

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Abraham Atiyeh and Pennsylvania	:	
Venture Capital, Inc.,	:	
Petitioners	:	
	:	
v.	:	No. 312 M.D. 2012
	:	
Commonwealth of Pennsylvania,	:	Argued: March 11, 2013
Thomas W. Corbett, in his official	:	
capacity of Governor of the	:	
Commonwealth of Pennsylvania and	:	
Daniel Meuser, Secretary of Revenue	:	
of the Commonwealth of Pennsylvania	:	
and Linda L. Kelly, Attorney General	:	
of the Commonwealth of Pennsylvania	:	
and Jack Wagner, Auditor General of	:	
the Commonwealth of Pennsylvania	:	
and Robert McCord, State Treasurer	:	
of the Commonwealth,	:	
Respondents	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE MARY HANNAH LEAVITT, Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER**

FILED: May 28, 2013

Before this Court in our original jurisdiction are the Preliminary Objections (POs) filed by Respondents¹ and Intervenors² to the “First Amended Petition for

¹ Respondents are: (1) the Commonwealth of Pennsylvania (Commonwealth); (2) Thomas W. Corbett, in his official capacity as Governor of the Commonwealth of Pennsylvania
(Continued...)

Review in the Nature of a Complaint Seeking Declaratory Judgment and Injunctive Relief” (Petition) filed by Abraham Atiyeh and Pennsylvania Venture Capital, Inc. (PVC) (together, Petitioners).³ Petitioners’ Petition challenges the constitutionality of Article XVI-B of the Fiscal Code⁴ (Article XVI-B) on the grounds that it violates the Pennsylvania constitutional prohibition against special legislation and unconstitutionally attempts to bind future legislatures.^{5,6}

(Governor); (3) Daniel Meuser, Secretary of Revenue of the Commonwealth of Pennsylvania (Secretary of Revenue); (4) Kathleen G. Kane, Attorney General of the Commonwealth of Pennsylvania (Attorney General); (5) Eugene A. DePasquale, Auditor General of the Commonwealth of Pennsylvania (Auditor General); and (6) Robert McCord, State Treasurer of the Commonwealth of Pennsylvania (State Treasurer). Pursuant to Rule 502 of the Pennsylvania Rules of Appellate Procedure, Kathleen G. Kane and Eugene A. DePasquale are substituted for Linda L. Kelly and Jack Wagner in this matter.

² Intervenor are the City of Allentown, the Allentown Commercial and Industrial Development Authority and the Allentown Neighborhood Improvement Zone Development Authority. This Court granted their unopposed application to intervene on June 8, 2012.

³ On March 27, 2013, the parties filed an “Amended Application to Approve Stipulation of Discontinuance” (Amended Application) with an attached “Stipulation of Discontinuance.” Therein, Petitioners have agreed to voluntarily discontinue, with prejudice, this matter as to the Commonwealth, the Governor, the Attorney General and the Auditor General. The Stipulation of Discontinuance further provides that the State Treasurer and the Secretary of Revenue will remain as Respondents and the City of Allentown, the Allentown Commercial and Industrial Development Authority and the Allentown Neighborhood Improvement Zone Development Authority will remain as Intervenors. We will grant the Amended Application and approve the parties’ Stipulation of Discontinuance.

⁴ Sections 1601-B – 1608-B of the Act of April 9, 1929, P.L. 343, added by Section 3 of the Act of October 9, 2009, P.L. 537, as amended, 72 P.S. §§ 1601-B – 1608-B. Article XVI-B of the Fiscal Code is titled “Borrowing for Capital Facilities.”

⁵ Petitioners initially filed a petition for review with this Court on April 23, 2012 to which Respondents and Intervenors filed preliminary objections. After Article XVI-B was amended by Section 4 of the Act of July 2, 2012, P.L. 823 (Act 87 of 2012), the Commonwealth, the Governor and the Secretary of Revenue filed an Application for Stay, which this Court granted. We further directed Petitioners to either discontinue this matter or file a motion to lift
(Continued...)

Article XVI-B relates to neighborhood improvement zones⁷ (NIZ) within a third class city⁸ and provides for borrowing by a contracting authority⁹ to raise revenue for economic development or to finance the construction of sports facilities within the NIZ. 72 P.S. §§ 1601-B-1608-B. When a NIZ is designated, a special fund for the benefit of each contracting authority is established through the

the stay by September 7, 2012. Petitioners' timely motion to lift the stay was granted. In addition, Petitioners were granted leave to file an amended petition for review and Respondents' and Intervenors' preliminary objections were stricken. Petitioners filed their amended petition on October 12, 2012.

