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**LOCAL GOVERNMENT
COMMISSION**
Created in 1935

EXECUTIVE DIRECTOR
Virgil F. Puskarich

ASSISTANT DIRECTOR
Michael P. Gasbarre

MEMBERS

Senator Robert D. Robbins
Senator J. Doyle Corman
Senator Robert J. Thompson

Senator J. Barry Stout
Senator Roy C. Afflerbach

Representative Ellen M. Bard
Representative Lynn B. Herman
Representative Chris Ross

Representative Victor J. Lescovitz
Representative Jeffrey W. Coy

13 August 1998

TO: All Members of the House Resolution 167 Task Force

FROM: Virgil F. Puskarich
Executive Director

SUBJECT: Attached Memorandum on Charging Municipalities for State Police Protection

As discussed at the April 8, 1998, House Resolution 167 Task Force Meeting, Representative Thomas A. Tangretti requested the staff of the Local Government Commission to explore the constitutionality of requiring municipalities to increase their millage rates beyond statutory limits in order to pay for State Police services. Please find enclosed the findings of Commission Legal Counsel Patrick F. Kielty on this issue. We request that you bring this important memorandum with you to the September 16, 1998, Task Force meeting as it will be discussed immediately after approval of the minutes.

Thank you.

VFP:mg

c: Local Government Commission Members
Other Interested Parties



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2 June 1998

TO: Virgil F. Puskarich, Executive Director

FROM: Patrick F. Kielty, Legal Counsel

SUBJECT: Request from Representative Thomas A. Tangretti concerning a possible constitutional impediment to the Commonwealth's requiring municipal payment for State Police services, if, in order to pay these charges, some municipalities would need to raise revenue in excess of their statutory millage rate limit for real estate taxes.

Issue

If the proposed cost-per-resident assessment upon municipalities for State Police services were to require those municipalities to exceed their statutory millage limit¹ would this violate the constitutional standard² against the unreasonable or unduly oppressive exercise of the police power?

Conclusion

The Commonwealth has plenary power over municipalities and, therefore, would be entitled to impose a pay-for-service requirement on municipalities for State Police services. This conclusion is not altered by the following assumptions:

- (1) that the municipalities required to pay for State Police services would have no other revenue sources available except the 14 mill general purpose real estate tax levy;
- (2) that existing municipal expenditures could not be reduced; and

- (3) that real estate taxes at the legal limit would raise insufficient revenue to allow the affected municipalities to make the required payment.

The proposed pay-for-service requirement is not a direct charge or tax on individuals and it is not subject to a substantive-due-process defense. This proposed requirement comes within the broad power to control and regulate municipalities possessed by the Commonwealth. Municipalities are subject to the Commonwealth as to what they can do and how they can do it. Moreover, municipalities have only those powers granted to them by the Commonwealth. More importantly, municipalities, as such, may not raise constitutional protections against the Commonwealth.

The protection of substantive due process (currently denied to municipalities) conceivably could be applied to invalidate the pay-for-service scheme as it applies to individual taxpayers. Generally, however, courts will not overturn a tax because it appears excessive. Determining whether an otherwise valid tax is unreasonably burdensome is considered to be a legislative rather than a judicial prerogative. Nevertheless, one might speculate that a court would act if it found the effect of the pay-for-service requirement to be the equivalent of a subterfuge to pass through to individuals an unreasonably burdensome tax. This kind of action or interference by a court likely would occur only after the scheme was implemented. Any invalidation of the pay-for-services proposal would result from a finding that the scheme was unconstitutional as applied, not on its face.

It is within the prerogative of the Commonwealth to exercise plenary authority over its municipalities. This plenary authority includes the right to impose on municipalities a pay-for-service requirement for State Police services. The exercise of this prerogative would not justify interference by the judiciary without a clear demonstration of its effect on individuals.

