

Recent Developments in PA Rental Registration and Inspection Cases

By: Bradley S. Dornish, Esquire

The last few months have seen several important developments in rental registration litigation in Pennsylvania. The most recent development was a series of Commonwealth Court decisions on May 17th, which will have a significant impact on the pending rental registration cases challenging Pittsburgh's rental registration ordinance. Those cases, Building Owners and Managers Association of Pittsburgh v. City of Pittsburgh et. al., at No. 100 C.D. 2016 and No. 102 C.D. 2016, and Pennsylvania Restaurant and Lodging Association, et.al. v. City of Pittsburgh, at No. 79 C.D. 2016 and No. 101 C. D. 2016, were both appeals of decisions by Allegheny County Court of Common Pleas Judge Joseph James, in which Judge James had found city ordinances, one requiring City employers to give all employees sick time off under a specific set of rules, and the other ordinance requiring security guards and building service employees in Pittsburgh buildings to receive training on emergency response to exceed the City's authority to regulate employers under its Home Rule Charter.

In both cases the Commonwealth Court en banc , meaning seven of the judges of that court together, rather than a panel of three, affirmed Judge James' decision that the ordinances exceeded the City's authority under its Home Rule Charter to regulate employers. These decisions are very positive signs for the rental registration cases against the City, which are now pending in front of the same Judge James in the Court of Common Pleas of Allegheny County. That is because the landlords' and real estate agents' attorneys in the rental registration cases made the same argument that the rental registration ordinance exceeded the City's authority under the Home Rule Charter.

Not only are those arguments made in briefs which we filed with the court many months ago, but Judge James had also stayed further proceedings in the rental registration cases while waiting for the Commonwealth Court rulings on the cases above. When he did that, he indicated that he preferred to wait to see what the Commonwealth Court decided in those cases, so he would not be reversed on three similar cases. This suggests that the Judge

is inclined to rule that the Pittsburgh rental registration ordinance likewise exceeds the City's authority under its Home Rule Charter.

On May 30th, Judge James advised that he is now ready to move forward on the rental registration case, with additional briefs and argument by the attorneys to take into account the recent decisions of the Commonwealth Court. We expect to get dates for those briefs and argument in June, and could get the court's decision on the Home Rule Charter issue this Summer. Even if the decision is in our favor, and the ordinance is invalidated by Judge James, the City could still appeal, and the case could go until well into 2018.

Unfortunately, a decision invalidating the City of Pittsburgh's rental registration ordinance on the basis of exceeding its authority under its Home Rule Charter will not invalidate all other such ordinances, even if the decision is appealed to Commonwealth Court and affirmed there. That is because most PA municipalities are not home rule municipalities, so the decision on that basis would have no bearing on their ordinances.

The other rental registration case we are following is now pending in Pennsylvania appellate courts. The case of Costa, et. al v. City of Allentown, was decided in the Commonwealth Court at No. 826 C.D. 2016, with an opinion filed January 12, 2017. That decision does affect all other rental registration ordinances in Pennsylvania, and the cases pending in the courts to challenge those ordinances, such as the cases against the Erie and Pittston ordinances.

In the Allentown case, there was a non-jury trial in the Court of Common Pleas of Lehigh County, and the primary issue in that trial was whether the \$75.00 annual fee for rental registration in Allentown was an amount which covered the City's costs of administering the registration program, and therefore a legal and proper fee, or whether that amount was substantially in excess of the costs of the registration program, and therefore an illegal tax on residential rental properties in violation of the Local Tax Enabling Act, 53 P.S. Section 6901 et. seq.

The Local Tax Enabling Act (LTEA) is the PA state law keeping control of the power to tax in the state legislature, except for certain specific types of taxes which the legislature has specifically authorized municipalities and school districts to charge. For example, a few years ago when the City of Pittsburgh tried to fill a budget shortfall by raising its occupational privilege tax on those who work in the City from \$10.00 per year to over \$50.00 per year, the City had to go to the State Legislature and get the legislature to

amend the LTEA to allow the City to impose that exact tax on those who worked there. The legislature amended the LTEA, and Pittsburgh has collected the extra tax ever since.

In Allentown, the City had imposed rental registration, with inspection every five years, beginning in 1999. The original license fee was \$11.00 per year per residential rental unit, and climbed to \$21.00 per unit by 2009. In 2010, the City more than tripled its annual license fee to \$75.00 per unit per year, and landlords in the City thereafter filed suit seeking a declaration that the \$75.00 annual fee was an unlawful special tax, an injunction against the collection of the fee, and a refund of the fee paid by all landlords in the City since 2010.

At trial, the landlords and the City each had accountants as expert witnesses. The landlords' accountant, Robert Boland analyzed the amount of revenue collected by the City from the \$75.00 fee, looked only at the direct costs to the City associated with the registration and licensure of rental units and inspections, and testified that the revenue generated by the \$75.00 annual fee on 24,000 units, roughly \$1,800,000.00 per year, grossly exceeded the costs of the program and therefore constituted an illegal tax. Boland looked at the city's personnel costs related to the rental registration, licensing and inspections, and certain direct costs like vehicle maintenance, vehicle insurance and fuel, cell phones for inspectors, and increased computer costs of the City.

