however, did not prevail; rather, the Court reaffirmed the strict waiver approach that previously had been announced in Lord.

[3] In the course of the latter argument, Glen-Gery did include a short paragraph suggesting some broader challenge to the amendment to Section 5571(c)(5), indicating that "the law of Pennsylvania" should not cognize unnoticed "stealth" legislation. See id. at 6. To the extent that such a generalized statement, identifying no specific legal theory and containing no citation to supporting authority, could be construed as raising a due process challenge to the application of the amendment, again, Glen-Gery's failure to adhere to the other procedural requirements for raising and preserving the issue impeded appellate review of the question.

In this landscape, I believe that the Commonwealth Court's approach to the case in merely applying the plain language of amended Section 5571(c)(5) was apt.[4] Further, I find merit in Appellee's contention, as developed in the briefing, that the constitutional question is waived.

Since the majority elects to reach the merits of the due process question, my position is as follows. I agree with the majority to the extent that it holds that the government cannot materially alter existing property interests of citizens in the absence of adequate notice and an opportunity to respond.[5] I also do not believe that the Legislature, consistent with the due process norms, can restrict the ability of landowners who have not been afforded reasonable notice to obtain redress in the courts of law to a thirty-day period after the passage of an unnoticed ordinance. Therefore, in circumstances in which a landowner can establish such a lack of timely notice and reasonable diligence in the aftermath, I believe that Section 5571(c)(5) may be unconstitutional as applied.[6]

---

[4] I offer no comment, however, on the resolution of the retroactivity issue, since the question was not included within the limited appeal allowed by this Court. See Glen-Gery Corp. v. ZHB of Dover Twp., 584 Pa. 132, 882 A.2d 461 (2005) (per curiam).

[5] The substantive due process standards applicable to land use validity changes, see generally In re Realen Valley Forge Greenes, 576 Pa. 115, 146-50, 838 A.2d 718, 737-739 (2003) (Saylor, J., dissenting) (discussing same), do not appear to be directly applicable in this case, as Appellant's challenges to the ordinance are centered on the asserted procedural irregularities in its enactment.

[6] I have some difficulty, however, with the majority's suggestion that the approach of courts in deeming unconstitutional statutes (or ordinances) void ab initio is rooted in due process. See Majority Opinion, slip op. at 7. While certainly enactments that violate due process interests may implicate the doctrine (as is now asserted to be the case here), I believe that the void ab initio conception has been applied to a considerably broader range of unconstitutional legislation. See generally 1 SUTHERLAND STATUTORY CONSTRUCTION §2:7 (6th ed. 2005) (citing cases). I also think that it is helpful in this (continued . . .)

As to the ultimate result in this case, I believe that the common pleas court should have addressed whether Appellant met its burden of establishing that the government failed to provide adequate notice and an opportunity to respond in connection with the passage of the ordinance, and correspondingly, that Section 5571(c)(5) should be deemed unconstitutional as applied in the circumstances.[7] Had the due process issue been adequately preserved for appellate review, I would therefore have vacated the orders of the Commonwealth Court and the common pleas court and remanded for such an undertaking, with a directive that the court would be authorized to entertain additional evidence to the extent that Appellant was not provided with a sufficient opportunity for presentation in the first instance. See supra note 7.

Mr. Chief Justice Cappy joins this dissenting opinion.

(…continued)
arena to maintain a distinction between substantive and procedural invalidity in terms of the application of the doctrine, which, in my view, is particularly relevant to the applicability of potential exceptions.

[7] While Appellant did not raise the due process issue in its statement of matters complained of on appeal, it had otherwise raised it before the common pleas court prior to the filing of the notice of appeal. See, e.g., Appellant's Brief in Support of Land Use Appeal, at 9, Glen-Gery Corporation v. ZHB of Dover Twp., No. 2003-SU-02356-08, slip op. (C.P. York Dec. 22, 2003). In this regard, the common pleas court noted that it permitted the presentation of evidence at a series of hearings. See Glen-Gery Corp. v. ZHB of Dover, No. 2003-SU-02356-08, slip op. at 3 (C.P. York Dec. 22, 2003). There are no transcripts of such proceedings in the original record as provided, however. Thus, it is impossible to assess the adequacy of Appellant's presentation from the appellate perspective at this juncture.