Discussion

As a preliminary matter, the nature of the potential objection³ to the proposed action by the Commonwealth will be considered. There have been various formulations of the elements which constitute the test to determine whether an exercise of the police power is constitutional. One such statement of criteria involves both the effect of using the police power and the means used to obtain the desired objective. Under this test, the effect of exercising the police power must not be (1) unreasonable, (2) unduly oppressive or (3) patently beyond the necessities of the case. In addition, the means employed must have a real and substantial relation to the objects sought to be attained.⁴

A similar formulation of this defense has been made by the Commonwealth Court⁵ as follows: "[Pennsylvania's]...Supreme Court has adopted a standard first enunciated by the United

States Supreme Court in ... (1894). ... That standard sets forth a three-prong test that requires the police power to be exercised reasonably:

1. it must be in the interest of the public that it requires such an interference;
2. the means are reasonably necessary to accomplish the goal; and
3. the means are not unduly oppressive upon individuals."

Both of the foregoing formulations are examples of the standard analysis⁶ to test constitutionality on the basis of what is referred to as "substantive due process."⁷ Pennsylvania courts have stated that "[w]hen an attack upon a statute is made on due process grounds, the following analysis is required:

[A] law which purports to be an exercise of the police power must not be unreasonable, unduly oppressive or patently beyond the necessities of the case, and the means which it employs must have a real and substantial relation to the objects sought to be attained."⁸

Another variation of this constitutional test provides: "The standard of review for a substantive due process challenge is whether the statute at issue has a reasonable basis, 'whether it was irrational for the law to have been passed at all,.... that there is no relationship between the statute and a legitimate state interest.' ... A law that purports to be an exercise of police power must not be arbitrary, unreasonable or patently beyond the necessities of the case, and the means which it employs must have a real and substantial relation to the object sought to be attained. ... It is the prerogative of the legislature, and not of the courts, to resolve matters of public policy. ... It is the prerogative of the courts to decide whether the legislature has overstepped its power by violating constitutional restraints. ..."⁹

Similarly, it has been stated: " ... [T]he rational basis test is the proper test to be applied to ... due process and equal protection claims.... The focus of the rational basis test for substantive due process is whether it was irrational for the law to have been passed at all, while the focus for equal protection is whether the law irrationally distinguishes between similarly situated classes.... To prove that a statute is irrational and, therefore unconstitutional, the challenger must show for substantive due process purposes that there is no relationship between the statute and a legitimate state interest ... and for equal protection purposes, that the different treatment of the groups is unrelated to a legitimate state interest."¹⁰

Given the preceding background regarding the constitutional, Fourteenth-Amendment, substantive-due-process objection to an exercise of the police power, the question that remains can be posed in the alternative:

- (1) whether a decision by the Commonwealth to require payment or reimbursement by a class of municipalities¹¹ for certain State Police services would constitute an exercise of the police power subject to judicial scrutiny, if the result would be to require municipalities to pay the Commonwealth more money than could be raised by utilizing the current maximum millage generally applicable to real estate taxes.¹² or
- (2) whether a contrary argument would prevail, that such a decision is an exercise of administrative or legislative discretion regarding the method of funding the State Police and not an exercise of the police power which violates the standards of substantive due process.

The pay-for-service proposal does not necessarily fall within the common understanding of what constitutes an exercise of the police power subject to the limitations of substantive due process. The classic exercise of police power consists of governmental interference with transactions and matters involving private parties.¹³ In any event, a determination that the proposal is facially unconstitutional as violating substantive due process would require two findings: that the Commonwealth has no legitimate interest in establishing the means of paying for State Police services within municipalities; and that the proposal's effect on individuals is unreasonable and unduly burdensome.¹⁴ There is little doubt that the Commonwealth has a legitimate interest in providing for the payment of State Police services. Moreover, in the absence of the proposal being implemented, its actual impact on individuals cannot be conclusively demonstrated to be unreasonable and unduly burdensome. Therefore, the proposal cannot be said to be unconstitutional on its face.

