IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

BOARD OF REVISION OF TAXES, CITY OF PHILADELPHIA, acting by and through its individual members, Charlesretta Meade, Chair, Harvey M. Levin, Vice-Chairman, Robert N.C. Nix III, Secretary; Honorable Russell M. Nigro; Honorable Alan K. Silberstein, Applicant v. CITY OF PHILADELPHIA, Respondent	: : : : : : : : : : : : : : : : :	32 EM 2010

ANSWER TO THE BOARD OF REVISION OF TAXES' APPLICATION FOR THE EXERCISE OF ORIGINAL JURISDICTION AND KING'S BENCH POWER

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Suggested answer: Yes.

2. Should this Court dismiss this suit as unripe because the legislation about which the BRT complains has not yet been approved?

Suggested answer: Yes.

3. Should this Court dismiss this suit for lack of standing because a suit challenging the right of public officeholders to hold office must be brought in quo warranto by the Attorney General or the District Attorney?

Suggested answer: Yes.

4. Should this Court deny the request to enjoin transfer of the BRT's appellate function to a new Board of Property Assessment Appeals, where the General Assembly authorized the City to abolish the BRT "with respect to the making of assessments . . . as provided by act of Assembly," and where "the making of assessments" includes the entirety of the BRT's responsibilities, viz., the initial valuation of properties and the conduct of assessment appeals?

Suggested answer: Yes.

5. If the Court finds against the City on each of the foregoing questions, should the Court, at most, sever only that portion of the challenged ordinance that transfers the BRT's appellate function, but let stand that portion of the ordinance that transfers the BRT's initial valuation function?

Suggested answer: Yes.

STATEMENT OF THE CASE

The Board of Revision of Taxes ("BRT") assesses Philadelphia property values for real estate tax purposes. Act of June 27, 1939, P.L. 1199, § 4, 72 P.S. § 5341.13. It consists of seven members who are appointed for six-year terms, 72 P.S. § 5341.1, by the judges of the Court of Common Pleas of Philadelphia County, 72 P.S. § 5341.2. In assessing property values, the BRT performs two functions. First, it determines the actual value of the property through an initial valuation, 72 P.S. § 5341.13; and second, it reviews appellate challenges to those initial valuations, 72 P.S. § 5341.14. The taxpayer can then challenge the BRT's assessment by filing a de novo appeal with the Court of Common Pleas. Act of May 22, 1933, P.L. 853, art. V, § 518.1, 72 P.S. § 5020-518.1.

Pursuant to its statutory and constitutional authority, City Council passed an ordinance on December 17, 2009, proposing to abolish the BRT and to replace it with a new Office of Property Assessment (which will perform the initial valuations) and a new Board of Property Assessment Appeals (which will hear appeals from the initial valuations). (A certified copy of the Ordinance is attached hereto as Exhibit A). The Ordinance, by its terms, is effective upon approval of the electorate, by referendum. See Ordinance, section 2. This case is a challenge to the validity of that Ordinance.

The proposed abolition of the BRT is the culmination of almost sixty years of intermittent history. In 1951, the Pennsylvania Constitution was amended to consolidate Philadelphia city and county government, abolishing the latter while allowing former county officers to continue to perform their duties until the legislature provided otherwise. Pa. Const., former Art. XIV, § 8, now found at art. IX, § 13; see generally Comm. *ex rel.* Truscott v. Philadelphia, 380 Pa. 367, 373, 111 A.2d 136, 138 (1955). In 1953, pursuant to the constitutional amendment, the General Assembly enacted legislation authorizing

City Council to eliminate some of the remaining county offices and positions. Act of August 26, 1953, P.L. 1476, § 2, 53 P.S. § 13132(a), (b). That legislation, however, as construed by this Court, did not allow for the elimination of the BRT, because it did not specifically mention the BRT. Truscott, supra.

In 1963, the General Assembly completed the consolidation, specifically allowing City Council to abolish the BRT, albeit subject to referendum. Act of August 13, 1963, P.L. 795, § 1, 53 P.S. § 13132(c), (d). More than 45 years later, spurred on in large part by a well-publicized investigative series in The Philadelphia Inquirer, as well as the ensuing outrage, City Council has now proposed to do just that.

The Inquirer series, entitled "Assessment: Broken," detailed the myriad flaws with the entire assessment process as performed by the BRT, starting with its initial valuations and ending with its handling of assessment appeals.[1] The criticisms included the following: "Political influence pervades the agency."; "More than 9000 properties haven't been reassessed in at least 20 years."; "The BRT works far better for insiders than rank-and-file taxpayers"; and "The agency's records are a mess." Mark Fazlollah and Joseph Tanfani, "Can the BRT finally fix property valuation? Maybe, but that's the tip of the iceberg," Philadelphia Inquirer, May 2, 2009. The series was long on detail, including assertions that the Chair of the BRT was not aware that the Board had to conduct its business (including its appellate hearings) in public; that politically connected lawyers won a far greater percentage of their appeals than the public at large; that the Board kept

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[1] The entire series can be found at:
http://www.philly.com/philly/classifieds/real_estate/BRT_Main.html?viewAll=y&c=y;
http://www.philly.com/inquirer/special/20090504_BRT_serves-as-political_jobs_bank.html?viewAll=y&c=y; and
http://www.philly.com/inquirer/special/20090505_Crossing_Fumo.html?viewAll=y&c=y

no records of its appellate proceedings, including the votes of its members; and that certain elected officials received favorable treatment on their personal assessment appeals. Id. May 2, 2009; May 5, 2009.

City Council passed the Ordinance at issue here in response. The Mayor signed the Ordinance on January 23, 2010. The proposed abolition is to be presented to the voters of Philadelphia in the form of a referendum at the upcoming election of May 18, 2010. If the referendum is passed by a majority of voters, the BRT will be eliminated and the new entities will assume responsibility for the assessment process, effective October 1, 2010. See Exhibit A, Section 1, Phila. Code § 2-113. If the referendum is not passed, the BRT will continue to value properties and to consider appeals, and the ordinance, by its terms, will not become effective. See Exhibit A, Section 2.

On March 8, 2010, five of the seven members of the BRT filed, purportedly in the name of the BRT itself, an Application in this Court for the Exercise of Original Jurisdiction and King's Bench Power ("Application").[2] Specifically, the Application asks this Court to take jurisdiction, and asks the Court to enjoin the placement on the ballot in the upcoming election of the BRT abolition question, and to enjoin enforcement of the Ordinance.

On March 12, 2010, the City filed a Motion to Strike as Unauthorized the Application (Motion to Strike), and the Applicant subsequently responded. The Court has

[2] The members also filed an Application for Leave to File Original Process, asking this Court to grant leave to file the Application for original jurisdiction and King's Bench Power. We do not oppose the Application for Leave. We take no position on the subsequently-filed Application to supplement the caption to add the names of the two remaining Board members.

not yet ruled on the Motion to Strike, so we now answer the Application. We do not oppose the request for the exercise of jurisdiction by this Court.

For ease of reference, we will refer to the Applicant herein as the "BRT," though, as we explain infra, it is not at all clear that the BRT itself actually has authorized this suit, and it is quite clear that, if the BRT did authorize the suit, it has no authority to do so.

