

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

NO. 1741 C.D. 2008
NO. 1750 C.D. 2008
Consolidated Appeals

SUMMIT TOWNSHIP INDUSTRIAL AND
ECONOMIC DEVELOPMENT AUTHORITY;
SUMMIT TOWNSHIP; SUMMIT TOWNSHIP
SEWER AUTHORITY; SUMMIT TOWNSHIP
WATER AUTHORITY; and PERRY
HI-WAY HOSE COMPANY

v.

THE COUNTY OF ERIE,
PENNSYLVANIA; ERIE COUNTY GAMING
REVENUE AUTHORITY; MILLCREEK TOWNSHIP;
MILLCREEK TOWNSHIP SEWER
AUTHORITY; MILLCREEK TOWNSHIP
WATER AUTHORITY; McKEAN TOWNSHIP;
McKEAN TOWNSHIP SEWER AUTHORITY;
McKEAN TOWNSHIP WATER AUTHORITY;
WATERFORD TOWNSHIP; WATERFORD
TOWNSHIP SEWER AUTHORITY;
WATERFORD TOWNSHIP WATER
AUTHORITY; and GREENE TOWNSHIP

Appeals from the Orders Entered on August 4, 2008 and
September 3, 2008 in the Court of Common Pleas of
Erie County, Pennsylvania at No. 15679-2007

BRIEF OF AMICUS CURIAE
ERIE REGIONAL CHAMBER AND GROWTH PARTNERSHIP
IN SUPPORT OF REVERSAL

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**QUESTION PRESENTED FOR REVIEW AND POSITION
OF AMICUS CURIAE**

On September 3, 2008 and September 5, 2008, Notices of Appeal were filed with this Honorable Court by the County of Erie and the Erie County Gaming Revenue Authority. Amicus Curiae Erie Regional Chamber and Growth Partnership submits this brief to present argument on the following issue:

- I. WHETHER ERIE COUNTY, AS HOST COUNTY, AND ITS ECONOMIC DEVELOPMENT AUTHORITY, ECGRA, HAVE BROAD DISCRETION TO ADMINISTER MUNICIPAL GRANTS UNDER SECTION 1403(c)(2)(v) AND SECTION 1403(c)(2)(ix) OF THE PENNSYLVANIA GAMING ACT AND ARE NOT REQUIRED TO FUND EVERY “ELIGIBLE” APPLICATION FOR A MUNICIPAL GRANT UNDER SECTION 1403(c)(2)(v) WITHOUT CONSIDERATION OF THE RELATIVE MERITS OF THE APPLICATION OR THE REASONABLENESS OF THE AMOUNT REQUESTED IN THE GRANT APPLICATION?

Answered in the negative by the court below.

For the reasons set forth below, the Erie Regional Chamber and Growth Partnership urges the court to answer the questions in the affirmative and reverse the Order of the Court of Common Pleas of Erie County.¹

¹ Amicus Curiae relies upon the appellant’s statement of jurisdiction, orders in question, statement of scope and standard of review and statement of the case.

STATEMENT OF AMICUS CURIAE

The Erie Regional Chamber and Growth Partnership (hereinafter “ERCGP”) is the unified voice of the Erie business community. The ERCGP is a 501(c)(3) organization which was formed in November 2002 through the merger of the Erie Conference on Community Development, the Erie Area Chamber of Commerce and Erie Insight. The ERCGP represents more than 800 members and is comprised of three divisions - Chamber of Commerce, Economic Development and Growth Partnership- each supporting the organization’s core mission of providing leadership to attract, retain and expand business in the region.

The Chamber division is responsible for membership sales, programs and services. It is the revenue generating and marketing arm for the organization. The Economic Development division is dedicated to business attraction and helping current businesses expand and prosper. This division’s four key activities include coordinating the region’s business attraction efforts, the Commonwealth’s Business Retention and Expansion Program (BREP), workforce development initiatives and the county’s Lead Economic Development Team. The Growth Partnership division is comprised of CEOs and top decision makers from ERCGP companies. The group’s current membership includes more than 140 individuals, overseen by a 15 member steering committee. The Growth Partnership’s role is to advance transformational community initiatives that impact the region’s long term economic future. The group’s overarching objectives include promoting a vibrant urban area that is a center for home life, retail, entertainment and culture; creating strong public/private partnerships to accomplish important civic objectives; and promoting regionalism to enhance public service delivery in the region.