The fact that the proposed requirement for municipal payment for State Police services makes no direct demand on individuals, but rather establishes a municipal obligation, is of prime importance. Thus, the analysis of the proposal must be in the context of a state's power over its municipalities. "The traditional conception of state-municipal legal relations was that a municipality ...[is] merely a subordinate creature or instrumentality of the sovereign state. The powers of the state legislature over a municipality ... [are] considered to be, except for constitutional limitations, plenary or absolute."¹⁵

It is a basic proposition that the "...authority of the Legislature over all ... civil, political, or governmental powers [of municipal corporations] is, in the nature of things, supreme, save as limited

by the Federal Constitution or that of the Commonwealth.¹⁶ Yet, even this proposition must be qualified and explained. Thus, it has been reasoned: "The problem with this proposition [i.e., that the power of a state over its municipalities is limited by the constitution] ... is that it is contrary to and thus nullified by a principle established by the Supreme Court of the United States: that a municipal corporation, being a creature of the state, cannot invoke federal constitutional protections against legislative acts of its sovereign, the state."¹⁷

Admittedly, two competing ideas seem to be at odds. On the one hand, there may be constitutional limitations on a state's power over its municipalities. Yet, on the other hand, municipalities have no right to raise constitutional protections against the state. These concepts, however, are not irreconcilable. The seeming dichotomy may be understood as follows:

The authority of a state is supreme over its municipalities except with regard to those limitations on legislative or state power that are specifically designated in the Federal or state constitutions. Thus, there may exist a specific prohibition or limitation on the exercise of a particular power.¹⁸ The Constitution of Pennsylvania, for example, does contain specific limitations¹⁹ upon the residual power of the General Assembly.²⁰ Thus, Pennsylvania's constitution could have contained a provision specifically limiting the power of the state to require municipal reimbursement for police services provided by the state--but it does not. In the absence of a such a designated limitation, however, a municipality may not avail itself of the more generic, fundamental constitutional safeguards of substantive due process which are afforded individuals²¹ in their relationship with government.

Specified limitations on legislative power, such as the prohibition against passing a "local" or "special" law,²² are not, however, the equivalent of the broad, constitutional protections of procedural and substantive due process and equal protection.²³ With regard to these broad, general protections, municipal corporations are viewed as having no standing "to invoke the provisions of the Fourteenth Amendment in opposition to the will of their creator," the State.²⁴

From the foregoing, it may be concluded that the state has complete power to regulate its municipalities except as specifically limited in the constitution, and that municipalities, as creatures of the state, are denied the right to raise the fundamental defenses, such as due process and equal protection, against the state.

A municipal corporation cannot raise constitutional protections against the state, but individual citizens of the municipal corporation may. While the state has absolute, plenary power over its municipalities, this is not the case with regard to individuals, and "[t]he state may not employ its power to establish, destroy or reorganize its political subdivisions to camouflage a strategy designed to deprive certain of the citizenry of the subdivisions of their individual

constitutional rights."²⁵ Nevertheless, even where the action of the state is not directed at municipalities but rather constitutes direct governmental interference with individuals, the judiciary is often reluctant to substitute its judgement for that of the Legislature.

The issue being addressed herein asks whether it is constitutional to effectively require municipalities to raise real estate taxes above currently authorized limits in order to meet the expense of paying for State Police services. Some might argue that this requirement on municipalities is the equivalent of a tax levy on individuals. As such, they would further argue that it should be overturned as being too burdensome. Yet, the judiciary has refused requests to overturn otherwise bona fide state action in the field of taxation on the grounds that it will be burdensome and unreasonable.²⁶ The United States Supreme Court commented on a state court holding "... that a bona fide tax, if sufficiently burdensome, could be held invalid under the Fourteenth Amendment."²⁷ It disapproved of the state court's reasoning, noting that "[t]his approach is contrary to the cases particularly to the oft-repeated principle that the judiciary should not infer a legislative attempt to exercise a forbidden power in the form of a seeming tax from the fact, alone, that the tax appears excessive or even so high as to threaten the existence of an occupation or business. [Citations omitted]"²⁸