SUMMARY OF ARGUMENT

The BRT contends in its Application that City Council is not authorized to abolish the BRT. The BRT concedes that the General Assembly authorized City Council to abolish the initial valuation function of the BRT, but contends that the General Assembly did not authorize City Council to abolish the BRT's appellate function. Therefore, the BRT argues, by abolishing the entire BRT -- both the initial valuation function and the appellate function -- City Council overstepped its authority.

There are four fatal flaws with the BRT's contention. First, as we previously explained in our Motion to Strike, the BRT -- which was not authorized by the City Solicitor to bring this suit, and which did not make the decision to pursue this litigation at a public "sunshined" meeting -- lacks legal authority to bring this suit. Second, this case is not yet ripe because we will not know until after the May 18, 2010, voter referendum whether the BRT's appellate function will be abolished. Third, the applicant here does not have standing to pursue a claim challenging the assignment of appellate responsibilities to the members of the new appeals Board; only the Attorney General or District Attorney does. Finally, contrary to the BRT's assertion on the merits, the General Assembly specifically authorized City Council here to abolish the BRT in its entirety, with respect to both its initial valuation function and its appellate function. Specifically, the General Assembly authorized the City to abolish the BRT "with respect to the making of assessments," and "the making of assessments" includes the entirety of the BRT's responsibilities, viz., the initial valuation and assessment appeals.

Lastly, even if this Court disagrees with each of the foregoing arguments, this Court should, at most, sever only that portion of the Ordinance that transfers the appellate function, and should let stand the portion that transfers the initial valuation function.

ARGUMENT

There are four fatal flaws with the BRT's Application. First, as we previously explained in our Motion to Strike, the BRT lacks legal authority to bring this suit. Second, this case is not yet ripe because we do not know yet whether the BRT's appellate function will be abolished. Third, the applicant here does not have standing to pursue a claim challenging the assignment of appellate responsibilities to the members of the new appeals Board. Fourth, the General Assembly specifically authorized City Council to abolish the BRT in its entirety.

Lastly, even if this Court disagrees with each of the foregoing arguments, this Court should, at most, sever only that portion of the ordinance that transfers the appellate function.

I. The BRT -- Which Was Not Authorized by the City Solicitor to Bring This Lawsuit, and Which Did Not Make the Decision to Pursue This Litigation at a Public Meeting -- Lacks Legal Authority to Bring This Suit.

As we explained in our Motion to Strike, the named plaintiff in this case is the "Board of Revision of Taxes, acting by and through its individual members." In other words, the plaintiff is the BRT itself in its official capacity; the individual members have not sued individually on behalf of themselves. This suit by the BRT itself -- without the approval of the City Solicitor and without the BRT approving the suit in an open meeting -- should be stricken for two independent reasons.

One: The BRT, as an office of the City, can only bring litigation if represented or authorized by the City Solicitor. Phila. Home Rule Charter §§ 4-400, 8-410. Having instead brought this lawsuit through private counsel, the BRT lacks legal authority to proceed with this case.

Two: The BRT can only make a decision to pursue litigation by a vote of the Board itself, at a public meeting. 65 Pa. C.S. § 704. Having failed to hold an open "sunshined" meeting to authorize this suit, the BRT lacks legal authority to proceed with this case.

If the individual Board members wish to use their own funds to sue their employer to save their jobs and their salaries, that will be their prerogative. But the instant lawsuit should be peremptorily stricken, as neither the five Board members, nor the Board itself, has authority to bring this lawsuit on behalf of the Board.

A. No City Agency Can Bring Litigation Without Representation or Authorization by the City Solicitor.

The Home Rule Charter specifically and clearly requires that the BRT, as a City agency, be represented by the Law Department in any litigation. There are two different provisions of the Charter that mandate such representation. Pursuant to section 4-400:

> The Law Department shall have the power and its duty shall be to perform the following functions:
>
> (a) Legal Advice. It shall furnish legal advice to the Mayor, to the Council and to all officers, departments, boards and commissions concerning any matter or thing arising in connection with the exercise of their official powers or performance of their official duties and except as otherwise expressly provided, shall supervise, direct and control all of the law work of the City.
>
> (b) Litigation. The Department . . . shall represent the City and every officer, department, board or commission in all litigation. . . .

Philadelphia Home Rule Charter § 4-400.

Furthermore, pursuant to section 8-410:

> Whenever any officer, department, board or commission shall require legal advice concerning his or its official business or whenever any legal question or dispute arises or litigation is commenced or to be commenced in which

> any officer, department, board or commission is officially concerned, . . . it shall be the duty of such officer, department, board or commission, to refer the same to the Law Department.
>
> . . . .
>
> It shall be unlawful for any officer, department, board or commission to engage any attorney to represent him or it in any matter or thing relating to his or its public business without the approval in writing of the City Solicitor.

Philadelphia Home Rule Charter § 8-410.[3]

Thus, the Law Department: (1) "shall supervise, direct and control all of the law work of the City," Philadelphia Home Rule Charter § 4-400(a); and (2) "shall represent . . . every . . . board . . . in all litigation," id. § 4-400(b). Furthermore, (3) "[w]henever any . . . board . . . shall require legal advice concerning . . . its official business or whenever any legal question or dispute arises or litigation is commenced . . . in which any . . . board . . . is officially concerned, . . . it shall be the duty of such . . . board . . . to refer the same to the Law Department." Id. § 8-410. Finally, (4) "[i]t shall be unlawful for any . . . board . . . to engage any attorney to represent . . . it in any matter or thing relating to . . . its public business without the approval in writing of the City Solicitor." Id.

Accordingly, there can be no doubt that the BRT, which sued here in its official capacity, can only be represented by the Law Department. Given that the Law Department does not represent the BRT here, the Application must be stricken as unauthorized and "unlawful." Id.

Indeed, in Lennox v. Clark, 372 Pa. 355, 380, 93 A.2d 834, 846 (1953), this Court specifically held that sections 4-400(a) and 8-410 (as well as several other provisions of

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[3] The Philadelphia Home Rule Charter can be found online at: www.phila.gov --> Quick Hits --> City Code and Charter.

the Home Rule Charter) shall "apply to, and [be] binding upon, the members of the Board of Revision of Taxes," as the board (pursuant to City-County Consolidation) was as fully a part of City government as any other City agency.

The Court further explained that this "requirement that all the city departments should rely upon the City Solicitor for advice is obviously a wise one, since it is important that there be a unified, consistent interpretation of legal problems arising under the administration of the city government, which might not be the case if there were individual solicitors for the different departments." Lennox, 372 Pa. at 369, 93 A.2d at 840; see also Philadelphia Home Rule Charter § 8-410, Annotation 1 ("[This section] seeks to prevent the practice of each officer and agency having its own counsel. It thereby makes possible an effective and well organized, central law agency."); Horsley v. Phila. Bd. of Pensions & Ret., 519 Pa. 264, 273 n.14, 546 A.2d 1115, 1119 n.14 (1988) ("Section 8-410 merely requires that the various administrative agencies of the City must heed the advice of the city's chief legal officer. This seems like a sound management decision and we detect nothing improper about such a requirement.").