⁶ Two associated cases were discontinued and withdrawn by the petitioners as being moot after Article XVI-B was amended by Act 87 of 2012. See Hanover Township, et. al v. Commonwealth, et. al (Pa. Cmwlth., 281 M.D. 2012, Discontinued August 24, 2012) and Borough of Catasauqua, et. al v. Commonwealth, et. al (Pa. Cmwlth., 360 M.D. 2012, Discontinued September 5, 2012).

⁷ "Neighborhood improvement zone" is defined as: "[a] neighborhood improvement zone designated by the contracting authority for the purposes of neighborhood improvement and development within a city." Section 1602-B of Article XVI-B, 72 P.S. § 1602-B.

⁸ "City" is defined as: "[a] city of the third class with, on the date of the designation of a neighborhood improvement zone by the contracting authority, a population of at least 106,000, based on the most recent Federal decennial census." Id. Prior to Act 87 of 2012, "city" was defined in Section 1602-B as "[a] city of the third class with, on the effective date of this section, a population of at least 106,000 and not more than 107,000, based on the 2000 Federal decennial census."

⁹ "Contracting authority" is defined as:

An authority created under 53 Pa. C.S. Ch. 56 (relating to municipal authorities) for the purpose of designating a neighborhood improvement zone and constructing a facility or other authority created under the laws of this Commonwealth which is eligible to apply for and receive redevelopment assistance capital grants under Chapter 3 of the act of February 9, 1999 (P.L. 1, No. 1), known as the Capital Facilities Debt Enabling Act.

72 P.S. § 1602-B.

State Treasurer, which is funded by tax revenues collected or withheld from qualified businesses¹⁰ located, or partially located, within a NIZ. Id. Section 1607-B sets forth the “Commonwealth pledges” and provides:

If and to the extent that the contracting authority pledges amounts required to be transferred to the fund of the contracting authority under section 1604-B for the payment of bonds issued by the contracting authority, until all bonds secured by the pledge of the contracting authority, together with the interest on the bonds, are fully paid or provided for, the Commonwealth pledges to and agrees with any person, firm, corporation or government agency, whether in this Commonwealth or elsewhere, and to and with any Federal agency subscribing to or acquiring the bonds issued by the contracting authority that the Commonwealth itself will not, nor will it authorize any government entity to, abolish or reduce the size of the neighborhood improvement zone; to amend or repeal section 1604-B(a.1), (b) or (d); to limit or alter the rights vested in the contracting authority in a manner inconsistent with the obligations of the contracting authority with respect to the bonds issued by the contracting authority; or to otherwise impair revenues to be paid under this article to the contracting authority necessary to pay debt service on bonds. Nothing in this section shall limit the authority of the Commonwealth or any government entity to change the rate, tax bases or any subject of any specific tax or repealing or enacting any tax.

72 P.S. § 1607-B.

¹⁰ “Qualified business” is defined as:

An entity authorized to conduct business in this Commonwealth which is located or partially located within a neighborhood improvement zone and is engaged in the active conduct of a trade or business for a taxable year. An agent, broker or representative of a business shall not be considered to be in the active conduct of trade of business for the business.

Id.

Pursuant to the allegations of the Petition, the City of Allentown, with a population of at least 106,000, is the only third class city in the Commonwealth that meets the definition of “city” as set forth in Article XVI-B. (Petition ¶¶ 2, 6.) “Allentown, acting with and through the Allentown Economic Development Corporation or the Allentown Commercial and Industrial Development Authority as a contracting authority, has created a development zone in Allentown pursuant to Article XVI-B.” (Petition ¶ 2.)

Petitioners allege in Count I of the Petition that Article XVI-B is special legislation that violates Article III, Section 32¹¹ of the Pennsylvania Constitution because Allentown is the only third class city out of the 53 located in the Commonwealth that meets the definition of “city.” (Petition ¶¶ 41-52.) No other third class city will meet the definition of “city” until at least the 2020 Federal decennial census. (Petition ¶ 28.) Therefore, Petitioners aver, as the only city meeting the definition of “city,” “Allentown is the sole and exclusive beneficiary under Article XVI-B.” (Petition ¶ 47.) “Article XVI-B produces a purely local result only” and “by its terms, creates a class with a single member.” (Petition ¶¶ 50-51.) “Legislation creating a municipal class of one member that is closed, or substantially closed, to future membership is *per se* unconstitutional.” (Petition ¶ 52 (citing West Mifflin Area School District v. Zahorchak, 607 Pa. 153, 4 A.3d 1042 (2010).)