Presque Isle Downs and Casino is located in Summit Township, Erie County, Pennsylvania. It will generate annually millions of dollars in gaming revenue which will flow to

Summit Township and to Erie County. ERCGP has a vital interest in the flow of those gaming dollars. ERCGP recognizes the need to use a portion of the gaming revenues to fund grants to offset costs associated with the presence of the facility but it also believes that this stream of revenue represents a unique opportunity to stabilize, preserve and grow regional assets that are vital to the community and to address transformational community needs in the area of economic development and education.

In order to effectuate these goals, the ERCGP Growth Partnership division convened a series of work sessions beginning in February 2007 to develop the best possible understanding of the gaming statute and to strategize the best use of gaming revenue funds. The collaborative effort of the ERCGP, The Erie Community Foundation and the Erie Regional Assets Task Force involving many business and community leaders resulted in a slate of recommendations for gaming revenue use that was subsequently adopted by the ERCGP Board of Directors and presented to Erie County government for consideration.

The recommendations adopted by the ERCGP took into account both the gaming revenue restricted for municipal grants (or economic development purposes if funds are uncommitted at the end of the fiscal year) and unrestricted funds that can be used for any purpose within Erie County. The recommendations were built upon the premise that Erie County government and its economic development authority (the Erie County Gaming Revenue Authority) have discretion as they make decisions regarding both the restricted and the unrestricted funds. More specifically, the ERCGP's basic premises are these:

1. Regarding "municipal grants":
 - a. Municipal grants are not entitlements;
 - b. The County, through its economic development authority

(the Erie County Gaming Revenue Authority) has reasonable discretion as it makes funding decisions regarding municipal grant applications;

- c. It is possible that there may be “uncommitted” funds at the end of a fiscal year that would then be paid over to the County’s economic development authority (the Erie County Gaming Revenue Authority).

2. Following proper exercise of discretion by the County through the municipal grant application and decision making process, with the possibility that some of the restricted money may end up being uncommitted and paid over to the County’s economic development authority (the Erie County Gaming Revenue Authority), the authority would then have the ability to distribute those funds in accordance with its charter.

The ERCGP’s recommendations were built upon five fundamental principles:

First, gaming revenues must not be dissipated and diluted to such an extent that they will have no discernable impact on the community’s quality of life and economic vitality.

Second, a reasonable amount of gaming revenues should be allocated for municipal grants to Erie County, Summit Township and/or the townships which are contiguous to Summit Township to address problems which are directly related to the presence of gaming in Summit Township. Municipal grants should be made pursuant to an application process wherein the merits of the proposed grant are explained and it is demonstrated that the grant addresses a problem directly created by the presence of the gaming facility. Underlying this principle is the concept that municipal grants are not entitlements, and that Erie County has the obligation to evaluate each municipal grant application based on its own merits, against other municipal grant requests, and in light of other pressing economic development priorities in the county.

Third, a reasonable portion of gaming revenues should be used to fund projects that are truly transformational. Any such project should be permanent in nature, first in class for a

community of Erie's size, highly visible, and should impact the lives of a large number of Erie County citizens.

Fourth, a reasonable portion of gaming revenue should be used to stabilize, preserve and grow existing regional assets. Finally, a reasonable portion of the gaming revenue should be reserved on an annual basis for discretionary county uses so Erie County can address one-time needs throughout the county.

In order to effectuate the ERCGP's recommendations, five broad categories were identified for spending: municipal grants, transformational projects, governmental regional assets, non-governmental regional assets and discretionary/county uses. General parameters for evaluating funding requests were also defined.

It is fundamentally the goal of amicus curiae that the gaming revenues be used to provide maximum benefit to the citizens of Erie County, Pennsylvania. The Court's resolution of the issues presented will determine whether the revenues will benefit all of the citizens of Erie County, Pennsylvania or inure to the benefit of a few.

SUMMARY OF ARGUMENT

The lower court's Order of August 4, 2008 directs that all "available 'restricted' gaming revenue must be used to fund applications for municipal grants which are submitted and eligible for funding during the fiscal year, without restriction upon the amount requested in the grant applications." Amicus Curiae ERCGP avers that the lower court erred in ruling that the County of Erie lacks discretion to award those grants. The Gaming Act provides for the award of grants and not entitlements. It also grants the County discretion as to how to award those grants. Amicus avers that it is contrary to the Gaming Act and public policy to mandate funding as required by the lower court.

