

DO YOU HAVE A VALID ZONING PERMIT OR JUST A PIECE OF PAPER? **The Pennsylvania Supreme Court Decision in *Luke v. Cataldi***

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In *Luke v. Cataldi*¹ the Pennsylvania Supreme Court has held that a conditional use permit issued by local zoning officials is invalid *ab initio*, if the municipality did not comply with the public notice and hearing requirements of the state's zoning statute. In *Luke* neighbors filed suit challenging a permit months after it was issued, despite the 30-day limitation placed by the statute on all appeals from land use decisions. The neighbors alleged that the municipality failed to provide the public notice and hearing required by state law.² The court determined that if the neighbors' allegations are proved true, the permit would be void *ab initio*.

The court, in *Luke*, applied the rule from *Schadler v. Zoning Hearing Board of Weisenberg Township*,³ where the court concluded that a zoning ordinance enacted in violation of procedures required by state law is void *ab initio*. As a result of *Schadler*, challenges to the validity of a zoning ordinance could be brought after the expiration of the 30-day appeal periods in both state zoning law⁴ and the state's judicial code,⁵ if the statutory procedures for enactment were not followed. *Luke* extended *Schadler's* "void *ab initio* doctrine" to the issuance of permits.

The *Luke* decision affects anyone who needs some form of municipal land use approval in Pennsylvania. In essence, it puts the burden on the private party seeking a permit to make sure that local government complies with the procedural requirements of state law. Moreover, because the court did not limit the application of its decision to future cases, there may be permits issued long ago that, unbeknownst to the permittee, are vulnerable to a "void *ab initio*" challenge. *Luke* also has potential application, beyond zoning law, to any permit issued by a state or local regulatory agency, where state law imposes procedural requirements for issuance.

Background of the *Luke* Case

In April 2000, the land owner and the owner or lessee of mineral rights on a tract in a rural township⁶ applied for conditional use permits to mine coal on the property. The township's planning commission, after holding a hearing, issued a recommendation to approve the application, supported by findings of fact and conclusions of law. At its June 2000 public meeting, the township's board of supervisors approved the applications. Mining started in December 2000.

Seven months later, neighboring landowners filed an action in the Commonwealth Court of Pennsylvania⁷ alleging

that the township violated their due process rights because they had not received notice of the permit until the mining commenced in December 2000. After the Commonwealth Court dismissed the case on unrelated procedural grounds,⁸ the neighbors filed a *mandamus* action in the Court of Common Pleas of Armstrong County alleging that the procedure used to approve the permit did not comply with state law.⁹ The law requires that the township supervisors give public notice of their intention to act on the permit before approval and hold a public hearing before deciding to issue a permit. The township filed preliminary objections, contending that the law barred a challenge to procedural irregularities in the conditional use approval process after the statutory 30-day appeal period expired.¹⁰ The trial court agreed with the township, dismissing the action as untimely.

On appeal, the Commonwealth Court affirmed, but did so before the Supreme Court decided *Schadler*. After deciding *Schadler*, the Supreme Court granted the neighbors' petition for allowance of appeal and remanded to the Commonwealth Court to reevaluate the case in light of *Schadler*. On remand the Commonwealth Court again affirmed the trial court, declining to apply the void *ab initio* doctrine recognized in *Schadler*. The Commonwealth Court majority distinguished a procedural challenge to the validity of a zoning ordinance (a quasi-legislative act) from a procedural challenge to the approval of a conditional use permit (an adjudication). In adhering to the statutory deadlines for appeals of permit approvals, the Commonwealth Court noted the public interest in promoting finality. The Commonwealth Court also reasoned that, even if the municipality failed to give public notice and hold a hearing, its failure would be in effect no different than a deemed approval for failure to act, which also triggers the 30-day appeal period.

The Supreme Court allowed a second appeal and concluded that *Schadler's* void *ab initio* doctrine also applies to conditional land use permits, if statutory procedural requirements were not followed.¹¹ The court acknowledged the difference between legislative enactments and quasi-adjudicatory conditional land use permit approvals, but concluded the distinctions were not as meaningful as the Commonwealth Court determined.¹² The court then conducted a series of comparisons between the adjudicatory process for conditional land use permits and the legislative process for enactment of zoning ordinances and concluded: "[T]he procedural safeguards afforded to neighboring landowners and the general public by

the [zoning statute], grounded in underlying principles of due process, apply with equal force to situations involving either a procedurally defective zoning ordinance or a conditional use permit granted in violation of statutory procedural requirements.”¹³