¹¹ Petitioners cite to Section 7 of the Pennsylvania Constitution; however, the correct Section is 32. Article III, Section 32 prohibits the General Assembly from passing a “local or special law in any case which has been or can be provided for by general law.” Pa. Const. art. III, § 32.

Petitioners further allege in Count II that Section 1607-B of Article XVI-B violates Article I, Section 17¹² of the Pennsylvania Constitution by unconstitutionally binding future legislatures:

through a Commonwealth “pledge” that the Commonwealth will not, nor will it authorize a government entity to: (1) abolish or reduce the size of a NIZ; (2) amend or repeal certain sections of Article XVI-B; or (3) limit or alter the rights given to a contracting authority under Article XVI-B with respect to bonds issued to fund development programs within an NIZ; or (4) otherwise impair revenues paid under Article XVI-B to pay debt service on bonds.

(Petition ¶ 54.) Petitioners aver that “Article XVI-B, insofar as it purports to prohibit future legislatures from making such laws as are determined to be necessary and appropriate with respect to Article XVI-B, is unconstitutional.”

(Petition ¶ 56.)

Petitioner Atiyeh¹³ alleges that he “has standing to bring this action as an individual who does business, holds ownership interests in businesses, owns and develops property and pays taxes within Allentown, the Lehigh Valley and the Commonwealth of Pennsylvania, and his interests have been and will be substantially and detrimentally affected by” Article XVI-B. (Petition ¶ 37.) Atiyeh alleges that he is “affiliated with a business entity which holds a ten-year leasehold interest in a building located” in Allentown. (Petition ¶ 33.) Atiyeh

¹² Article I, Section 17 of the Pennsylvania Constitution, states that “[n]o *ex post facto* law, nor any law impairing the obligation of contracts . . . shall be passed.” Pa. Const. art. I, § 17.

¹³ Atiyeh, who is domiciled in Bethlehem, Pennsylvania, owns real property in Allentown, Bethlehem and Easton. (Petition ¶ 5.)

avers that this is “one of the properties that is the subject of a proposal to develop a 1,00,100 [sic] square foot professional sports arena, hotel, office and entertainment complex . . . within the NIZ which has been established in Allentown, and funded pursuant to the challenged legislation.” (Petition ¶ 33.) Atiyeh alleges that he “is also affiliated with another business entity which owns property located . . . within said NIZ, in very close proximity to the proposed arena, hotel, office and entertainment complex.” (Petition ¶ 34.) Atiyeh avers that “[b]oth of these properties will be directly substantially and adversely impacted by the development proposed pursuant to the challenged legislation.” (Petition ¶ 35.)

PVC¹⁴ alleges it has standing “as an entity which does business, owns and develops property and pays taxes within Allentown, the Lehigh Valley and the Commonwealth of Pennsylvania, and its interests have been and will be substantially and detrimentally affected by” Article XVI-B. (Petition ¶ 36.) Petitioners further aver that they have standing because Article XVI-B “would otherwise go unchallenged as others directly and immediately affected by the complained-of matter are beneficially affected and not inclined to challenge this action; because judicial relief is appropriate; because redress through other channels is unavailable; and because no other persons are better suited to assert the claim.” (Petition ¶ 38.)

¹⁴ Petitioner PVC is a Pennsylvania corporation with a mailing address in Whitehall, Pennsylvania; PVC is in the business of owning, maintaining, operating, and developing real estate throughout the Lehigh Valley. (Petition ¶ 10.)

Petitioners seek immediate injunctive relief because the harm to them “is irreparable and they do not have an adequate remedy at law.” (Petition ¶ 57.) Petitioners contend that immediate relief is necessary and the implementation of Article XVI-B should be stayed because, if bonds are issued pursuant to Article XVI-B, their “ability to challenge Article XVI-B [will] be seriously and permanently affected by the reliance of third party purchasers.” (Petition ¶ 58.) Petitioners request that this Court issue an order declaring that Article XVI-B, and the amendment thereto, have been enacted unconstitutionally.