The United States Supreme Court further commented that "[t]he claim that a particular tax is so unreasonably high and unduly burdensome as to deny due process is both familiar and recurring, but the Court has consistently refused either to undertake the task of passing on the 'reasonableness' of a tax that otherwise is within the power of Congress or of state legislative authorities...."²⁹ "The clear teaching of prior cases is that [separating those taxes that are too burdensome from those that are not] ... is not a task that the Due Process Clause demands of or permits to the judiciary."³⁰

As the foregoing discussion indicates, one might argue that requiring certain municipalities to pay for State Police service may result in the need for excessively burdensome taxes on individuals in some or all of those municipalities. Thus, it also might be contended that this requirement is something more than the Commonwealth's exercise of its plenary power over its municipalities. Nevertheless, even if the requirement for municipal payment of State Police services were viewed as a direct tax on individuals, courts would refrain from passing on the "reasonableness" of the tax, in that such a determination is within the purview of the legislative, not the judicial, branch of government.

As previously mentioned, the issue presented implicitly makes the following assumptions:

- (1) that the municipalities required to pay for State Police services have no other revenue sources available except the 14 mill general real estate tax levy;
- (2) that other expenditures could not be reduced; and

- (3) that real estate taxes at the legal limit would raise insufficient revenue to allow them to make the required payment.³¹

Presumably, under the forgoing assumptions, municipalities would find themselves either "in debt" to the Commonwealth or being denied services by the State Police. One might speculate as to whether the Commonwealth would permit either of these conditions to exist or continue without taking remedial action. Nevertheless, a court would refuse or, at best, be hesitant to prevent the Commonwealth from imposing a municipal pay-for-service requirement by superimposing its judgment to circumvent the Commonwealth's plenary power over its municipalities.

The proposed pay-for-service requirement is not a direct charge or tax on individuals subject to the substantive-due-process defense, and it is individuals, not municipalities, who may raise constitutional protections against the Commonwealth.³² The proposal comes within the broad power of control and regulation that the Commonwealth possesses with regard to its municipalities.³³

Assuming that the substantive-due-process defense³⁴ conceivably could be applied to invalidate the pay-for-service scheme as it indirectly applies to individual taxpayers on the basis that it is a subterfuge to pass through to individuals an unreasonably burdensome tax, courts would refrain from overturning a tax because such a determination is a legislative rather than a judicial prerogative.³⁵ In any event, action or interference by a court would occur only after the scheme was implemented; any invalidation of the pay-for-services proposal would result from a finding that the scheme was unconstitutional as applied, not on its face.³⁶

Without a clear demonstration of its effect on individuals, the Commonwealth's imposition of a pay-for service requirement on municipalities for providing State Police services would not justify the judiciary interfering with the prerogative of the Commonwealth to exercise plenary authority over its municipalities.

¹It is assumed that this 14 mill limit refers to the millage cap on real estate taxes generally for townships of the second class. In this regard, it is noted that this limit can be increased by 5 mills by court order. Also, the payment for State Police services might not result in a township exceeding its 14 mill limit, if there are other taxes, such as Act 511 taxes, from which the needed revenue might be derived. Additionally, a township may be able to utilize certain special purpose real estate taxes which are supplementary to the general real estate levy, thereby freeing funds for payment of police services. Finally, revenue currently used for other municipal purposes might be redeployed in order to pay for the State Police services.

²The inquiry from Representative Tangretti specifically references Com. ex rel. Woodside v. Sun Ray Drug Co., 383 Pa. 1, 116 A.2d 833 (1955), a case dealing with whether a law regulating the quality of ice cream can be applied to the regulation of iced milk products. The court therein set forth a well-recognized standard for determining the validity of the exercise of such regulatory police

power: "[A] law which purports to be an exercise of the police power must not be unreasonable, unduly oppressive or patently beyond the necessities of the case, and the means which it employs must have a real and substantial relation to the objects sought to be attained." 116 A.2d 838.

