[J-28-2016] [MO:Wecht, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

MOUNT AIRY # 1, LLC, Petitioner v. PENNSYLVANIA DEPARTMENT OF REVENUE AND EILEEN MCNULTY, IN HER OFFICIAL CAPACITY AS ACTING SECRETARY OF THE PENNSYLVANIA DEPARTMENT OF REVENUE, Respondents	:	No. 34 EM 2015 ARGUED: March 8, 2016

CONCURRING AND DISSENTING OPINION

JUSTICE TODD **FILED: September 28, 2016**

In my view, Section 1403(c)(3) of the Pennsylvania Race Horse Development and Gaming Act, 4 Pa.C.S. § 1101-1904 (the "Gaming Act"), violates the Uniformity Clause of the Pennsylvania Constitution. Accordingly, I join the majority's reasoning and conclusion that Section 1403(c)(3) — because it creates a variable-rate tax, with one rate for non-Philadelphia casinos with gross terminal revenue ("GTR") below $500 million, and another for non-Philadelphia casinos with GTR greater than $500 million — is constitutionally infirm. See Majority Opinion at 4-11.

With respect to the issue of severability, however, I respectfully dissent. In my view, the majority has engaged in an unnecessarily limited severing of the Gaming Act — that is, they have unnecessarily stricken provisions of the legislation — and, as a result, have placed numerous counties and municipalities in a state of financial

uncertainty. Application of both the General Assembly's general and specific standards regarding severance leads me to conclude that the violation of the Uniformity Clause manifest in this matter requires the striking of only subsection (c)(3) of Section 1403, thus preserving the remainder of that section. My reasoning follows.

Severance permits a court, which finds a provision of legislation to be constitutionally infirm, to nevertheless maintain the integrity and functionality of some or all of the remaining provisions of the legislation. In Pennsylvania, the legislature, through the canons of statutory construction, has given guidance to the courts as to how it desires severability to operate. The General Assembly has created a presumption of severability, and directed courts to uphold the remainder of an infirm statute "unless the court finds that the valid provisions of the statute are so essentially and inseparably connected with, and so depend upon, the void provision . . . that it cannot be presumed the General Assembly would have enacted the remaining valid provisions without the void one; or unless the court finds that the remaining valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent." 1 Pa.C.S. § 1925.

Even more definitively, the General Assembly has set forth an express, and arguably more exacting, severance guideline for courts to follow when considering the invalidity of provisions of the Gaming Act. Indeed, except for certain core statutory provisions, the legislature has dictated that all provisions of the Gaming Act "are severable," and that an infirm provision "shall not affect other provisions or applications of this part which can be given effect without the invalid provision or application." 4 Pa.C.S. § 1902(a). Thus, in general, and most emphatically with respect to the Gaming Act, the legislature has expressed its intent that the judiciary is to give maximum effect to non-infirm provisions, and act with a scalpel, rather than with an ax.

Applying these standards to the Uniformity Clause challenge before us, while I agree that subsection (c)(3) of Section 1403 is constitutionally infirm, in my view, all of Section 1403's remaining provisions are capable of severance and, thus, being given effect. Initially, as noted by the majority, only the constitutionality of subsection (c)(3), concerning local share assessments of municipalities, is at issue in this matter. Its sister provision, subsection (c)(2), concerning county assessments, is not challenged. In my view, this unchallenged county assessment provision can be severed from the infirm provision concerning municipalities, and be given independent effect.

Specifically, while both provisions fall under the umbrella of transfers and disbursements of local share assessments, subsection (c)(2) stands as a parallel, and save one subclause, independent provision from subsection (c)(3). Indeed, these provisions are characterized by their specific and distinctive language. Significantly, there is only a single cross-reference to subsection (c)(3) found in (c)(2), and that connection, while outwardly giving a certain degree of credence to the idea of interrelatedness, would merely be rendered inoperative by the striking of subsection (c)(3). See 4 Pa.C.S. § 1403(c)(2)(iii)(F)(III) (for Category 2 licensees, providing for distribution to counties of the fifth class of any revenue required to be transferred under paragraph (c)(3)(v)).[1] [2] Subsection (c)(2) is but one portion of the local share

[1] Related to this single provision, subsection (c)(2)(viii) provides that "[i]f any provision of this paragraph [i.e., subsection (c)(2)] is found to be unenforceable for any reason, the distribution provided for in the unenforceable provision shall be made to the county in which the licensed facility is located for the purposes of grants to municipalities in that county, including municipal grants as specified in subparagraph(v)." As styled, this savings clause is not triggered by the striking of (c)(3), as subsection (c)(2)(iii)(F)(III), noted above, would merely be rendered inoperative, as a practical matter, by the striking of (c)(3), and not made unenforceable. Similarly, the corresponding savings clause for subsection (c)(3) — subsection (c)(3)(xiii) — while implicated, would not, as styled, save any provisions due to the taxing scheme rendering infirm the entirety of subsection (c)(3).