Respondents’ and Intervenors’ POs to the Petition raise several issues, the first of which is whether Petitioners lack standing to bring this action.¹⁵ Intervenors argue that Petitioners lack standing because they have failed to allege any negative impact in a real and direct fashion and, as taxpayers, have failed to show a substantial, direct, and immediate interest in the subject matter of this action as their interests do not surpass the common interest of all citizens.¹⁶ While Atiyeh alleges that he is affiliated with business entities that own real properties within the NIZ and that such properties will be affected by development contemplated by Article XVI-B, those business entities are not owned by Petitioners; thus, the alleged harm to them cannot support Atiyeh’s standing. Intervenors argue that anyone who actually owns property within or adjacent to the

¹⁵ Standing is a threshold requirement. Howard v. Commonwealth, 957 A.2d 332, 335 (Pa. Cmwlth. 2008). A preliminary objection based on standing is proper pursuant to Rule of Civil Procedure 1028(a)(5), Pa. R.C.P. No. 1028(a)(5).

¹⁶ The Secretary of Revenue relies upon the Intervenors’ arguments on this issue.

NIZ would be a person or entity better suited to assert the challenge, not a party who merely claims to be “affiliated” with such entities.

With respect to the allegation set forth in Count II of the Petition that Section 1607-B of Article XVI-B impermissibly binds future legislatures, Intervenor argues, citing Pittsburgh Palisades Park, LLC v. Commonwealth, 585 Pa. 196, 888 A.2d 655 (2005), that it is the legislators, and not Petitioners, who would have standing to bring such an action. Intervenor contends that it is the legislators who are arguably harmed by any limitation of future legislative discretion.

In response, Petitioners argue that they both have a direct, substantial and immediate interest in challenging Article XVI-B because, under this special legislation, development opportunities that would exist in the Lehigh Valley, outside of the Allentown NIZ, are being drawn into the NIZ by the availability of subsidies, depriving Petitioners of valuable business opportunities. Petitioners argue that they also have standing as taxpayers under the test set forth in Application of Biester, 487 Pa. 438, 409 A.2d 848 (1979).

We will first address whether Petitioners have standing under the traditional concept. As explained by our Supreme Court in Pittsburgh Palisades:

The traditional concept of standing focuses on the idea that a person who is not adversely impacted by the matter he seeks to challenge does not have standing to proceed with the court system’s dispute resolution process. See William Penn Parking Garage v. City of Pittsburgh, 464 Pa. 168, 346 A.2d 269, 280-81 (1975) (plurality). The courts in our Commonwealth do not render decisions in the

abstract or offer purely advisory opinions; consistent therewith, the requirement of standing arises from “the principle that judicial intervention is appropriate only when the underlying controversy is real and concrete” City of Philadelphia v. Commonwealth of Pennsylvania, 575 Pa. 542, 838 A.2d 566, 577 (2003).

Stated another way, a controversy is worthy of judicial review only if the individual initiating the legal action has been “aggrieved.” In re Hickson, 573 Pa. 127, 821 A.2d 1238, 1243 (2003); see also City of Philadelphia, 838 A.2d at 577. This principle is based upon the practical reason that unless one has a legally sufficient interest in a matter, that is, is “aggrieved,” the courts cannot be assured that there is a legitimate controversy. In re Hickson, 821 A.2d at 1243; see also City of Philadelphia, 838 A.2d at 577.

With respect to this requirement of being aggrieved, an individual can demonstrate that he is aggrieved if he can establish that he has a substantial, direct, and immediate interest in the outcome of the litigation in order to be deemed to have standing. In re Hickson, 821 A.2d at 1243; City of Philadelphia, 838 A.2d at 577. An interest is “substantial” if it is an interest in the resolution of the challenge which “surpasses the common interest of all citizens in procuring obedience to the law.” In re Hickson, 821 A.2d at 1243. Likewise, a “direct” interest mandates a showing that the matter complained of “caused harm to the party’s interest,” id., i.e., a causal connection between the harm and the violation of law. City of Philadelphia, 838 A.2d at 577. Finally, an interest is “immediate” if the causal connection is not remote or speculative. Id.; see Kuropatwa v. State Farm Ins. Co., 554 Pa. 456, 721 A.2d 1067, 1069 (1998).

The keystone to standing in these terms is that the person must be negatively impacted in some real and direct fashion. If the individual “is not adversely affected in any way by the matter he seeks to challenge[, he] is not ‘aggrieved’ thereby and has no standing to obtain a judicial resolution of his challenge. In particular, it is not sufficient for the person claiming to be ‘aggrieved’ to assert the common interest of all citizens in procuring obedience to the law.” In re Hickson, 821 A.2d at 1243 (quoting Independent State Store Union v. Pennsylvania Liquor Control Board, 495 Pa. 145, 432 A.2d 1375, 1379-80 (1981)).

