In The

Court of Appeals of Maryland

No. 52
September Term, 2020

COA-REG-0052-2020

MAYOR AND CITY COUNCIL OF OCEAN CITY, *et al.*,

Petitioners,

vs.

COMMISSIONERS OF WORCESTER COUNTY, MARYLAND, *et al.*,

Respondents.

Writ of Certiorari to the Court of Special Appeals of Maryland from its Decision in No. 2751, Sept. Term 2018, on the Appeal from the Circuit Court for Worcester County No. C-23-CV-18-000021

REPLY BRIEF FOR PETITIONERS

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Appeal from the Court of Special Appeals of Maryland

PETITIONERS' REPLY BRIEF

As it did below, the County argues in its Brief (incorrectly) that it already provides tax relief to Ocean City; it relies on erroneous and non-authoritative opinions from a former Assistant Attorney General; it misconstrues applicable caselaw; it fails to acknowledge or recognize that the purpose of the tax set-off statutes is to correct the inequity of "double taxation" of municipal taxpayers in our State; and it encourages this Court to ignore its duty to sever the "may" provisions in order to resolve the clear unconstitutionality of the existing statutory scheme. None of these arguments should

deter this Honorable Court from concluding, as it should, that the statutory scheme of §§6-305, 6-305.1, and 6-306 violates the uniformity requirement of Article XI-E, §1 of the Maryland Constitution.

I. THE COUNTY'S ASSERTION THAT IT HAS, IN EFFECT, PROVIDED TAX SET-OFFS TO OCEAN CITY IS FACTUALLY INCORRECT, NOT PROPERLY BEFORE THIS COURT, AND UNSUPPORTED BY THE RECORD.

The County asserts that it has provided Ocean City with millions of dollars in annual grants. Said grants, the County suggests, satisfy the definition of a tax setoff. Respondents' Brief at pp. 3-4.

The record is clear that, since 1999, the County has never provided a tax setoff, of any kind, to any of the four municipalities within its jurisdiction, including Ocean City. E. 410-15.[1] This is based on the Annual Reports by the State Department of Legislative Services for each of those years, which state clearly that "Worcester County did not provide tax set-offs to its municipalities in [this fiscal year]." (E. 404-415).

The County contends that certain grants made by the County to Ocean City, having nothing to do with tax setoffs or tax differentials, "may apply to offset the cost of any of the similar services that Ocean City may provide." Respondents' Brief, at p. 4. But the County concedes in the same breath that "[t]hese grants were not included as part of the Department's reports of tax setoffs, as the Department has consistently declined to include this funding in its reports." Respondents' Brief, at p. 4.

[1] In 1999, the County reported that it provided "rebates" to its four municipalities (totaling $400,000 in the aggregate), but the nature of those "rebates" is unknown.

Indeed, the grants that the County has provided to the City are not, and may not be deemed, proffered, or considered for purposes of this case to be, tax differentials or setoffs provided to Ocean City pursuant to section 6-306 of the *Tax-Property* Article. The trial Court did not make any finding that any County grants provided to the City constituted a tax setoff or differential under the challenged statute (E. 587-588, Transcript of Court's ruling from the Bench; E. 590-591, Trial Court's Order entered October 19, 2018). Such a finding did not undergird any part of the trial court's appealed ruling (the trial court incorporated into its ruling the arguments advanced by the County in its reply memorandum filed on June 22, 2018 (E. 592-604) and those arguments had nothing to do with grants having been provided to Ocean City constituting tax differentials or setoffs provided under or pursuant to the challenged statutes). The Court of Special Appeals' Unreported Opinion states clearly, as background for its consideration of the constitutionality of the statutory tax setoff scheme, **that the County had "declined" to provide a tax setoff to Ocean City, and the County has not appealed that holding**. App 2-3.

II. THE COUNTY'S ASSERTION THAT IT HAS "MET ANNUALLY WITH OCEAN CITY OFFICIALS TO DISCUSS TAX SETOFFS" ALSO HAS NO BEARING ON THIS APPEAL.

The County asserts it has "met annually with Ocean City officials to discuss tax setoffs," and therefore has "fully complied with the 'meeting' requirements" of the challenged statutes. Respondents' Brief, at p. 4.