assessment, and may be uncoupled from the municipal portion of that assessment in subsection (c)(3) stricken today. Thus, applying the applicable severance standards, subsection (c)(2) can be given effect without the invalid subsection (c)(3) and is not essentially and inseparably connected with that infirm subsection. While the Gaming Act's funding and taxing provisions at issue are no doubt complex, it cannot be presumed the General Assembly would not have enacted subsection (c)(2) without subsection (c)(3). Thus, contrary to the majority and concurrence, I find subsection (c)(2) to be severable.

Further, in preserving subsection (c)(2), I find that the other related provisions of Section 1403 are likewise severable. Specifically, subsection (a) merely establishes the State Gaming Fund; it is wholly unaffected by subsection (c)(3), and assuredly would have been enacted without subsection (c)(3). Similarly, subsection (b) sets a daily tax of 34% from daily GTR and a local share assessment as provided in subsection (c). While "local share assessment" is not defined, as indicated above, it includes assessments from licensees for distribution to *both* counties and municipalities. Further, subsection (b) speaks of funds that are owed to the Commonwealth, a county, or a municipality, being held in trust by the licensed gaming entity. Thus, the mere striking of subsection (c)(3) regarding the municipal portion of the local share assessment does not render nugatory the local share assessment for counties, or the

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(…continued)

[2] While subsection (c)(2) only contains a single cross-reference to subsection (c)(3), subsection (c)(3) contains numerous references regarding the distribution of remaining funds pursuant to subsection (c)(2). See, e.g., 4 Pa.C.S. § 1403(c)(3)(ii), (iii), (iv), (v), (vi), (vii), (viii). While this understandably supports the majority's conclusion that (c)(2) and (c)(3) are so interrelated that they both must be stricken, given the severance standards, and in particular the more demanding severance requirements set forth in the Gaming Act, we are tasked to analyze the severance question with exacting scrutiny. Thus, I find subsection (c)(2) is not so intertwined with (c)(3) that it cannot be severed.

holding of any funds in trust; it merely renders the subsection inoperative with respect to hosting municipalities. Again, subsection (b) can be given effect without subsection (c)(3) and it cannot be presumed that the General Assembly would not have enacted subsection (b) without subsection (c)(3). In addition, subsection (c)(1) merely provides for the transfer of slot machine tax and local share assessments imposed by subsection (b) to the State Gaming Fund. There is no basis to conclude this transfer cannot operate without the municipal portion of the local share assessment.

The remaining subsections are likewise severable. Subsection (d), which defines the Consumer Price Index, is wholly operative without subsection (c)(3), as it is utilized in subsection (c)(2) for defining distributions among the counties. Similarly, subsection (e) speaks to reporting requirements and information-providing obligations regarding distributions of local share assessments, which applies to counties and municipalities; thus, this subsection remains operative, albeit there would be nothing to report with respect to municipalities governed by subsection (c)(3). Subsection (f) prohibits certain compensable lobbying activities. It can remain wholly operative without (c)(3). Even though it recognizes an exception for certain qualified persons preparing grant applications for funds for counties and municipalities, that exception is meaningful because funding flows to both counties and municipalities in (c)(2).

Finally, as an aside, by engaging in broad severance, and keeping operative as many provisions of the Gaming Act as possible as envisioned by the General Assembly, our Court would be acting consistent with the public policy goals of that Act, which include providing a significant source of revenue to the Commonwealth, 4 Pa.C.S. § 1102(3), providing broad economic opportunities to the citizens of the Commonwealth, 4 Pa.C.S. § 1102(5), and considering the public interest of the citizens of the Commonwealth in any decision or order with respect to the Gaming Act. 4 Pa.C.S. §

1102(10); cf. Pennsylvanians Against Gambling Expansion Fund, Inc. v. Com., 877 A.2d 383, 403 n.14 (Pa. 2005) (acknowledging, as a separate matter, significant policy justifications against severance on a finding of a violation of the single-subject provision in circumstances where logrolling may have occurred). Indeed, the majority's striking of Section 1403(c)(2) (in addition to its proper striking of subsection (c)(3)) will, in my view, unnecessarily throw numerous counties and municipalities, already facing difficult budgetary constraints, as well as the Commonwealth itself, into a state of further financial uncertainty.

Thus, for the above reasons, I join the Majority Opinion in part, and respectfully dissent in part.