Pittsburgh Palisades, 585 Pa. at 203-04, 888 A.2d at 659-60. Pursuant to this standard, the allegations of the Petition are not sufficient to confer standing upon Petitioners in the traditional sense. The allegations do not show how Petitioners are negatively impacted in a real and direct fashion by the provisions of Article XVI-B. While Petitioners generally argue that development opportunities that would exist in the Lehigh Valley, outside of the Allentown NIZ, are being drawn into the NIZ by the availability of subsidies, depriving Petitioners of valuable business opportunities, they do not describe any substantial, direct, or immediate interest. Instead, the allegations are conclusory and speculative, merely asserting that Petitioners “will be substantially and detrimentally affected by the challenged legislation” and that certain unnamed businesses, with which Atiyeh is allegedly affiliated, will be adversely impacted by the proposed development.¹⁷ (Petition ¶¶ 33-37.) Thus, the allegations of the Petition lack the specificity necessary to give Petitioners standing as aggrieved parties.

With respect to taxpayer standing based upon Biester, which is an exception to the traditional requirements of standing, our Supreme Court in Pittsburgh Palisades further explained:

The once liberal approach granting individuals standing based upon their interest as taxpayers was rejected by our Court in the seminal decision of Application of Biester, 487 Pa. 438, 409 A.2d 848 (1979), which reinvigorated the traditional requirements of standing that an

¹⁷ As pointed out by Intervenors, the fact that Petitioners are affiliated with business entities that own real properties within the NIZ and that such properties will be affected by development contemplated by Article XVI-B is insufficient to establish standing. Those business entities are not owned by Petitioners; therefore, any alleged harm to those businesses with which Atiyeh is allegedly affiliated cannot, without more, support his standing.

individual must establish an interest in an action that surpasses the common interest of all taxpaying citizens. Id. at 851-52. While Biester curtailed the concept of standing based solely upon taxpayer status, it also recognized that one who was not “aggrieved” so as to satisfy standing requirements might nevertheless be granted standing as a taxpayer if certain preconditions were met.

This exception’s relaxation of the general rules regarding standing and their requirement of a substantial, direct, and immediate interest in the challenge, is policy driven. This policy, as expressed in Biester, revolves around the concept of giving standing to enable the citizenry to challenge governmental action which would otherwise go unchallenged in the courts because of the standing requirement. “Such litigation allows the courts, within the framework of traditional notions of ‘standing,’ to add to the controls over public officials inherent in the elective process the judicial scrutiny of the statutory and constitutional validity of their acts.” Id. at 851 n.5.

Consistent with this policy, five requirements have subsequently emerged as the preconditions necessary to satisfy the Biester exception for taxpayer standing:

- (1) the governmental action would otherwise go unchallenged;
- (2) those directly and immediately affected by the complained of matter are beneficially affected and not inclined to challenge the action;
- (3) judicial relief is appropriate;
- (4) redress through other channels is unavailable; and
- (5) no other persons are better situated to assert the claim.

Consumer Party of Pennsylvania v. Commonwealth, 510 Pa. 158, 507 A.2d 323, 329 (1986) (summarizing Biester taxpayer exception standing requirements).

Pittsburgh Palisades, 585 Pa. at 206-07, 888 A.2d at 661. Here, the Petition simply lists the five established criteria without description or explanation of how Petitioners fall within the Biester taxpayer exception. (Petition ¶ 38.) Therefore, the allegations of the Petition are insufficient to confer taxpayer standing upon Petitioners under the Biester standard.

Accordingly, we are constrained to sustain the POs challenging Petitioners' standing to bring this action and dismiss the Petition with leave to amend in accord with Farmland Industries, Inc. v. Penn Dairies, Inc., 473 A.2d 730, 734-35 (Pa. Cmwlth. 1984) (affording Petitioner leave to amend "[b]ecause the deficiency in the pleading[, which was a lack of specificity necessary to confer standing under the established criteria,] is potentially subject to correction by amendment"). See also Jones v. City of Philadelphia, 893 A.2d 837, 846 (Pa. Cmwlth 2006) ("If it is possible that the pleading can be cured by amendment, a court 'must give the pleader an opportunity to file an amended complaint This is not a matter of discretion with the court, but rather a positive duty.'") (quoting Framlau Corporation v. County of Delaware, 299 A.2d 335, 337 (Pa. Super. 1972)).

For the foregoing reasons, Intervenors' and Respondents' POs based upon lack of Petitioners' standing are sustained and the Petition is dismissed; however, Petitioners are afforded leave to amend the Petition within thirty days.¹⁸

RENÉE COHN JUBELIRER, Judge

Judge Brobson did not participate in the decision in this case.