ARGUMENT

I. WHETHER ERIE COUNTY, AS HOST COUNTY, AND ITS ECONOMIC DEVELOPMENT AUTHORITY, ECGRA, HAVE BROAD DISCRETION TO ADMINISTER MUNICIPAL GRANTS UNDER SECTION 1403(c)(2)(v) AND SECTION 1403(c)(2)(ix) OF THE PENNSYLVANIA GAMING ACT AND ARE NOT REQUIRED TO FUND EVERY “ELIGIBLE” APPLICATION FOR A MUNICIPAL GRANT UNDER SECTION 1403(c)(2)(v) WITHOUT CONSIDERATION OF THE RELATIVE MERITS OF THE APPLICATION OR THE REASONABLENESS OF THE AMOUNT REQUESTED IN THE GRANT APPLICATION?

The lower court’s order of August 4, 2008, provides, *inter alia*, that 4 Pa.C.S.A. §1403 requires that:

- (2) All available “restricted” gaming revenue must be used to fund applications for municipal grants which are submitted and eligible for funding during the fiscal year, without restriction upon the amount requested in the grant applications.
- (3) Grants from the “restricted” gaming revenue may not be awarded to units of local government or their respective public authorities other than Erie County, Summit Township, Millcreek Township, McKean Township, Waterford Township, and Greene Township. (Court’s order of 08/04/08; *Infra* at p. 33)

ERCGP respectfully avers that the court’s ruling violates the Gaming Act and public policy.

The General Assembly set forth its legislative intent at 4 Pa.C.S.A. §1102. Section 1102 provides in part:

The General Assembly recognizes the following public policy purposes and declares that the following objectives of the Commonwealth are to be served by this part:

- (3) The authorization of limited gaming is intended to provide a significant source of new revenue to the Commonwealth to support property tax relief, wage tax reduction, economic development opportunities and other similar initiatives.
- (5) The authorization of limited gaming is intended to provide economic opportunities to the citizens of this Commonwealth

and shall be implemented in such a manner as to prevent possible monopolization by establishing reasonable restrictions on the control of multiple licensed gaming facilities in this Commonwealth.

- (6) The authorization of limited gaming is intended to enhance the further development of the tourism market throughout this Commonwealth, including, but not limited to, year-round recreational and tourism locations in this Commonwealth.
- (10) The public interest of the citizens of this Commonwealth and the social effect of gaming shall be taken into consideration in any decision or order made pursuant to this part. (Emphasis Added)

4 Pa.C.S.A. §1403(c)(2)(ii)(D) provides that Erie County receive one (1%) percent of gross terminal revenue (“unrestricted funds”) and one (1%) percent of gross terminal revenue “for the purpose of municipal grants within the county....” (“restricted funds”) Section 1403(c)(2)(v) provides that:

“Unless otherwise specified, for the purposes of this paragraph money designated for municipal grants within a county, other than a county of the first class, in which a licensed facility is located shall be used to fund grants to the municipality in which the licensed facility is located, to the county in which the licensed facility is located and to the municipalities which are contiguous to the municipality”

Furthermore, Section 1403(c)(2)(ix) authorizes Erie County to enter into intergovernmental cooperative agreements with other jurisdictions to share the money.

The lower court’s order effectively negates the intent of the Legislature to ensure that gaming proceeds reach a broad section of community needs. It also converts a “grant” to an “entitlement” by mandating that all eligible applications for municipal grants be funded without regard to the amount requested or the merits of the application under consideration.

ERCGP agrees with the County of Erie that such a funding scheme violates the Gaming Act. Section 1403(c)(2)(v) explicitly grants authority to the county to administer grants through

its economic development or redevelopment authority. The procedures and guidelines for municipal grants must be established by the county to ensure appropriate application and the highest and best use of the funds. The Legislature deferred to the county to establish those procedures and guidelines. The ERCGP was intimately involved in establishing those procedures and guidelines. ERCGP worked closely with representatives of Erie County government, and other community leaders to provide recommendations to County Council relative to the distribution of gaming revenues. The recommendations sought to ensure that gaming revenues not be dissipated and diluted to the extent that they would have no discernable impact on the community's quality of life and its economic vitality. ERCGP agreed that a reasonable amount of revenues be allocated to Summit, the contiguous municipalities and Erie County to address facility related issues. It also recommended that gaming revenues be used for transformational projects, regional assets such as the Erie Zoo and County Library system and for one time needs throughout Erie County. The only way to achieve these goals is through the grant process authorized by the Gaming Act.