Yet the Board, here (if, indeed, the Board is the moving party behind this lawsuit), is doing precisely what Lennox and the Charter expressly intended to preclude -- initiating litigation by one agency of City government, contrary to the unified legal position of the rest of City government. This is untenable and, indeed, "unlawful." Charter § 8-410.

In fact, this concept -- that the City should speak with one legal voice -- is supported by the General Assembly as well, which has provided that an individual City agency does not have a "separate corporate existence" and "all suits growing out of

transactions [with an individual agency] . . . shall be in the name of the City of Philadelphia." Act of April 21, 1855, P.L. 264, § 11, 53 P.S. § 16257.

And it is for exactly this reason -- that the City must speak with one legal voice -- that there can be no claim of conflict here between the BRT's position and the Law Department's position. As the Charter has unambiguously declared, there is no separate BRT legal position (any more than there could be a separate Streets Department position or Recreation Department position) and, thus, there is no conflict. It is the City Solicitor's job to balance and reconcile intra-City interests, and then formulate one centralized position that represents the City's legal interests as a whole.

Accordingly, the Court should strike this unauthorized lawsuit, purportedly brought in the name of a City agency, against the City itself. See also City of Erie (Council) v. Dep't of Envtl. Prot., 844 A.2d 586, 590 (Pa. Commw. 2004) (Commonwealth Court granted city solicitor's motion to withdraw an appeal because the city entity that brought the appeal, city council, was not authorized to do so; relying upon statutory language that gave solicitor the authority to "[c]ommence and prosecute all and every suit") (emphasis in original).

The BRT responded to our Motion to Strike by contending that City Council had no authority to abolish the BRT's appellate function, but in doing so, the BRT conflates the underlying merits question with the threshold issue of whether the BRT is authorized to bring this suit. We explain below that the BRT is incorrect on the merits; regardless, however, the BRT is simply not authorized to pursue this challenge. If a challenge to the ordinance lies, it should be brought by an aggrieved party -- we suggest, infra, the Attorney General or the District Attorney; if we are incorrect in that suggestion, then

perhaps the individual members who seek to save their jobs -- but not by an agency of the City itself. The City, pursuant to its Charter, speaks with one legal voice.

By way of analogy, the Home Rule Charter requires the City to conduct sanitation operations through its Streets Department. Philadelphia Home Rule Charter § 5-500(c). If the Mayor, by executive order, were to abolish the Streets Department in its entirety, and thereby eliminate hundreds of paid jobs, including that of the Street Commissioner, such an order would appear to violate the Charter, but the Streets Department itself could not sue to preserve its existence. The Streets Department is a component of the City, is represented by the Solicitor, and if the Solicitor concludes the abolition is lawful, no component of the City can challenge the City itself regarding its own actions. So, too, with the BRT.

B. The BRT Has Not Properly Authorized the Suit at an Open Meeting.

Even if the BRT were somehow authorized to bring this lawsuit without Law Department approval, notwithstanding the clear provisions of the Charter, the BRT has not actually authorized this lawsuit under the Sunshine Act, 65 Pa. C.S. §§ 701 to 716. The Sunshine Act provides, subject to certain exceptions, that "[o]fficial action . . . of an agency shall take place at a meeting open to the public." Id. § 704. Thus, the Act requires "agencies" to take "official actions" only at "meetings open to the public." Id. To our knowledge, the BRT conducted no open, public meeting at which the decision to initiate this lawsuit was made. Indeed, it is not clear that the BRT ever met at all to authorize this suit.

The Sunshine Act defines "agency" to include "any board . . . of any political subdivision of the Commonwealth"; there is no doubt that includes the BRT. And the Act

defines "official action" to include "[t]he decisions on agency business made by an agency" and "the vote taken by an agency on any motion, proposal, resolution, rule, regulation, ordinance, report, or order." Id. § 703. The BRT cannot avoid this requirement by simply failing to conduct a formal vote.

We do not contend here that the agency's deliberation, regarding whether to pursue litigation, needed to be performed in public. Privileged communications regarding litigation strategy are protected from Sunshine Act disclosure, allowing the agency to pursue the communications in executive session, id. § 708(a)(4). But an executive session "to consult with [an] attorney" (id. (emphasis added)) provides no exemption from the requirement that the ultimate decision to retain an attorney and to proceed with litigation must be made at a public meeting. "Official action on discussions held [in executive session] shall be taken at a public meeting." Id. § 708(c). See also Keenheel v. Comm., Pennsylvania Sec. Comm., 134 Pa. Commw. 494, 500, 579 A.2d 1358, 1361 (1990) (settlement conversations were protected but actual vote on whether to enter into settlement agreement was subject to open meeting requirement). The Court may void any official action taken at an unauthorized meeting. 65 Pa. C.S. § 713.

Indeed, even an authorized executive session is not an authorization to meet in secret; an executive session must be announced, and its purpose disclosed, at an open meeting, and it generally must occur at, or immediately upon the close of, an open meeting. 65 Pa. C.S. § 708(b).

Yet, here, to the best of our knowledge, and after reasonable inquiry and investigation, the BRT does not appear to have conducted any announced executive session to discuss potential litigation; nor did the Board determine to initiate this litigation at an open meeting. (The Board, its response to our Motion to Strike, appears to concede

these facts as true.) Having failed to conduct a public vote or to make a public decision to bring this suit, the BRT has not properly authorized this suit. Indeed, to allow the individual members of a public agency to act in the name of the agency itself, without any formal record of the agency itself making an official decision to proceed -- let alone a formal record made at an open meeting -- would too readily allow individual members to substitute their own personal interests for the official interest of the agency itself.

As the Commonwealth Court held under the prior Sunshine Act in Preston v. Saucon Valley Sch. Dist., 666 A.2d 1120, 1123 (Pa. Commw. 1995), "official action" that must be conducted at an open meeting includes "decisions of a . . . board that commit the board to a particular course of conduct." And, though the Sunshine Act "permits an agency to discuss [certain] matters in a private executive session, the final vote on those matters must be taken at a public meeting." Id.

Thus, in Preston, even though the discussion of employment matters was expressly allowed in executive session, the court invalidated an employment contract adopted at a closed meeting, as the final decision to enter into the contract was not made in a public session. So too, here. The discussion of potential litigation was permitted at an executive session (though no formal executive session ever even was announced here, to our knowledge). But the final decision to initiate litigation by the Board can only be taken at an open meeting of the Board. Failing that, the decision must be invalidated.

The BRT contends, in response to our Motion to Strike (at 9), that our Sunshine Act argument -- i.e., that the decision to initiate litigation on behalf of a public agency must be made at a public meeting -- somehow implies that "each and every step in the course of agency litigation must be a subject of an open meeting and discussion." The BRT's contention, however, proves far too much. We simply ask the Court to reach no

further than the instant situation, and hold that the game-changing decision to start a lawsuit in the name of the BRT constitutes "official action" of the BRT, and, therefore, requires an open meeting. The Court need not reach the BRT's parade of horribles contention, or decide whether each decision related to litigation strategy constitutes "official action."

Indeed, an agency might well choose -- at an open and public meeting -- to delegate the authority to make litigation decisions to the agency's chair, thus obviating the need for individual meetings to make each litigation strategy decision related to the course of a lawsuit. But the act of initiating a lawsuit is of a different kind; and, at all events, is the only decision at issue here. Accordingly, the filing of this lawsuit violated the Sunshine Act, and the Court should strike the Application.