To support its conclusion, the Supreme Court gave three reasons: (1) “the conditional use sought in the present matter – coal mining, excavation, and preparation – has the potential to affect Appellant’s property rights as substantially as would a new zoning ordinance”;¹⁴ (2) the alleged failure to comply with the notice requirements “may have left Appellants without any practical opportunity to contest the effects of the Supervisors’ action on their property rights, thereby implicating the harm from which the void *ab initio* doctrine was intended to protect citizens”;¹⁵ and (3) although land use appeals must be “filed within 30 days after entry of the decision,” a defective conditional land use approval is no decision at all, and therefore, no appeal period ever commenced.¹⁶ The court also noted that even if a municipality fails to hold a hearing on a conditional land use permit application and a deemed approval would result, the municipality must still give public notice, the absence of which is a procedural defect that renders the “action” void *ab initio*.¹⁷

Recognizing that the trial court and the Commonwealth Court decided the case at the motion-to-dismiss stage, the Supreme Court concluded that “Appellants’ complaint sets forth sufficient facts that, if proven, would render the permits presently at issue void *ab initio*”¹⁸ and remanded for further proceedings.

Impact of The *Luke* decision

Luke diminishes the ability of a landowner or lessee to rely on an unappealed permit approving a land use. Applicants for permits must now make certain not only that they have complied with the substantive provisions of the law, but also that the public body processing the permit complies with procedural requirements. Permits issued prior to *Luke* may need to be reviewed if there is a question of whether mandated procedures were followed.

Although *Luke* dealt with an approval of a permit, it also may have implications for those instances where a decision is deferred or where an application is denied. If no action is taken on an application, a statutory “deemer” may not automatically provide approval, if statutory notice and hearing procedures have not been followed. If an approval is denied, but the process was procedurally deficient, is the a99 denial void *ab initio*? Just to get either a valid deemed approval or an appealable denial, it may be necessary for the applicant to take legal

action to compel compliance with those procedures. Only then might an appeal on substantive issues be ripe, whether the appellant is a protester or the disappointed applicant.

Luke did not explore a number of legal and factual issues that may be faced on remand, such as who the proper parties are (the landowners were not parties), what is the proper form of action and remedy and whether *laches* may apply. *Luke* also did not involve the potential issue of whether the holder of an invalid permit is liable for penalties for changing a land use without authorization. This important precedent seems likely to beget future controversies.

Notes:

¹ *Luke et al. v. Cataldi et al.*, __ Pa. __, __ A.2d __, Docket No. 37 WAP 2006, 2007 Pa. LEXIS 1983 (Sept. 26, 2007).

² The Municipalities Planning Code (“MPC”), Act of July 31, 1968, P.L. 805, as amended, 53 P.S. §§ 10101-11202.

³ *Schadler v. Zoning Hearing Board of Weisenberg Township*, 578 Pa. 177, 850 A.2d 619 (2004).

⁴ Section 909.1(a)(2) of the MPC, 53 P.S. § 10909.1(a)(2).

⁵ Section 5571(c)(5) of the Judicial Code, 42 Pa. C.S. § 5571(c)(5).

⁶ Buffalo Township, Armstrong County, Pennsylvania.

⁷ The Commonwealth Court is an intermediate appellate court that hears appeals from government decisions, but that also has trial-level jurisdiction over actions by or against state government. The court’s specialized jurisdiction may be unique in the nation.

⁸ The court dismissed for lack of original jurisdiction. See 42 Pa. C.S. § 761.

⁹ Sections 603(c)(2) and 913.2(a) of the MPC, 53 P.S. §§ 10603(c)(2) and 10913.2(a).

¹⁰ Section 1002-A of the MPC, 53 P.S. § 11002-A.

¹¹ *Luke*, Slip Op. at 19; 2007 Pa. LEXIS 1983, at *32.

¹² *Id.* at 14; 2007 Pa. LEXIS 1983, at *22-*24.

¹³ *Id.* at 16; 2007 Pa. LEXIS 1983, at *26-*27.

¹⁴ *Id.*

¹⁵ *Id.* at 17; 2007 Pa. LEXIS 1983, at *27.

¹⁶ *Id.* at 17; 2007 Pa. LEXIS 1983, at *28.

¹⁷ *Id.* at 18; 2007 Pa. LEXIS 1983, at *30-31.

¹⁸ *Id.* at 19; 2007 Pa. LEXIS 1983, at *32.