The lower court's order would require full funding for each project submitted by Summit Township, the contiguous townships and Erie County regardless of community need and cost. The only factors to be considered, according to the lower court, are: (1) Is the request for funding being made by Summit Township, a contiguous municipality, or Erie County and (2) Is the grant to be used for "costs of human services, infrastructure improvements, facilities, emergency services or health and safety expenses associated solely with the operation of Presque Isle Downs and Casino...?" (*Infra* at 32) There is no requirement that the county consider the cost of the request. There is no requirement that the county consider the feasibility and necessity of the request. Rather, according to the court's order, the grant must be awarded without regard to the amount of the project or whether it has any merit. For example, if Summit Township

wished to construct a six lane heated highway to serve the facility it would merely have to file for the funding. The county would have no discretion to deny funding even though the cost would be ridiculous and the need illusory. In fact, Summit has filed a request for \$13,785,661.79 for infrastructure improvements to the facility which were part of the costs of building the facility incurred by the developer. Summit intends to remit that amount directly to the developer, MTR Gaming. (R. 39a-44a) Such a scheme clearly violates the Gaming Act and numerous other statutes. Nonetheless, the county might have little option but to award the funding to Summit based upon the lower court's order.

Amicus respectfully avers that the system set up by the lower court is one of entitlement and not grant. It is violative of the Gaming Act, contrary to public policy and unworkable. Will the county be required to provide grant money for projects without regard to the need, cost or feasibility of the projects? Will funds have to be provided for unnecessary highway projects? Will funds be mandated for reimbursement to the facility owner? If requests for moving, enclosed sidewalks are submitted by Summit Township will the county be required to fund them? Funding requests will likely exceed annual fund availability. If the county has no discretion in awarding grants, how will it be determined which projects will receive funding?

Amicus asserts that if there are "eligible" grant applications totaling more than the available amount in any given year, the County through its economic development authority, the Erie County Gaming Revenue Authority, must have some discretion, as there would be insufficient funds to cover all grant applications in their fully requested amounts. Therefore, of necessity, there must be discretion used and procedures developed to determine what happens if and when all eligible grants cannot be funded. Possible scenarios could include all eligible grants being funded on a per capita, or pro rata, or first come, first served basis, etc., but each of these constitutes the execution of some type of discretion. The Legislature did not specify how

to handle this; rather it used the word “grant” not “entitlement” because it intended Erie County and its economic development authority to use their discretion and develop procedures for handling these types of situations.

As is readily apparent, the system of entitlement set forth by the lower court is unworkable and contrary to the Gaming Act. The Legislature set up a system of grants and not entitlements. By not mandating procedures, the Legislature left it up to Erie County to develop appropriate regulations to disburse grants. Erie County developed guidelines and procedures with input from Amicus and many others. These guidelines and procedures will benefit all Erie County residents.

In addition, the Gaming Act provides that funds not distributed through the grant process are to be paid to “the economic development or redevelopment authority of the county in which the licensed facility is located...” 4 Pa.C.S.A. §1403(c)(2)(v). The intent of the Legislature was to provide funds for long-term projects to benefit the citizens of Erie County. ERCGP respectfully avers that these projects are of extreme importance to the community. The lower court’s order would effectively terminate this avenue of funding. It is possible there would be no “uncommitted funds” as the county would have no discretion in funding grant requests and the requests could therefore exhaust the funds annually. ERCGP contends that such a funding scheme violates the Gaming Act by providing funding to a select few to the detriment of the community.

CONCLUSION

Based upon the above arguments, Amicus Curiae ERCGP respectfully requests that this Court reverse the Order of the Court of Common Pleas of Erie County and permit Erie County and its economic development authority, Erie County Gaming Revenue Authority, broad discretion to administer municipal grants pursuant to Section 1403(c)(2)(v).

Respectfully Submitted,

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PROOF OF SERVICE

I hereby certify that I am this day serving the foregoing Brief of Amicus Curiae Erie Regional Chamber and Growth Partnership in Support of Reversal upon the persons and in the manner indicated below which service satisfies the requirements of Pa.R.A.P. 121:

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