If the individual members of the BRT wish to hire their own lawyer with their own funds to pursue their own interests in litigation, of course they may do so. But they cannot hide behind the public veneer of a public agency without formal and lawful authorization to do so by that agency.

II. This Case Is Not Ripe Because the Legislation About Which the BRT Complains Is Not Even on the Books Yet; Enjoining a Vote Upon It Would Impermissibly Interfere with the Legislative Process.

This case, in which the BRT asks the Court to consider whether the General Assembly gave City Council the authority to abolish the BRT, is not ripe because there is no such City Council ordinance in effect yet, abolishing the BRT, and there may never be such an ordinance in effect, unless the electorate approves it in May. This Court has rebuffed requests like the one made in the instant case to enjoin such proposed legislation, based upon the firmly-held view that the powers granted to the Judicial Branch under the Constitution of the Commonwealth do not extend to interference with the enactment of

legislation. Mt. Lebanon v. County Board of Elections, 470 Pa. 317, 320, 368 A.2d 648, 650 (1977).

In the current case, section 2 of the Ordinance (Exhibit A hereto) clearly provides that "the ordinance shall be submitted to the qualified electors of the City of Philadelphia for their approval or disapproval at a special election to be held on May 18, 2010, and shall not take effect unless so approved."

This case is on all fours with Mt. Lebanon, which held that "[t]he jurisdiction of a court of equity may not be invoked to enjoin the enactment of a bill during the course of its passage through a legislative body. Such is the preponderant weight of authority throughout this Country and I say that without fear of successful contradiction." Id. (quoting Schultz v. City of Philadelphia, 385 Pa. 79, 89-90, 122 A.2d 279, 284 (1956) (Jones, J., dissenting)).

Mt. Lebanon applied this principle to a case just like this one, where litigants sought to enjoin the Allegheny County Board of Elections from placing proposed amendments to Mt. Lebanon's Home Rule Charter on the ballot. Those amendments would have required voter approval of new non-electoral debt obligations exceeding a certain amount, and of substantial increases in the annual tax levy. The lower court had held that those amendments, if adopted, would be unconstitutional, but this Court rejected that ruling as premature interference with the legislative process. See 470 Pa. at 318, 368 A.2d at 649.

The factual scenario before the Court in Mt. Lebanon was no different than the one before the Court now. Applicant here also seeks to enjoin the City from placing a proposed question on the ballot for voter approval on the ground that City Council does not have the legal authority to take the proposed action for which it seeks approval.

Mt. Lebanon held that this Court lacks subject matter jurisdiction to enjoin the placement of legislation on a ballot for voter approval merely because it might ultimately be determined that the legislation is defective once it goes into effect. See 470 Pa. at 320, 368 A.2d at 649. As Mt. Lebanon explained, courts may not encroach upon the legislative power to make, alter and repeal laws. Id. Because amendments to home rule charters have "the force and status of a legislative enactment, Addison Case, 385 Pa. 48, 122 A.2d 272 (1956), the courts should not interfere" with their enactment either. Id.[4]

In addition to finding impermissible judicial interference in the legislative process, Mt. Lebanon also found that by passing upon the legality of the proposed Home Rule Charter amendments, the lower court had rendered an impermissible advisory opinion "during the deliberative stages of the legislative process." 470 Pa. at 321, 368 A.2d at 650. As Mt. Lebanon found, until enacted, proposed legislation affects no one, and this Court "does not undertake to decide academically the unconstitutionality or other alleged invalidity of legislation until it is brought into operation so as to impinge upon the rights of some person or persons." Id. (quoting Knup v. Philadelphia, 386 Pa. 350, 353, 126 A.2d 399, 400 (1956)); see also Bliss Excavating Co. v. Luzerne Co., 418 Pa. 446, 211 A.2d 532 (1965); Pittsburgh Outdoor Adv. Co. v. Clairton, 390 Pa. 1, 133 A.2d 542 (1957). In the instant case, as well, the ballot question abolishing the Board is only proposed legislation. No one will suffer actual harm if the voters never approve the

[4] The Court distinguished Schultz v. Philadelphia, 385 Pa. 79, 89-90, 122 A.2d 279, 284 (1956), because, in that case, the alleged defect concerned a failure to comply with the required process for placing Home Rule Charter amendments on the ballot. 470 Pa. at 322, 385 A.2d at 650. By way of contrast, this case, like Mt. Lebanon, does not concern alleged deficiencies in the process by which the proposal has been placed on the ballot. It concerns the legality of the proposal itself.

legislation. That harm may never come to pass, and therefore, any determination by this Court that the legislation is legally deficient, prior to the legislation becoming effective, is an impermissible advisory opinion.[5]

Pennsylvania Gaming Control Bd. v. City Council, 593 Pa. 241, 258, 928 A.2d 1255, 1270 (2007), does not hold to the contrary. Gaming Control distinguished Mt. Lebanon because in Gaming Control, the act of submitting the question of where to locate casinos for voter approval itself caused harm. See id. As the Court explained, in the Gaming Act, the General Assembly gave the Board "the sole authority to locate licensed facilities in Philadelphia and [did] did not give the City's electorate the right to consider or override that decision or to prevent the implementation of that decision under the City's laws." Id. Thus, "the pending opportunity for the voters to pass upon this matter via the ballot question [was] as much a concern to the Board and the Intervenors as is the outcome of the vote, should it take place." Id. Therefore, this Court found that, contrary to the ballot question in Mt. Lebanon, the Court's opinion as to the legality of the City's gaming referendum was "neither theoretical nor abstract. Rather, it addresse[d] the legality of the Ordinance on its face and the effect it has had already -- to submit a question to the Philadelphia electorate that impacts on and could nullify the Board's

[5] Deer Creek Drainage Basin Authority v. County Bd. of Elec. of Allegheny Co., 475 Pa. 491, 381 A.2d 103 (1977), is also distinguishable. In Deer Creek, the referendum petition automatically suspended an existing ordinance, resulting in immediate harm. 475 Pa. at 493, 381 A.2d at 104. The ordinance suspended by the referendum petition had initiated a multi-township, joint water authority, and its suspension by the referendum petition resulted in the township's immediate withdrawal from the authority before the referendum was even voted upon. In this case, the existence of the referendum itself has no effect upon the Board. The Board remains in existence until after the voters approve the amendment.

decision to locate licensed facilities in the City and the process of putting that decision in place." Id.

The referendum in this case does not implicate the concerns raised in Gaming Control about executive authority versus the will of the general electorate. Nor does the submission of the question to the electorate present any harm. Rather, the question presented by the Applicant is a simple question of statutory interpretation. Nothing about the fact of the referendum or the taking of a vote impinges upon anyone's rights or causes anyone harm. Any harm at issue here is theoretical, speculative, and entirely contingent upon the outcome of the election.

The BRT can allege no harm in this case at this point. Therefore, any opinion on the legality of the proposed legislation would be advisory, and would interfere with a legitimate legislative process that this Court should not disturb. Pursuant to the City-County Consolidation Act, Act of August 26, 1953, P.L. 1476, § 2, as amended, Act of August 13, 1963, P.L. 795, § 1, 53 P.S. § 13132(d), City Council legislation with respect to the power and duties of the BRT cannot become effective until approved by the electorate. This Court should not interfere with that State-mandated approval process unless and until it is completed in a manner that produces real harm, not mere speculative effects.