³The constitutional "defense" to the exercise of police power as set forth in Sun Ray Drug Co. See note 2 supra.

⁴Sun Ray Drug, supra, 116 A.2d at 838.

⁵North Cambria Fuel Co. v. Department of Environmental Resources, 153 Pa.Cmwlt. 489, 621 A.2d 1155, 1161 (1993).

⁶By way of comparison, the court, in Klein v. Com., State Employees' Retirement System, 521 Pa. 330, 555 A.2d 1216, 1224 (1989), quoting from Mr. Justice Flaherty's majority opinion in James v. Southeastern Pennsylvania Transportation Authority, 505 Pa. 137, 477 A.2d 1302 (1984), set forth an analytical framework for reviewing government actions which affect disparate classes.

... [T]here are three different types of classifications calling for three different standards of judicial review. The first type classifications implicating neither suspect classes nor fundamental rights--will be sustained if it meets a "rational basis" test.... In the second type of cases, where a suspect classification has been made or a fundamental right has been burdened, another standard of review is applied: that of strict scrutiny.... Finally, in the third type of cases, if "important," though not fundamental rights are affected by the classification, or if "sensitive" classifications have been made, the United States Supreme Court has employed what may be called an intermediate standard of review, or a heightened standard of review.... There are, in summary, three standards of review applicable to an equal protection case, and the applicability of one rather than another will depend upon the type of right which is affected by the classification.

(Citations omitted).

⁷See "The Development of Substantive Due Process," (*Findlaw*, Internet Legal Resources, Copyright 1994-1998).

⁸Edwards v. Com., State Dental Council and Examining Bd, 71 Pa.Cmwlt. 139, 454 A.2d 218, 219 (1983) (emphasis supplied), citing Gambone v. Commonwealth, 375 Pa. 547, 551, 101 A.2d 634, 637 (1954) as quoted, with approval, in McCoy v. State Board of Medical Education and Licensure, 37 Pa.Cmwlt. 530, 391 A.2d 723 (1978).

⁹Dranzo v. Winterhalter, 395 Pa.Super. 578, 577 A.2d 1349, 1355 (1990) (Citations omitted).

¹⁰Worley v. Pennsylvania Public School Employes' Retirement Bd., 689 A.2d 334, 339 (Pa. Cmwlt. 1997) (Citations omitted.).

¹¹Municipal corporations over a fixed population that have no municipal police force.

¹²See note 1, supra.

¹³"The term 'police power' connotes the time-tested conceptional limit of public encroachment upon private interests. Except for the substitution of the familiar standard of 'reasonableness,' this Court has generally refrained from announcing any specific criteria. The classic statement of the rule ... is still valid today: ... '[I]t must appear, first, that the interests of the public ... require [government] interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.' Even this rule is not applied with strict precision, for this Court has often said that 'debatable questions as to reasonableness are not for the courts but for the legislature'" Nollan v. California Coastal Com'n, 107 S.Ct. 3141, 1364 (1987). (Citations omitted; emphasis supplied.)

¹⁴Ordinarily, to prevail on a facial challenge, plaintiffs would have to prove that no set of circumstances exists under which the law could be applied constitutionally. See United States v. Salerno, 481 U.S. 739, 745, 107 S.Ct. 2095, 2100, 95 L.Ed.2d 697 (1987).

¹⁵Philadelphia Facilities Management Corp. v. Biester, 60 Pa.Cmwlth. 366, 431 A.2d 1123, 1133 (1981), citing among others, the case of Shirk v. City of Lancaster, 313 Pa. 158, 169 A. 557 (1933).

¹⁶Shirk v. City of Lancaster, 169 A. at 559.