The City's expert accountant, Trevor Knox did a different analysis of the costs of the rental registration and licensing, called a "full cost" approach. In his analysis, Knox considered the rental program as a comprehensive program regulating all activities of the City related to residential rental units. Knox more broadly allocated personnel costs to the program, including \$223,000.00 per year for wages of City personnel who performed general services not specific to rental registration, and \$165,566.00 in general City overhead. He also allocated \$482,285.00, a substantial amount of the City's police budget, to the rental program based on a finding that there had been a disproportionate number of police calls to residential rental units, as opposed to commercial properties and owner occupied homes.

Even with these allocations of additional costs over \$900,000.00, constituting over half of the total revenue collected by the City, and additional allocation by Knox of the cost of certain code enforcement functions like boarding up vacant properties, complaint

inspections, emergency sewer issue responses and social services to tenants living in substandard conditions, Knox concluded that the total costs which he allocated to the rental program were about 15% below the revenue generated by the \$75.00 fee per unit, resulting in general revenue to the City of over \$250,000.00 per year.

The trial judge rejected Boland's testimony, accepted Knox's testimony, and concluded that for all practical purposes, the costs of the Rental Program equaled the revenues generated by the \$75.00 annual fee.

On appeal to the Commonwealth Court, the landlords made the argument that only the direct costs associated with the registration of each unit, the inspection of each unit, and disruptive conduct reporting costs should have been considered by the trial court, since those were the only costs which were created by the ordinance, and which would disappear if the Rental Program created by the ordinance ended. The Commonwealth Court rejected the landlords' argument, and affirmed the trial court decision in favor of the City.

The Commonwealth Court explained its decision by finding that the landlords' attempt to limit the calculation of the City's costs to direct costs was too narrow. Judge Brobson, writing an opinion in which Judges Wojcik and Pellegrini joined, explained the Court's decision that the City was allowed to add some indirect costs related to the Rental Program to its calculation of cost of the program, including some pre-existing budget items which were redirected to the Rental Program. Judge Brobson stated "In essence, the governmental unit is permitted to reallocate or redirect existing costs to a newly established program if additional burdens are placed on such governmental unit's existing services."

In applying the "additional burdens" standard to Allentown's allocation of costs to the Rental Program, Judge Brobson explained that some costs like the time police took to track and report disruptive conduct of tenants, and some part of the salaries and benefits of City employees who worked in other departments but spent some of their time performing functions for the Rental Program, were reasonable to allocate as costs of the program. However, the judge also explained that certain other indirect costs included by the City's expert would not be properly attributable to the Rental Program. Those costs included general administrative overhead supporting the City as a whole, and any code enforcement functions not related specifically to the Rental Program, such as costs to board up vacant

properties, responding to emergency sewer issues, or assisting social services agencies with conditions at residential rental properties.

Judge Brobson's opinion thus gave a good bit of guidance on how to analyze allocation of indirect costs in rental registration cases under his "additional burdens" standard. In the Allentown case, however, the Commonwealth Court did not go through each allocation of indirect costs made by the City. Instead, the court stopped its analysis once it found that the landlords had taken an all or nothing approach, arguing that only direct costs of the program could be allocated by the City. The court found that the landlords had the burden of proof of showing which indirect costs were not reasonable to allocate to the program, and by not getting into the details of those costs, did not meet their burden.

To be fair, the landlords not knowing the standard the Commonwealth Court, or even the trial court would apply at the time they engaged in discovery, it would have been extremely difficult to anticipate correctly. And since the Allentown decision has been appealed to the PA Supreme Court, and is awaiting its decision whether to allow the appeal, we can't presume that the additional burdens standard will remain the law in Pennsylvania. Landlords would certainly prefer a direct costs analysis like that presented by the landlords in Allentown.

If the PA Supreme Court allows the appeal and reverses the Commonwealth Court, we could get a better standard against which to hold ordinances in future cases. For the time being, however, the standard explained by Judge Brobson in his Allentown decision is the current law in Pennsylvania. That means we have changed our approach to arguing the reasonableness of rental fees in other pending cases. In cases from Erie to Pittston, we are developing through additional discovery whether there are indirect costs which those cities can show they reasonably allocate as costs of their rental programs, as creating additional burdens on existing city services. We will also have our expert witnesses analyze the direct costs of such programs separately from the indirect costs, so that we can be prepared if the PA Supreme Court reverses the Commonwealth Court decision in the Allentown case on appeal while our other cases are still pending. It is likely to be a very interesting year for rental registration cases in PA. Look for more updates to come!

The author, Bradley S. Dornish is a licensed attorney, title insurance agent and real estate instructor in Pennsylvania. He can be reached at bdornish@dornish.net.

June 2017