III. The Applicant Does Not Have Standing to Pursue a Claim Challenging the Creation of the New Board of Property Assessment Appeals; Only the Attorney General or District Attorney Does.

The Applicant in this case is challenging the City's creation of the new Board of Property Assessment Appeals, and is seeking to enjoin the creation of that agency.[6] Specifically, the Applicant claims that it is not proper for the members of the new board to "hear and decide appeals of property assessments in Philadelphia." Application, at ¶ 8. However, where (as here) a party challenges the right to exercise the powers of a public office (i.e., the right of the members of the new board to hear assessment appeals), and claims that the powers should be exercised by somebody else, that challenge must be brought through a quo warranto action, and only a public entity such as the Attorney General or District Attorney has standing to pursue such a quo warranto action.

"Historically, Pennsylvania courts have held that the quo warranto action is the sole and exclusive method to try title or right to public office." Spykerman v. Levy, 491 Pa. 470, 484, 421 A.2d 641, 648 (1980). This Court has further explained:

> Title [to public office] cannot be tested by mandamus, injunction, or any other proceeding that is provided for by the common law. A quo warranto is addressed to preventing a continued exercise of authority unlawfully asserted, rather than to correct what has already been done under the authority. The gravamen of the complaint is the right to hold and exercise the powers of the office in contradistinction to an attack upon the propriety of the acts performed while in office. . . . A complaint in quo warranto is aimed at the right to exercise the powers of the office, which is a public injury, rather than an attack upon the propriety of the actions performed while in office, which would be a private injury. Accordingly, standing to pursue quo warranto is generally within a public entity such as the Attorney General, or the local district attorney.

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[6] Applicant is not challenging the creation of the new Office of Property Assessment.

Id. at 484-485, 421 A.2d at 648-649 (internal citations omitted). Given that the BRT is challenging the right of the members of the new board to hear appeals, this case should be pursued in quo warranto by the Attorney General or the District Attorney.

Effectively, what the BRT is claiming in this lawsuit is that its members are the only persons authorized under the law to hold the public office of appeals board member. The BRT is claiming that the soon-to-be appointed members of the soon-to-be created new Board of Property Assessment Appeals are usurping the power and authority of the true office-holder with true statutory authority. But that is precisely the claim to public office that must be brought by the Attorney General or the District Attorney, and not by the interested agency on behalf of its members.

Indeed, Comm. *ex rel.* Truscott v. Philadelphia, 380 Pa. 367, 111 A.2d 136 (1955), the very case upon which the BRT relies most heavily in its Application, itself suggests that the BRT does not have standing here. The issue presented in Truscott was the same issue presented here: whether Philadelphia City Council was authorized to abolish the entire BRT. There, just as here, City Council abolished the BRT in its entirety and transferred all of the BRT's functions and duties to other City entities, and a challenge was brought seeking to enjoin the enforcement of the ordinance, attacking the right of the new entities to perform the powers of the new offices. Unlike here, however, that action was properly brought by the Attorney General, not by the BRT. Because only a public entity like the Attorney General or the District Attorney is authorized to challenge the propriety of the newly created Board of Property Assessment Appeals, the BRT's Application should be rejected.[7]

[7] Truscott held that City Council was not authorized to abolish the BRT, but Truscott analyzed a 1953 Act, which did not mention the BRT at all. The current case, in

(footnote continued on next page)

We recognize that this Court has on occasion created exceptions to the rule that challenges to the powers of public office must be brought in a quo warranto action, and has instead allowed individual challenges to the powers of public officers, but such exceptions arise where there is evidence on the record that the Attorney General or District Attorney has specifically refused to proceed. E.g., Andrezjwski v. Borough of Millvale, 543 Pa. 539, 543, 673 A.2d 879, 881 (1996) ("In the instant case, we are presented with circumstances that are an exception to the rule. The attorney general refused to institute the proceedings and the district attorney also failed to grant appellees' request for the institution of quo warranto against appellant. Under this set of facts, appellees were precluded from a course of action that would challenge appellant's right to office, and equity was their only avenue of approach.").

Here, by contrast, the BRT has offered no suggestion that the public entities tasked with quo warranto challenges have refused to pursue such a challenge here. (This, of course, is unsurprising given, inter alia, the premature nature of the challenge.) Accordingly, the BRT's application should be rejected.

IV. The General Assembly Authorized City Council Here to Abolish the BRT.

The issue in this case on the merits is narrow: did the General Assembly authorize City Council to abolish the BRT's appellate function. The relevant language in the City-County Consolidation Act is as follows:

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contrast, analyzes the 1963 Act, which (as explained in detail below) specifically authorizes City Council to abolish the BRT.

> Subject to the provisions of the Philadelphia Home Rule Charter and the First Class City Home Rule Act of April twenty-one, one thousand nine hundred forty-nine (Pamphlet Laws 665), the Council of the City of Philadelphia shall have full powers to legislate with respect to the election, appointment, compensation, organization, abolition, merger, consolidation, powers, functions and duties of the Sheriff, City Commissioners, Registration Commission and Board of Revision of Taxes, or its successor, with respect to the making of assessments of real and personal property as provided by act of Assembly. The provisions of Section 1-102(2) of the Philadelphia Home Rule Charter are hereby validated and the power of Council to act thereunder is hereby confirmed.

Act of August 26, 1953, P.L. 1476, § 2, as amended, Act of August 13, 1963, P.L. 795, § 1, 53 P.S. § 13132(c) (emphasis added). Thus, City Council shall have full power to legislate regarding the abolition of the BRT "with respect to the making of assessments of real and personal property as provided by act of Assembly." Id.[8]

The BRT claims that the General Assembly only permitted City Council to abolish the BRT with respect to its initial valuation function, but not with respect to its appellate function. The BRT claims that City Council is so limited because it can only abolish the BRT with respect to the BRT's role in "the making of assessments of real and personal property as provided by act of Assembly." In other words, according to the BRT, the phrase "with respect to the making of assessments of real and personal property as provided by act of Assembly" was intended to limit City Council's authority, and refers only to the BRT's initial valuation function, and not the BRT's appellate review function.

There are two independent reasons, however, why the 1963 Act does not preclude City Council from abolishing the BRT's appellate function.

First, the job of "making of assessments," a job which City Council can unquestionably transfer out of the BRT, was not intended to parse the BRT's assessment

[8] The immediately following subsection requires that any such Council legislation must first be approved by the voters before becoming effective. 53 P.S. § 13132(d).

responsibilities as finely as the BRT suggests in its Application; rather, it refers to the entirety of the BRT's well-established role in making assessments, i.e., the BRT's initial valuation function and the BRT's subsequent appellate function, and not just the BRT's initial valuation function. Indeed, given the Act's authorization to legislate with respect to the "abolition" of the BRT, it would be an odd choice of words if the City were only authorized to "abolish" the BRT in part.

Second, to the extent that the phrase "making of assessments" limits City Council's ability to legislate with respect to the BRT, it only prohibits City Council from deviating from the statutory rules "as provided by act of Assembly" with respect to the "making of assessments"; i.e., City Council is still governed by the First Class County and General County Assessment Laws, and cannot change the rules provided by act of Assembly with regard to the "making of assessments."