¹⁷Philadelphia Facilities Management Corp., 431 A.2d at 1134-35 (emphasis supplied), citing Williams v. Baltimore, 289 U.S. 36, 53 S.Ct. 431, (1933); Trenton v. New Jersey, 262 U.S. 182, 43 S.Ct. 534, (1923); Newark v. New Jersey, 262 U.S. 192, 43 S.Ct. 539, 67 L.Ed. 943 (1923); Hunter v. Pittsburgh, 207 U.S. 161, 28 S.Ct. 40, (1907). Accord, Department of Environmental Resources v. Westmoreland-Fayette Municipal Sewage Authority, 18 Pa.Cmwlth. 555, 336 A.2d 704 (1975); Department of Environmental Resources v. Borough of Carlisle, 16 Pa.Cmwlth. 341, 330 A.2d 293 (1974); Commonwealth v. Shippensburg Borough, 2 Pa.D. & C.3d 417 (1977).

¹⁸In considering the specific constitutional limitations on the Commonwealth's power vis-a-vis municipalities, it is to be noted that one purpose of the Pennsylvania Constitution is to "...set forth the duties, powers and limitations of the agencies and officers created or authorized [therein]...." Woodside, Pennsylvania Constitutional Law (see footnote 3, supra), at 2 (Original in Capitals) (Emphasis supplied). "[Another]...purpose of a state constitution [generally] is to prescribe the manner in which the state is to exercise its inherent powers. ...[Such] provisions are technically limitations on the exercise of power rather than complete prohibitions.... [Also among]...the primary functions of a state constitution is to establish the structure of state and local government. ...[T]hese...provisions can be viewed as allocating power and limiting the right of the state to interfere in local affairs." Marks and Cooper, State Constitutional Law, at 3 - 6 (West 1988) (Emphasis supplied).

¹⁹See, for example, Constitution of Pennsylvania, Article III, Sections 28, 29, 30, 31, and 32.

²⁰In Pennsylvania, the legislative authority is absolute except where expressly limited. It has long been recognized as fundamental that "...the Constitution allows to the Legislature every power which it does not positively prohibit," Norris v. Clymer, 2 Pa. 277, 285 (1845), and that the Legislature may do whatever it is not forbidden to do by the federal or state Constitution. Luzerne County v. Morgan, 263 Pa. 458, 107 A. 17 (1919).

²¹Business corporations also are granted these protections as they relate to governmental interference with the corporations' private property and commercial activities.

²²Constitution of Pennsylvania, Article III, Section 32.

²³"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." United State Constitution, Fourteenth Amendment, Section 1 (Emphasis supplied.) Also, Article I, Section 26 of the Pennsylvania Constitution provides: "Neither the Commonwealth nor any political subdivision thereof shall deny to any person the enjoyment of any civil right, nor discriminate against any person in the exercise of any civil right." (Emphasis supplied.)

²⁴City of Pawhuska v. Pawhuska Oil Co., 250 U.S. 394 (1919); City of Trenton v. New Jersey, 262 U.S. 182 (1923); Williams v. Mayor of Baltimore, 289 U.S. 36 (1933). But see Madison School Dist. v. WERC, 429 U.S. 167, 175 n.7 (1976) (reserving question whether municipal corporation as an employer has a First Amendment right that may be asserted against the State).

²⁵Com. Dept. of Environmental Resources v. Westmoreland-Fayette Municipal Sewage Authority, 18 Pa.Cmwlth. 555, 336 A.2d 704, 706 (1975), citing Gomillion v. Lightfoot, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960).

²⁶City of Pittsburgh v. Alco Parking Corp., 94 S.Ct. 2291 (1974), a United States Supreme Court case originating in Pennsylvania.

²⁷94 S.Ct. at 2295.

²⁸Id.

²⁹94 S.Ct. at 2294.

³⁰94 S.Ct. at 2296.

³¹See note 1, supra.

³²See note 17, supra.

³³See note 15, supra.

³⁴See notes 8, 9, and 10, supra.

³⁵See note 28, supra.

³⁶See note 14, supra.