First, this is an incorrect statement factually. In responding to Ocean City's November 29, 2016 request, the County Commissioners simply voted at a regular

Commissioners' meeting to deny that request, even though the County's Chief Administrative Officer told the Commissioners at that meeting that County representatives were required to meet with representatives of the Town (E. 499, 502-04). Similarly, the Town's November 20, 2017 request for a tax setoff, while again a subject of discussion at a meeting of the Commissioners, appears never to have resulted in a meeting of County and Town representatives. (E. 506-07, 513-14). Indeed, based on the record presented below, the trial court "considered granting limited relief to [Ocean City], directing the County Commissioners . . . to meet [with Ocean City] and discuss a tax set-off as contemplated by . . . §6-306(c) and as otherwise provided in §6-306." E. 590, fn. 1 of trial court's Order; E. 588 (page 91 of Hearing Transcript). But the trial court ultimately did not include such a direction in its Order, finding that having ruled as it did on the constitutionality of the statutory scheme, the case was fully resolved. E. 590, fn. 1 of trial court's Order.

Second, as pleaded, Ocean City's case did not raise the matter of whether the County had fulfilled its obligation to meet with Ocean City under §6-306(c) in any particular year and did not seek any relief in that regard. E. 024-049. Ocean City's Complaint narrowly sought a declaration that the disparate treatment of municipalities as reflected in the subject statutory scheme (sections 6-305 and 6-306) is un-constitutional under §1 of Article XI-E of the Maryland Constitution.

Third, obviously and more generally, whether the County has met with Ocean City to earnestly and meaningfully discuss and consider tax set-offs for any particular year (the County has not done so) has no bearing at all, legally or otherwise on the

questions presented in this appeal. Even assuming *arguendo* the County *has* met with Ocean City to earnestly and meaningfully discuss and consider tax set-offs, such fact (if it existed) would not weigh in one direction or the other on the matters at issue in this case.

III. THE COUNTY CONTINUES TO RELY ON NON-AUTHORITATIVE, UNPERSUASIVE, ERRONEOUS ADVICE TO MEMBERS OF THE GENERAL ASSEMBLY FROM AN ASSISTANT ATTORNEY GENERAL.

A. The Letters are Not Authoritative.

In support of its arguments that the tax set-off statutes are constitutional, the County relies heavily (as it did below) on two unpublished advice letters from former Assistant Attorney General Richard E. Israel: one dated March 29, 1983 to a member of the State Senate dealing with the proposed enactment of Senate Bill 277 (E. 70-71), and the other dated February 28, 1986 to a member of the House of Delegates which discussed a proposed amendment to Tax-Property §6-305 (E. 72-75). Both should be disregarded by this Honorable Court.

In this State, even a reported opinion of the Attorney General (i.e. signed by the Attorney General himself) is considered by the courts to be "advisory only" and courts are "not bound by the positions taken in those opinions." *Maryland Auto Ins. Fund v. Lumbermen 's Mut. Cas. Co.,* 148 Md. App. 690, 702 n. 6 (2002). *See Immanuel v. Comptroller,* 449 Md. 76, 94 (2016) ("Although not binding on this Court, we consider the Attorney General's opinions for their persuasive value, if any").

Advice letters like those relied upon here by the County are given even less weight. *See Public Service Commission v. Wilson,* 389 Md. 27, 57 (2005) ("[W]e afford

no enhanced weight to [an advice letter of the Assistant Attorney General] .... [A]lthough we may give some consideration to formal opinions of the Attorney General, we are not bound by them.... In this case, however, we are confronted not with a formal opinion, but an informal advice letter"); *State Ethics Commission v. Evans,* 382 Md. 370, 384 n.4 (2004)(a letter of advice from an Assistant Attorney General "has no significance of its own"); *Montgomery County v. Maryland Economic Development Corp.*, 204 Md. App. 282, 323 n.17(2012) ("We are not bound by the formal opinions of the Attorney General and would afford even less weight to an informal letter written by a single Assistant Attorney General"); *Patterson Park Public Charter School, Inc. v. Baltimore Teachers Union*, 399 Md. 174, 206 (2007) ("Although we take into consideration the advice of the Assistant Attorney General, we are not bound by it, nor do we afford it any enhanced weight") (letter from Richard E. Israel).

B. The Advice Letters Reach the Wrong Conclusion.

Even if this Court considers the advice of the former Assistant Attorney General, such advice is not persuasive. The March 29, 1983 advice letter concerned Senate Bill 277, which proposed legislation repealing and reenacting Article 81, §32A, the predecessor to §§6-305 and 6-306. The letter dealt with the possible exemption of certain counties from the legislation, an issue which is certainly relevant to this lawsuit. The Assistant Attorney General concluded that, "as the bill concerns more than a purely municipal matter" it was constitutional. However, in so concluding, the Assistant Attorney General, like the County here, committed two errors. First, he erroneously confused the issue of whether the legislation was general

or local with the issue of whether the legislation related to municipal affairs. Second, he added a requirement to the language of the Article XI-E that does not exist: that the legislation must deal with "purely" municipal matters before it is subject to the uniformity requirement of Article XI-E §1.