A. The Making of "Assessments" Includes the Initial Valuation Function and the Appellate Function.

The phrase "making of assessments" refers to the entire assessment process, and not just the initial valuation step. When the BRT acts on a valuation appeal, it is every bit as much "making [an] assessment[]" as it is when it issues its initial valuations; and City Council, therefore, is authorized to transfer that responsibility to new agencies. The words of a statute are to be construed according to their commonly understood meaning, 1 Pa. C.S. § 1903, particularly the meaning regularly ascribed to them at the time of enactment. In 1963, as well as today, the making of assessments includes the BRT's appellate function.

1. The General Assembly uses the term "Assessments" to include the entire assessment process.

Perhaps the best place to look to understand what the General Assembly meant by "the making of assessments" is to the General Assembly's own use of the term "assessments" in related legislation. Thus, in the General County Assessment Law, the General Assembly speaks of an "appeal to court from assessments" when it discusses the right to appeal from a board of revision's appellate decision. See Act of 1933, May 22, P.L. 853, art. V, § 518.1, 72 P.S. § 5020-518.1 (title of section). The word "assessment" plainly includes the appellate function, as no appeal to court lies from the initial valuation decision, only from the appellate decision. See Act of 1939, June 27, P.L. 1199, § 14, 72 P.S. § 5341.14.

Likewise, in the First Class City Home Rule Act, which should be read in pari materia with the City-County Consolidation Act, the General Assembly prohibits the City from legislating contrary to "acts of the General Assembly . . . providing for the assessment of real or personal property and persons for taxation purposes." Act of 1949, April 21, P.L. 665, § 18(a)(9), 53 P.S. § 13133(a)(9). The word "assessment" in these two related pieces of legislation presumably has the same meaning. Yet the BRT, here, would have this Court hold that the word "assessment" is limited to the BRT's initial valuation function, and does not encompass the BRT's appellate function. Were that true, however, it would almost certainly follow that the Home Rule Act's limitations on the City's legislative powers were restricted to the making of initial valuation decisions, leaving the City free to legislate pursuant to its home rule authority in a manner contrary to State law with respect to the appellate function. Thus, for example, the City would be free to legislate contrary to the State law deadline of the first Monday in October for the filing of assessment appeals with the Board; or would be free to ignore the "15% rule"

and establish its own standards of uniformity on appeal. See generally 72 P.S. § 5341(a) (October deadline for appeals), (c) (on appeals, maximum 15% deviation from common level ratio).

The City, however, does not claim such powers; nor is this Court likely to construe the Home Rule Act as giving the City such powers. That is because, in the Home Rule Act, when the General Assembly prohibited the City from legislating contrary to State laws "providing for the assessment of . . . property . . . for taxation purposes," the General Assembly was including in that prohibition State laws regarding both the initial valuation stage and the appellate stage of the assessment function. So, too, in the 1963 Act.

Other legislation of the General Assembly is to the same effect. See, e.g., Act of 1931, June 26, P.L. 1379, § 9 (Third Class County Assessment Law) ("After action on such assessments by said board, any dissatisfied taxable may, within thirty days from the final fixing of his assessment and valuation, appeal therefrom to the court of common pleas of the said county in the manner provided by law for appeals from assessments"); Act of 1933, May 22, P.L. 853, art. V, § 520 ("[t]he corporate authorities of any city . . . which may feel aggrieved by any assessment of any property . . . shall have the right to appeal therefrom in the same manner") (currently set forth, as amended, at 72 P.S. § 5020-520). The word "assessments" is generally understood to mean the entire assessment process, both initial valuation and administrative appeal.

2. The Courts use the term "Assessments" to include the entire assessment process.

We should assume that the General Assembly and the courts generally use the same words to mean the same things. Yet a review of reported decisions at or around the time of passage of the 1963 Act reveals that the courts of this Commonwealth regularly

used the term "assessment" to include both the initial valuation decision and the administrative appeal decision of a board of revision. See, e.g., Appeals of Mathies Coal Co., 435 Pa. 129, 136, 255 A.2d 906, 909 (1969) (referring to taxpayer's appeal to Common Pleas Court from the appellate decision of the Board for the Assessment and Revision of Taxes as "an appeal from a tax-assessment"); Appeal of Rieck Ice Cream Co., 417 Pa. 249, 256, 209 A.2d 383, 387 (1965) (referring to the role of the Court of Common Pleas on appeal from an appellate decision of a board of revision as "reviewing an assessment on appeal," and noting that "[t]he thing from which the property owner appeals . . . is the total assessment of the property as a unit"); Schenley Land Co. v. Board of Property Assessment, etc., 205 Pa. Super. 577, 581, 211 A.2d 79, 82 (1965) (on appeal from the Board of Property Assessment's denial of taxpayer's appeal, "we are here dealing with an appeal from a tax assessment"); Pennsylvania Turnpike Comm'n v. County of Fulton, 195 Pa. Super. 517, 518, 171 A.2d 882, 883 (1961) (challenging the appellate decision of the Board of Tax Revision and Assessments, taxing authority filed an "appeal from the assessment of real estate taxes").

Indeed, courts often distinguish between the "initial assessment" function and the overall assessment function. See, e.g., Deitch Co. v. Board of Property Assessment, 417 Pa. 213, 215, 209 A.2d 397, 399 (1965) (referring to valuation, before board makes its final assessment on appeal, as an "initial assessment"); Taylor Borough Appeal, 408 Pa. 56, 64 (1962) (excusing a late appeal to the board of revision because of the board's delay "in fixing the initial assessment"); Emporium Assessment, 42 Pa. D. & C.2d 182, 183 (Cameron C.P. 1967) ("The leased premises were initially assessed for local real estate tax purposes by the chief assessor. . . . [On appeal], the Cameron County Board of Assessment and Revision of Taxes . . . advised the borough of a reduction from the initial

assessment."). The making of "assessments" includes both an initial assessment process and a final assessment on appeal. When the General Assembly authorized the City to abolish the BRT with respect to the making of assessments, it included in that authorization both the initial assessment function and the assessment appeal function.

3. Logic suggests that the term "Assessments" includes the entire assessment process.

This result -- that an "assessment" refers to the entire assessment process and not just the initial valuation -- is further supported by the fact that there is only one entity responsible for producing such assessments, the BRT. Had the General Assembly intended assessments to be severable from appeals, it likely would have designated two different entities to perform these two functions. Therefore, the BRT's appellate function is part of its assessment function. Because City Council can clearly abolish the BRT's assessment function, and because the appellate function is part of the assessment function, City Council's abolition of the appellate function is authorized by the 1963 Act.

And this conclusion makes logical sense. It is hard to imagine why the General Assembly would have authorized the City Council to abolish, inter alia, the Sheriff and the City Commissioners, but only half of the BRT. It is hard to imagine a sound policy basis why, having finally gotten around to completing the long-awaited City-County consolidation in Philadelphia, the General Assembly would have authorized the completion of 98% of the job, yet retained this one vestigial anachronism of former county government, viz., the BRT's appellate function.