¹⁸ Based upon our disposition of this matter, we need not address the remaining POs.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Abraham Atiyeh and Pennsylvania	:	
Venture Capital, Inc.,	:	
Petitioners	:	
	:	
v.	:	No. 312 M.D. 2012
	:	
Commonwealth of Pennsylvania,	:	
Thomas W. Corbett, in his official	:	
capacity of Governor of the	:	
Commonwealth of Pennsylvania and	:	
Daniel Meuser, Secretary of Revenue	:	
of the Commonwealth of Pennsylvania	:	
and Linda L. Kelly, Attorney General	:	
of the Commonwealth of Pennsylvania	:	
and Jack Wagner, Auditor General of	:	
the Commonwealth of Pennsylvania	:	
and Robert McCord, State Treasurer	:	
of the Commonwealth,	:	
Respondents	:	

ORDER

NOW, May 28, 2013, the Amended Application to Approve Stipulation of Discontinuance is **GRANTED**, the Stipulation of Discontinuance is **APPROVED** and the Commonwealth of Pennsylvania, Thomas W. Corbett, in his official capacity of Governor of the Commonwealth of Pennsylvania, Kathleen G. Kane, Attorney General of the Commonwealth of Pennsylvania, and Eugene A. DePasquale, Auditor General of the Commonwealth of Pennsylvania are hereby **DISMISSED** as Respondents in this matter. It is further **ORDERED** that the Preliminary Objections filed by Respondent Daniel Meuser, Secretary of Revenue of the Commonwealth of Pennsylvania, and Intervenors, the City of Allentown, the Allentown Commercial and

Industrial Development Authority and the Allentown Neighborhood Improvement Zone Development Authority, objecting to the standing of Petitioners are **SUSTAINED**, and the First Amended Petition for Review in the Nature of a Complaint Seeking Declaratory Judgment and Injunctive Relief is **DISMISSED WITH LEAVE GRANTED** to file an amended Petition for Review within thirty (30) days. The Preliminary Objections filed by Robert McCord, State Treasurer of the Commonwealth, are **DISMISSED AS MOOT**.

RENÉE COHN JUBELIRER, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Abraham Atiyeh and Pennsylvania :
Venture Capital, Inc., :
Petitioners :
 :
v. : No. 312 M.D. 2012
 : Argued: March 11, 2013
Commonwealth of Pennsylvania, :
Thomas W. Corbett, in his official :
capacity of Governor of the :
Commonwealth of Pennsylvania :
and Daniel Meuser, Secretary of :
Revenue of the Commonwealth of :
Pennsylvania and Linda L. Kelly, :
Attorney General of the Commonwealth :
of Pennsylvania and Jack Wagner, :
Auditor General of the Commonwealth :
of Pennsylvania and Robert McCord, :
State Treasurer of the Commonwealth, :
Respondents :

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE MARY HANNAH LEAVITT, Judge

OPINION NOT REPORTED

DISSENTING OPINION
BY JUDGE LEAVITT

FILED: May 28, 2013

Respectfully, I dissent to one part of the panel's decision. Specifically, I believe that Abraham Atiyeh and Pennsylvania Venture Capital, Inc. (Petitioners) have made allegations in their petition for review sufficient to confer taxpayer standing on them under the standard announced in *Application of Biester*, 487 Pa. 438, 409 A.2d 848 (1979), *i.e.*, that they are taxpayers and citizens. Further, I believe taxpayer/citizens have standing to challenge a statute that

purports to bind the will of future legislative bodies in violation of the Pennsylvania Constitution.

At issue is Article XVI-B of the Fiscal Code.¹ Petitioners allege that Section 1607-B of the Fiscal Code unconstitutionally prohibits future legislatures from making amendments to Article XVI-B of the Fiscal Code. Section 1607-B, entitled “Commonwealth Pledges,” states, in relevant part, as follows:

[T]he Commonwealth pledges to and agrees with any person, firm, corporation or government agency, whether in this Commonwealth or elsewhere, and to and with any federal agency subscribing to or acquiring the bonds issued by the contracting authority that the Commonwealth itself will not, nor will it authorize any government entity to, abolish or reduce the size of the neighborhood improvement zone; to amend or repeal Section 1604-B(A.1), (B) or (D); to limit or alter the rights vested in the contracting authority in a manner inconsistent with the obligations of the contracting authority with respect to the bonds issued by the contracting authority; or to otherwise impair revenues to be paid under this article to the contracting authority necessary to pay debt service on bonds.