More significantly, the March 29, 1983 advice letter relied on a May 12, 1975 opinion signed by then Attorney General Burch approving the constitutionality of the original tax set-off enabling legislation. Mr. Israel said the May 12, 1975 opinion "raised no constitutional objection to the exemption of [nine] counties" from the tax set-off statute. However, the Assistant Attorney General failed to note that the May 12, 1975 opinion, which is reproduced at Rep. App. 1-2 to this Brief, made no mention at all of Article XI-E.

Even more importantly, the Assistant Attorney General in his March 29, 1983 advice letter ignored that the Attorney General in his May 12, 1975 opinion expressly found that the purpose of the original tax set-off enabling legislation was to "insure that residents of municipalities who may be currently paying real property taxes to the county and the municipality for services which are provided by the municipality only are subjected to a tax burden commensurate with the services they receive" (COSA Rep. App. 2). The Attorney General added that "the effect of the [tax set-off] bills is to provide for a separate legislative classification of property within a municipality which provides governmental services to its residents." (COSA Rep. App. 1). Those conclusions, then, clearly contradict the Assistant Attorney General's March 29, 1983 statements, and the County's position in this case, that "the bill is

concerned with the levying of county taxes in municipalities" and is therefore "a matter of concern to county taxpayers" (E. 71).

The February 28, 1986 advice letter on which the County also relies, is no more persuasive. In that letter, Mr. Israel was asked to consider whether §6-305 could be amended to provide that in Garrett County similar municipal services offered by a municipality commenced after a certain date could be excluded from consideration during the negotiating process to set a tax differential. He concluded again, "The law does not concern the municipal property tax, but only the county property tax." (E. 72). He similarly ignored that the purpose of the tax set-off legislation is to address the inequity of "double taxation" of municipal taxpayers and again jumbled the two separate constitutional requirements of Article XI-E, §1. However, even he recognized that the conclusions in his February 28, 1986 advice letter were tenuous. He said that "on balance" "it seem[ed] that the law [was] essentially concerned with the affairs of the counties ... rather than the affairs of the municipal corporations," and that therefore "there [was] a reasonable basis for concluding that the [law] did not violate Section 1," but that "there are ambiguities about the matter." (Emphasis added) (E. 73-74).

Contrary to the advice letters relied on by the County, what *is* manifest is that §§6-305 and 6-306 are public general laws, that they relate directly and materially to the affairs of the Town of Ocean City, and that they fail to apply uniformly to all municipalities. Consequently, they are unconstitutional under Article XI-E, §1 and should be so declared by this Honorable Court.

IV. CASE LAW DEMONSTRATES THAT ARTICLE XI-E, §1 DOES NOT REQUIRE THAT A LAW MUST RELATE "PURELY" TO MUNICIPAL GOVERNMENT AND AFFAIRS BEFORE IT IS REQUIRED TO APPLY UNIFORMLY TO ALL MUNICIPALITIES.

The County continues to insist that, for the uniformity requirement of §1 of Article XI-E to apply as a test of constitutionality, the statute or statutes in question must relate "*purely*" or "*solely*" to local (municipal) affairs. *See e.g.* Respondents' Brief, at p. 27. In doing so, the County continues to rely most heavily on its interpretation of this Court's decision in *Birge v. Town of Easton*, 274 Md. 635 (1975).

Again, *Birge* dealt, not with the issue of uniformity, but rather with the power of the Town of Easton to amend its charter under Article XI-E, §3 which permits a municipality "to amend or repeal [its] charter or local laws relating to [its] incorporation, organization, government, or affairs." In *Birge*, the Town already had authority from the General Assembly dating to 1914 to operate an electric system and supply heat and power "to the citizens of Easton, and vicinity" (emphasis added) and as of the 1975 decision had a service area of some 50 square miles "both within and without the Town limits." 274 Md. at 636-37. The challenged charter amendment permitted the Town to acquire an interest in an electric plant located outside the Town (indeed, in the State of Delaware) in conjunction with a private entity. In deciding whether the charter amendment was valid *under Article XI-E, §3*, this Court looked to the Second Sobeloff Report and

said "what constitutes a matter of purely local or municipal concern, i. e., a matter relating to the 'incorporation, organization, government, or affairs' of the municipality, is for the courts to make in light of all existing circumstances." 274 Md. at 644. The *Birge* Court then looked to 1 C. Antieau, Municipal Corporation Law §3.36 (1973) and found that rather than speaking in terms of "pure" local concern, Antieau spoke in terms of relative effect: "If the effect of local rules or municipal control is not great upon people outside the home-rule city, the matter is apt to be deemed local. . . . Contrariwise, if the effect of the regulation or the administration of a particular matter is likely to be felt by a considerable number of people outside the city and in a rather strong degree, courts are probably going to conclude that the concern is for the state." (Emphasis added). 274 Md. at 644.