The BRT seems to suggest that it would somehow make sense to eliminate the BRT's valuation function, but not the BRT's appellate function, because the appellate function needed to be preserved by the General Assembly in the name of separation of powers. In other words, according to the BRT, the BRT's appellate function is

particularly important because that appellate function is "a judicial function," Application at ¶ 42, because the legislature intended that the persons who perform such judicial function be appointed by the judiciary, and that the appointing authority for City Council's newly created appellate function "would have no judicial involvement, thereby removing the element of comity established between the Legislative and Judicial Branches," Application at ¶ 49.

This reasoning, to the extent we understand it, is flawed. The BRT's appellate role is not particularly judicial in nature. Indeed, even the BRT's factual findings are reviewed de novo by the court of common pleas. Lincoln Phila. Realty Assocs. I v. Bd. of Revision of Taxes, 563 Pa. 189, 205, 758 A.2d 1178, 1187 (2000). More importantly, even if the BRT's appellate function were deemed quasi-judicial, there are many quasi-judicial entities whose members are appointed without court approval, including boards of assessment appeals in other counties. See, e.g., Act of 1943, May 21, P.L. 571, art. III, § 301, as amended, 72 P.S. § 5453.301 (assessment appeal boards composed of either the elected county commissioners, or persons appointed by the commissioners); cf. Philadelphia Home Rule Charter § 3-207 (Mayor appoints members of Boards, including quasi-judicial boards such as Zoning Board of Adjustment (Charter § 3-911) and Tax Review Board (Charter § 3-914)); Act of 1988, P.L. 1329, No. 170, § 80, 53 P.S. § 10903 (zoning boards appointed by governing body).

Simply put, there is no sound reason why the performance of a quasi-judicial adjudicatory function requires appointment of the members by the judiciary. The BRT cannot demonstrate that there is any particularly important reason to preserve the court appointment aspect of the BRT's appellate function, while simultaneously allowing the elimination of the court appointment aspect of the BRT's initial valuation function.

When the General Assembly authorized the City to abolish the BRT with respect to the making of assessments, there is no reason in logic or language to construe this to authorize only a partial abolition. The City has the authority to abolish the Board in its entirety.

B. The 1963 Act Makes Clear That the City Cannot Legislate Contrary to Acts of Assembly With Respect to the Making of Assessments.

To the extent that the phrase "making of assessments . . . as provided by act of Assembly" limits City Council's ability to legislate with respect to the BRT, it only prohibits City Council from deviating from the statutory rules "as provided by act of Assembly" with respect to the "making of assessments." City Council can still legislate broadly with respect to the abolition, powers, and duties of the BRT (both the valuation function and the appellate function), but the General Assembly wanted to make clear, beyond any doubt, that any such legislation affecting the BRT's powers and duties with respect to the "making of assessments" still must be consistent with other acts of the General Assembly.

In other words, the General Assembly wanted to make absolutely clear that City Council is still governed by the First Class County Assessment Laws (Act of June 27, 1939, P.L. 1199, as amended, 72 P.S. § 5341.1 et. seq.) and General County Assessment Laws (Act of May 22, 1933, P.L. 853, 72 P.S. §§ 5020-101 et. seq.), which govern the procedures and rules for making assessments, and that City Council cannot change the procedural and substantive rules with regard to the "making of assessments."

The limiting clause was designed to ensure that City Council did not change the assessment rules "as provided by act of Assembly." For example, City Council cannot change the meaning of "common level ratio" and how it is used to assess values, 72 P.S. § 5020-102. But the 1963 Act was not intended to prevent City Council from otherwise

changing the BRT's powers and duties, so long as City Council does not amend the General Assembly's assessment rules. Thus, City Council's action here, abolishing the BRT, was consistent with the limiting clause in the 1963 Act because City Council did not change the specific assessment procedures or rules; it merely transferred the responsibility to two new agencies.

Accordingly, the City is authorized to abolish the BRT in its entirety, and not just the initial valuation function.

C. Floor Debates Cannot Change the Meaning of Plain Language.

To be sure, there were individual members of the General Assembly who had a different intent than that suggested by the plain statutory language. To be sure, there were individual members of the General Assembly who wished to preserve the anachronistic, patronage-dominated BRT, at least with respect to its appellate function. See, e.g., Legislative Journal - Senate (Aug. 1, 1963) 1131. But those members apparently were unwilling to say so in plain English, on the face of the statute, in language that would be understood by the reader to mean what the BRT now claims the Act means. Rather, those members apparently were comfortable with obscure wording that concealed their individual intents. After all, there can be no doubt that there are many far clearer ways to say what the BRT now asks this Court to read the obscure language to say. For example: "The City shall have power to legislate with respect to the abolition of the Board of Revision of Taxes, but only with respect to the initial making of assessments"; or "but not with respect to appeals from initial assessments." Other than the floor debates, the BRT can provide no sound reason to read the Act to say what the General Assembly could so easily have said in plain English, had it wished to.

The hidden meaning ascribed to the obscure wording chosen by a few members cannot overcome the plain language of the statute, voted on by the full legislature. Indeed, there is simply no way of knowing how many members of the General Assembly even were present to hear the views of the few vocal members. Indeed, this is why this Court has repeatedly adhered to the salutary rule that floor debates are simply not relevant in ascertaining legislative intent. The General Assembly voted on (and passed) statutory language, not floor debates.

"[W]hat is said in debate, the remarks and understanding of individual legislators, is not relevant in ascertaining the meaning of a statute." McCormick v. Columbus Conveyer Co., 522 Pa. 520, 525 n.1, 564 A.2d 907, 910 n.1 (1989); see also Comm. v. Alcoa Properties, Inc., 440 Pa. 42, 46 n.1, 269 A.2d 748, 750 n.1 (1970) ("[W]hat is said on the floor of the House or the Senate should not be relied upon in formulating legislative intent."); Martin Estate, 365 Pa. 280, 283, 74 A.2d 120, 122 (1950) ("Moreover, in ascertaining the legislative meaning, while what is said in debate is not relevant, the report of a legislative commission or a Senate or House committee may, if obscurity or ambiguity exists, be considered."); but see Boettger v. Loverro, 526 Pa. 510, 523 n.16, 587 A.2d 712, 718 n.16 (1991).

Here, the Court can determine the meaning of the statute through its plain language, using the usual tools of statutory construction, including the common understanding of the words used in the statute at the time of enactment, and the context of the entire piece of legislation in the process of City-County consolidation. There is no reason to resort to debates among several members of the General Assembly, to which the majority of the legislature may not even have been privy. Yet that is precisely what the BRT must do here to win this case. Indeed, in responding to our Motion to Strike, the

BRT focused not on the statutory language, but rather on the floor debate. Respectfully, this is not persuasive authority.

A far more appropriate tool of construction is the title of the Act. See 1 Pa. C.S. § 1924 ("The title and preamble of a statute may be considered in the construction thereof."). And the title of the 1963 Act leaves no doubt that the General Assembly intended to provide "full power" to the Council to legislate with respect to the abolition of the BRT, with no substantive limitations on that power. (The full title is set forth in the margin.[9])

Having now legislated in conformity with the 1963 Act, as clearly expressed in its text and its title, Council's ordinance should be upheld.