72 P.S. §1607-B (emphasis added). Petitioners assert that this “pledge” not to amend Section 1604-B (A.1), (B) or (D) of the Fiscal Code is unconstitutional.

The legislature’s “pledge” not to amend or repeal Section 1604-B of the Fiscal Code is extraordinary because it is express and unequivocal. More typical is a contract or statute that arguably erects a barrier to legislative action by future legislatures.

In an early case, canal commissioners, creditors and taxpayers challenged the Act of May 16, 1857, which provided, *inter alia*, for the sale of

¹ Act of April 9, 1929, P.L. 343, *as amended*, 72 P.S. §§1601-B – 1608-B, added by Section 3 of the Act of October 9, 2009, P.L. 537, *as amended*.

public land with the proviso that should the Pennsylvania Railroad become the winning bidder on that sale, it would be excused from paying certain taxes to the Commonwealth for all time. *Mott v. The Pennsylvania Railroad Company*, 30 Pa. 9 (1858). The Pennsylvania Supreme Court affirmed the statute's sale of public land but held unconstitutional the proviso because it eliminated the legislature's ability to amend the Commonwealth's taxing laws. The Court explained:

And no one legislature can, by its own act, disarm their successors of any of the powers or rights of sovereignty confided by the people to the legislative body, unless they are authorized to do so under the constitution under which they are elected.

Id. at 9. Because there was no provision in Pennsylvania's Constitution authorizing a legislative body to "disarm" its successor, the challenged proviso in the Act of May 16, 1857, was held to be unconstitutional.

More recently, this principle has been tied to Article II, Section 1 of the Pennsylvania Constitution, which vests all legislative power in a General Assembly.² Legislative power is the power to make, alter and repeal laws. *Mt. Lebanon v. County Board of Elections of the County of Allegheny*, 470 Pa. 317, 320, 368 A.2d 648, 649 (1977). Accordingly, no legislative body may take action which binds its successors, that is to say, cannot "perpetuate its policies beyond its term of office [because that] would frustrate the ability of the citizenry to exercise

² It states as follows:

The legislative power of this Commonwealth shall be vested in a General Assembly, which shall consist of a Senate and a House of Representatives.
PA. CONST. art. II, §1. In addition, Article I, Section 17 of the Pennsylvania Constitution prohibits the legislature from passing "any law impairing the obligation of contracts, or making irrevocable any grant of special privileges or immunities." PA. CONST. art I, §17. The parties do not agree on whether Section 1607-B of the Fiscal Code involves contract interference.

its will at the ballot box.” *Lobolito, Inc. v. North Pocono School District*, 722 A.2d 249, 252 (Pa. Cmwlth. 1998), *rev’d in part on other grounds*, 562 Pa. 380, 755 A.2d 1287 (2000).³

Petitioners assert that as taxpayers and citizens, they have an interest that gives them standing to challenge Section 1607-B of the Fiscal Code as impermissibly “perpetuating” its stated policy “beyond the term of office” of those who voted it into law. *Lobolito*, 722 A.2d at 252. Under traditional standing precepts, there must be a “legitimate controversy” for an action to proceed. *In re Hickson*, 573 Pa. 127, 136, 821 A.2d 1238, 1243 (2003). A legitimate controversy exists if the individual bringing the legal action is “aggrieved,” *i.e.*, has a sufficient interest in the matter. *Id.* at 135-36, 821 A.2d at 1243. A litigant is “aggrieved” if he has “a substantial, direct and immediate interest in the outcome of the litigation.” *Id.* at 136, 821 A.2d at 1243.

There is, however, an exception to these traditional standing requirements. In *Biester*, the Pennsylvania Supreme Court held that a citizen taxpayer who is not aggrieved in the classic sense has standing to bring a suit by virtue of his taxpayer status if certain conditions are present. They are:

- (1) the governmental action would otherwise go unchallenged;
- (2) those directly and immediately affected by the complained of matter are beneficially affected and not inclined to challenge the action;
- (3) judicial relief is appropriate;

³ The inalienable power doctrine applies with equal force to officers in the executive branch. *See, e.g., State Street Bank & Trust Co. v. Commonwealth Treasury Department*, 712 A.2d 811 (Pa. Cmwlth. 1998) (holding that state treasurer could disavow custody and safekeeping services agreements executed by her predecessor).

- (4) redress through other channels is unavailable; and
- (5) no other persons are better situated to assert the claim.

Pittsburgh Palisades Park, LLC v. Commonwealth, 585 Pa. 196, 207, 888 A.2d 655, 662 (2005) (citing *Consumer Party of Pennsylvania v. Commonwealth*, 510 Pa. 158, 170, 507 A.2d 323, 329 (1986)).