The *Birge* Court then, exercising its authority to make its decision "in light of all existing circumstances" concluded that "[c]onsidering the nature and needs of the Town's electric utility, its limited service area, its overall regulation by the State through the PSC, and the negligible effect upon nonresidents of the Town, we think the power granted by the charter amendment with respect to the Town's electric system is in the sense contemplated by Article XI-E a local matter involving the 'incorporation, organization, government, or affairs' of the municipality."

Thus, while clearly the charter amendment at issue in *Birge* was not "purely" a municipal concern in the sense argued by the County in this case (there

were electric customers outside the Town and the proposed plant was located in Delaware), the *Birge* Court nevertheless found that, relatively speaking, the issue was a "local matter" involving the government and affairs of the Town, and was constitutional.

Adopting the incorrect arguments of the County, the Court of Special Appeals mis-applied or mis-construed *Birge*, as did the trial court, as establishing a binding "standard" for determining, not only under Article XI-E, §3, but also under Article XI-E, §1, "whether a matter is of local or of State concern, and how to deal with statutes that are of a mixed nature and concern both local and State matters." App. 11-12 (COSA Opinion, at p. 10). Again, if *Birge* created any "test" at all, it created a test for determining whether a locally adopted law or ordinance, having some impact outside the municipality, might nevertheless be deemed a constitutional exercise of Home Rule power by the municipality, vis-à-vis Article XI-E, *§3* of the Maryland Constitution. In *that* context, to reiterate, this Court held in *Birge* that, although the subject charter amendment was not "purely" a municipal concern (there were electric customers outside the Town and the proposed plant was located in Delaware), *relatively speaking*, the issue was a "local matter" involving the government and affairs of the Town (and therefore passed constitutional muster under Article XI-E, §3, as a proper exercise of Home Rule power).

This case presents a different question arising under a different constitutional provision – whether general State laws (§§6-305 and 6-306 of the *Tax-Property*

Article) relating materially, substantially, and directly to municipal affairs, *but not solely* to municipal affairs, and treating municipalities dramatically differently, violate the uniformity requirement of Article XI-E, §1. Ocean City submits respectfully that such laws violate the uniformity requirement of Article XI-E, §1, and that the "test" applied below by the Court of Special Appeals, purportedly under *Birge*, was erroneously gleaned from that case, erroneously articulated, and erroneously applied.

Again, the issue presented herein is closer to what was presented in *Mayor and Alderman of Annapolis v. Wimbleton*, Inc., 52 Md. App. 256 (1982). Even though the challenged law in *Wimbleton* was not a matter of "purely" local concern, the Court of Special Appeals found it violated the uniformity clause of Article XI-E, §1. That case involved the annexation to the City of a 188-acre parcel located outside the City. Former Article 23A, §19(u) permitted Anne Arundel County to object to the annexation and require a referendum of the entire County electorate on the matter. The City of Annapolis brought suit to have §19(u) declared unconstitutional under the uniformity requirement of Article XI-E, §1 because it did not apply to all municipalities in the State.

The circuit court, relying on *Birge*, found that §19(u) was a valid general law "that has substantial impact beyond the City, and therefore does not violate Article XI-E, §1." (52 Md. App. at 261-62). The Court of Special Appeals accepted the trial court's finding of a "substantial impact beyond the City" but nonetheless reversed, implicitly rejecting the requirement that the law must be

"purely" local in order to violate the uniformity requirement: "§19(u) clearly applies to Anne Arundel County only and, therefore, only to the two municipalities in Anne Arundel County. Accordingly, as a general law, it is unconstitutional because it violates the uniformity provision of Article XI-E, § I." 52 Md. App. at 267-68. Thus, just as is the case with §§6-305 and 6-306, §19(u) was drawn in a manner which impacts the County, but nonetheless violated Article XI-E, §1.

V. THIS COURT IS REQUIRED TO SEVER THE UNCONSTITUTIONAL PORTIONS OF §§6-305 AND 6-306 SO THAT ALL MARYLAND MUNICIPALITIES, INCLUDING OCEAN CITY, "SHALL" RECEIVE A TAX SET-OFF.