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[9] An Act Amending the act of August 26, 1953 (P. L. 1476), entitled "An act to carry out the intent and purpose of Article XV, Section 1 and Article XIV, Section 8 of the Constitution of Pennsylvania, and to supplement the First Class City Home Rule Act, approved April twenty-one, one thousand nine hundred forty-nine (Pamphlet Laws 665), by vesting in the Council of the City of Philadelphia full powers to legislate with respect to the election, appointment, compensation, organization, abolition, merger, consolidation, powers, functions and duties of certain officers, offices, boards and commissions of the City of Philadelphia; providing that such officers may be made appointive or abolished; altering the term of the District Attorney of Philadelphia; and establishing the status of the Sheriff, City Commissioners, Board of Revision of Taxes and Registration Commission, the members of such board and commission, and the subordinates and employees of such officers, board and commission," removing the exclusion of the Sheriff, City Commissioners, Board of Revision of Taxes and Registration Commission from the provisions of section 2, and providing that such officers be included within the provisions of the said section, so that the Council of the City of Philadelphia shall have full power to legislate with respect to the election, appointment, compensation, organization, abolition, merger, consolidation, powers, functions and duties of the Sheriff, City Commissioners, Board of Revision of Taxes and Registration Commission of the City of Philadelphia subject to approval of the electorate of the City of Philadelphia.

V. Even if Council Is Not Authorized to Abolish the Entire BRT, This Court Should At Most Sever Only That Portion of the Ordinance That Abolishes the Appellate Function, and It Should Let Stand the Portion of the Ordinance That Abolishes the Valuation Function.

The issue of severability is a question of legislative intent, and it asks "what the enacting legislature would have done had it known" that the void provision would be invalidated. Annenberg v. Comm., 562 Pa. 581, 596, 757 A.2d 338, 347 (2000). Thus, even if the Court rejects all of the foregoing arguments, the Court should find the ordinance here severable, unless it is clear that City Council would not have transferred only the initial valuation function had it known that it was powerless to transfer the appellate function.

According to the Statutory Construction Act, 1 Pa. C.S. §§ 1501-1991, all legislation carries a presumption of severability:

> The provisions of every statute shall be severable. If any provision of any statute or the application thereof to any person or circumstance is held invalid, the remainder of the statute, and the application of such provision to other persons or circumstances, shall not be affected thereby, 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 or application, 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.

This presumption of severability in the Statutory Construction Act is applicable to ordinances as well as statutes, e.g., Smaller Mfrs. Council v. Council of Pittsburgh, 85 Pa. Commw. 533, 537, 485 A.2d 73, 75 (1984); see also Patricca v. Zoning Bd. of Adjustment, 527 Pa. 267, 274, 590 A.2d 744, 747 (1991) ("the principles contained in [the Statutory Construction Act] are to be followed in construing a local ordinance"), and

applies whether or not an ordinance contains a severability clause, Comm. v. Williams, 574 Pa. 487, 527, 832 A.2d 962, 986 (2003) ("Although Megan's Law II does not contain a severability provision, unless otherwise specified the individual provisions of all statutes are presumptively severable."). In any event, The Philadelphia Code itself does contain such a severability instruction. Philadelphia Code § 1-106 ("The provisions of the Code are severable, and if any provision or application is held illegal, such illegality shall not affect the remaining provisions.").[10]

"Severance is precluded only where, after the void provisions are excised, the remainder of the statute is incapable of execution in accordance with legislative intent." Comm. v. Williams, 574 Pa. 487, 527, 832 A.2d 962, 986 (2003). Courts should sever where the void provisions are "readily separable from" the valid provisions. Stilp v. Comm., 588 Pa. 539, 627, 905 A.2d 918, 970 (2006). Finally, we note that the "public policy of this Commonwealth favors severability." Annenberg, 562 Pa. at 594, 757 A.2d 338, 345.

If this Court concludes (wrongly, in our view) that the General Assembly intended to preserve one last vestige of county government by preserving the BRT's appellate function, notwithstanding Council's undisputed authority to abolish the BRT's initial valuation authority, then it naturally follows, a fortiori, that the initial valuation and appellate functions are severable from one another, and that the ordinance should be so construed. Indeed, the ordinance is easily "capable of execution" after excising the transfer of the appeals function. Specifically, City Council very clearly established two functions in the ordinance, and it would be quite simple to excise the appeals function.

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[10] The Philadelphia Code of Ordinances can be found online at: www.phila.gov --> Quick Hits --> City Code and Charter.

The Court need only provide that the transfer of the appeals function to the Board of Property Assessment Appeals is void, that those sections of the ordinance relating to the transfer of the appeals function are stricken, and that the remainder of the ordinance, relating to the transfer of the initial valuation function to the Office of Property Assessment, remain intact.

Walking through the specifics of the Ordinance itself, this Court would simply excise the first three sections: (1) Philadelphia Code § 2-301, entitled Board of Property Assessment Appeals Nominating Board, (2) Philadelphia Code § 2-302, entitled Board of Property Assessment Appeals; Composition and Appointment, and (3) Philadelphia Code § 2-303, entitled Board of Property Assessment Appeals; Powers and Duties.

The Court would then leave intact the next two sections: (1) Philadelphia Code § 2-304, entitled Office of Property Assessment; Creation; Principal Officers, and (2) Philadelphia Code § 2-305, entitled Office of Property Assessment; Chief Assessment Officer; Powers and Duties. Finally, the Court would excise Philadelphia Code § 2-113, the section of the Ordinance that would abolish the BRT.[11]

In other words, the severing is entirely straightforward; the initial valuation function standing alone is easily "capable of execution" and "readily separable from" the appellate function. Indeed, the BRT's entire theory here is that the making of

[11] The Court would also need to excise the phrase "The Board of Property Assessment Appeals" from Philadelphia Code § 2-306(1), so that section 2-306(1), which provides that the re-assigned entities shall function in accordance with the Home Rule Charter, would apply only to the Office of Property Assessment. And the Court would need to excise the phrase "employees of or shall be assigned to the Board of Property Assessment Appeals, if they are regularly occupied in connection with the functions and duties transferred to that Board" from Philadelphia Code § 2-307(1), so that section 2-307(1), which relates to the transfer of existing employees, would also only apply to the Office of Property Assessment.

assessments is a "separate and distinct duty" from reviewing appeals. Application at ¶ 8. Therefore, at most, the Court should sever City Council's transfer of the initial assessment function, letting at least that portion of the ordinance remain intact.

CONCLUSION

Respondent City of Philadelphia respectfully requests that this Court:

(1) Strike the Application for lack of authority to bring suit; or, in the alternative,

(2) Dismiss the Application for lack of ripeness; or, in the alternative,

(3) Dismiss the Application for lack of standing; or, in the alternative,

(4) Deny the Application on the merits; or, in the alternative,

(5) If the Court rejects all of the foregoing requested forms of relief, grant the Application only to the extent it requests an injunction against the transfer of the BRT's appellate function, but deny the Application in all other respects.

Respectfully submitted,

CITY OF PHILADELPHIA LAW DEPT.
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Dated: April 6, 2010

CERTIFICATE OF SERVICE

I, Richard Feder, hereby certify that on April 6, 2010, I caused to be served true and correct copies of the foregoing Answer upon the persons at the addresses listed and in the manner listed below:

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