The majority holds that Petitioners' factual averments are insufficient to establish *Biester* standing because they allege that they satisfy each of the *Biester* criteria but do not explain how they do so. However, there are no facts to allege for the *Biester* standing test except that one is, in fact, a citizen and taxpayer, and Petitioners have so alleged. First Amended Petition for Review ¶¶36-37. The remaining criteria of the *Biester* standing test are legal argument to be made from the language of the challenged statute. I believe, therefore, that the petition for review contains factual averments sufficient to allege standing under *Biester* principles.

The Respondents contend that only legislators have standing to challenge Article XVI-B. In support, they cite *Pittsburgh Palisades Park*, 585 Pa. 196, 888 A.2d 655 (Saylor, J., dissenting). This case does not stand for the proposition that only legislators may bring a claim that a statute that binds future legislative bodies violates the Pennsylvania Constitution.

In *Pittsburgh Palisades Park*, putative applicants for slot machine gaming licenses challenged Section 1209 of the Pennsylvania Race Horse Development and Gaming Act, 4 Pa. C.S. §1209,⁴ for the stated reason that it

⁴ Specifically, Section 1209(f) states as follows:

(f) Return of slot machine license fee.—

(1) *The entire one-time slot machine license fee of \$50,000,000 for each Category 1 and Category 2 slot machine license shall be returned to*

(Footnote continued on the next page . . .)

bound future legislative bodies in violation of the Pennsylvania Constitution. Section 1209 provided that the slot machine license fee of \$50,000,000 would be returned to the licensee if, in the next five years, the legislature decided to amend the Gaming Act to increase the number of authorized slot machines in Pennsylvania. An increase in lawful slot machines would, presumably, diminish the monopoly held by the person that paid \$50,000,000 for a license. Applicants argued that Section 1209 operated as an unconstitutional drag on the ability of the General Assembly to amend the Gaming Act because it would be loathe to drain the Treasury by such large refunds.

The Supreme Court held that applicants did not have standing to bring this challenge because they were not aggrieved by Section 1209 but, more likely, stood to benefit by the refund. The Court rejected applicants' claim for *Biester* standing, observing, first, that the constitutionality of Section 1209 would not otherwise go unchallenged. Indeed, the Court noted that challenges to the Gaming Act had been plentiful, pointing to *Pennsylvanians Against Gambling Expansion Fund, Inc. v. Commonwealth*, 583 Pa. 275, 877 A.2d 383 (2005) (wherein five members of the General Assembly, seven organizations, a Lancaster County Commissioner and five individuals challenged the constitutionality of the Gaming Act). In the context of considering yet another challenge to the Gaming Act, the

(continued . . .)

each licensee *in the event* section 1201 (relating to Pennsylvania Gaming Control Board established), 1202 (relating to general and specific powers) or 1307 (*relating to number of slot machine licenses*) is amended or otherwise altered by an act of the General Assembly, within five years following the date established by the board as the deadline for the initial submission of Category 1 and Category 2 slot machine license applications

4 Pa. C.S. §1209(f) (emphasis added).

Supreme Court noted that legislators “would seemingly be better suited to bring such a challenge [to Section 1209] and have a greater interest in doing so.” *Pittsburgh Palisades Park*, 585 Pa. at 208, 888 A.2d at 662.

Biester standing ensures that the constitutionality of a statute will not escape judicial review. In *Pittsburgh Palisades Park*, the Supreme Court acknowledged the standing of legislators to challenge a statute that limited their ability to legislate. Nevertheless, the Supreme Court specifically declined to create “a special category of standing for legislators.” *Id.* In his dissenting opinion, Justice Saylor also cautioned against separating legislator standing from taxpayer/citizen standing. In *Mott*, our Supreme Court expressly acknowledged the interest of taxpayers in legislation that limited the ability of future legislatures to amend the tax laws. *Mott*, 30 Pa. at 14 (noting that “tax-payers whose burthens will be necessarily increased by releasing from taxation [others] ... have also an interest in the question and, of course, have a right to be heard.”). Legislation that binds future legislatures adversely affects taxpayer citizens because it deprives them of their right to petition their representatives for a change in law. Indeed, legislators do not represent themselves but their citizen constituents.

I would overrule the preliminary objection to Petitioners’ assertion of *Biester* standing with respect to the claim that Article XVI-B is unconstitutional because it impermissibly binds future legislatures.

MARY HANNAH LEAVITT, Judge