In *General Provisions* Article §1-210, the General Assembly has directed this Court that as to its enactments, a finding "that part of a statute is unconstitutional or void does not affect the validity of the remaining portions of the statute, unless the court finds that the remaining valid provisions alone are incomplete and incapable of being executed in accordance with the legislative intent." The Court of Appeals said in *Gordon v. Commissioners of St. Michaels*, 278 Md. 128, 134 (1976), "This Court has the duty, when finding that a statute is invalid in some respect, to separate the valid from the invalid provisions wherever possible." Clearly, the General Assembly's intent, as amplified by numerous Resolutions and Preambles over the last 60 years, has been and continues to be, that every municipality in this State which is being "doubly taxed" is entitled to a tax set- off after negotiation with the County in which it is located.

Thus, the exemptions in §6-305 and the entirety of §6-306 should be severed as unconstitutional, leaving a constitutional statutory framework in which all counties are deemed and treated as "shall counties" (i.e., there are no "may counties") and all qualifying municipalities are entitled to a tax set-off.

VI. THE ARGUMENT(S) ADVANCED BY THE *AMICUS* PARTIES – SALISBURY, DENTON, AND CHESTERTOWN – MAY PROPERLY AND SHOULD BE CONSIDERED BY THIS HONORABLE COURT.

The County contends in its Brief that the City/Town *amicus* parties' motion "sets forth new (and unsubstantiated) factual allegations with respect to tax setoffs in Wicomico, Caroline and Kent Counties." Respondents' Brief, at p. 29.

Whether or not the *amicus* parties' motion alludes to matters not strictly in the record, there are no "new" or "unsubstantiated" facts *in their amicus brief*. Indeed, the only "facts" set forth therein are those which have been advanced by Ocean City in its Brief and incorporated by reference by the *amicus* parties. *See* "Statement of Facts" in Amicus Brief, at p.1. Salisbury, Denton, and Chestertown are plainly "may counties" under section 6-306, are treated unfairly and disparately by virtue of the challenged statutory scheme, and therefore have a clear and direct interest in the outcome of this appeal. Their Brief and their expression of support for, and agreement with, Ocean City's arguments and positions, respectfully, should be considered by this Court.

The County contends that the *amicus* parties' brief advances a "new" constitutional challenge to sections 6-305 and 6-306. It does not. The *amicus*

parties merely point out that, to evaluate the constitutionality of the challenged statutory scheme under Article XI-E, §1, the Court should (and must) read Article XI-E, §1 in conjunction with Article XI-E, §2, *which is expressly referenced in Section 1*. This argument does not constitute a new issue or a new or different constitutional challenge raised by the *amicus* parties; it merely constitutes further discussion of the issue and constitutional challenge that is already squarely before this Court, as it was squarely before the lower courts.

CONCLUSION

WHEREFORE, Petitioner Ocean City respectfully requests that this Honorable Court reverse the ruling of the Court of Special Appeals and declare that: (a) §6-305(b) of the *Tax-Property* Article and the entirety of §6-306 of the *Tax- Property* Article violate §1 of Article XI-E of the Maryland Constitution, and are invalid on that basis; (b) the remainder of §6-305 of the *Tax-Property* Article is constitutionally valid and is severed and continues in force as a public general law of this State, to the end that tax differentials or tax rebates are mandatory for the Town of Ocean City, in relation to the cost of the services and programs which are provided by the municipality which would otherwise be provided by the county; and (c) that Worcester County is required to comply with the newly constituted §6-305 of the *Tax-Property* Article.

Respectfully submitted,

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CERTIFICATION OF WORD COUNT AND COMPLIANCE WITH RULE 8-112

1. This Brief contains 3,882 words, excluding the parts of the brief exemptedfrom the word count by Rule 8-503.

2. This Petition complies with the font, spacing, and type size requirements as stated in Rule 8-112. This Petition was printed using a 13-point Times New Roman font.

/s/ Bruce F. Bright
Bruce F. Bright

CERTIFICATE OF SERVICE

Court of Appeals
COA-REG-0052-2020

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MAYOR AND CITY COUNCIL OF
OCEAN CITY, et al.,
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COMMISSIONERS OF WORCESTER
COUNTY, MARYLAND, et al.,
Respondents.
----------)

I, John C. Kruesi, being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

Counsel Press was retained by AYRES, JENKINS, GORDY & ALMAND, P.A., counsel for Petitioners to print this document. I am an employee of Counsel Press.

On the **11th Day of May, 2021**, the Reply Brief for Petitioners has been filed and served electronically to registered users via the Court's MDEC system. Additionally, on this date I will serve paper copies upon:

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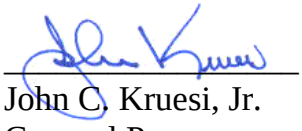
May 11, 2021



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