

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In Re: Borough of Whitehall :  
2003 Audit :  
 :  
Franco Mascatiello :  
 :  
 :  
Appeal of: Borough of Whitehall : No. 1999 C.D. 2008  
Council Members : Argued: October 14, 2009

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge  
HONORABLE BERNARD L. MCGINLEY, Judge  
HONORABLE DAN PELLEGRINI, Judge  
HONORABLE RENÉE COHN JUBELIRER, Judge  
HONORABLE ROBERT SIMPSON, Judge  
HONORABLE MARY HANNAH LEAVITT, Judge  
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY  
JUDGE BUTLER

FILED: November 19, 2009

The Council Members of the Borough of Whitehall (Whitehall) appeal from the September 15, 2008 order of the Court of Common Pleas of Allegheny County (trial court), denying their motion for post-trial relief and affirming the trial court’s May 6, 2008 order imposing a surcharge on each of them for authorizing expenditures of Whitehall’s funds in contravention of the Borough Code.<sup>1</sup> The issues before this Court are: (1) whether the trial court committed an error of law by denying the Council Members’ motion to quash; (2) whether the trial court committed an error of law by applying the Borough Code’s “lowest responsible

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<sup>1</sup> Act of February 1, 1966, P.L. (1965) 1656, *as amended*, 53 P.S. §§ 45101-48501.

bidder” standard; (3) whether the trial court committed an error of law in applying the doctrine of collateral estoppel against the Council Members; (4) whether the trial court committed an error of law in finding that Whitehall’s 2003 Beautification Project was not exempt from competitive bidding as a professional service; and, (5) whether the trial court committed an error of law in ruling that the evidence was sufficient to establish that any losses sustained by Whitehall in 2003 were material. For the following reasons, we reverse the trial court’s denial of the Council Members’ motion to quash. The remaining issues are, thus, rendered moot and will not be addressed.

Whitehall is a Pennsylvania home rule-chartered municipality. In 1993, Whitehall awarded a bid to perform underground sewer work to Antonio Moscatiello d/b/a Osiris Enterprises (Osiris). As a result of the work performed by Osiris, Whitehall residents complained that Osiris failed to fully restore their properties to their satisfaction. In 1995, when Osiris failed to correct the problem, Whitehall filed a lawsuit against Osiris. The parties ultimately settled the matter in 1996, and Osiris continued to submit bids for Whitehall contracts, but was never the lowest responsible bidder.

On August 1, 2001, based upon a presentation by Whitehall’s manager pertaining to Osiris’ 1993 performance, Whitehall’s Council voted to declare Osiris a non-responsible bidder. Thereafter, Whitehall would not accept Osiris’ bids for municipal projects. Specifically, Whitehall rejected Osiris’ bids on the East Barlind Drive Sewer Project and the 2003 Sanitary Sewer Repairs Project on the basis that Osiris was a non-responsible bidder, despite the fact that Osiris was the lowest bidder. Franco Moscatiello, taxpayer and father of Antonio Moscatiello, sought

injunctions from the trial court for each of these decisions.<sup>2</sup> In addition, relative to a 2003 Beautification Project, Whitehall awarded a contract, without competitive bidding, to Nelson Buys for the removal of dead trees, limbs, shrubs and debris.

In 2003, just before an annual audit was conducted of Whitehall's financial position, Moscatiello notified Whitehall's independent auditor that the seven elected Whitehall Council Members (Council Members) should be subject to surcharges as a result of a \$161,196.25 loss allegedly sustained by Whitehall due to its supposed failure to follow the proper procurement process for the aforementioned projects. The auditor, however, did not levy a surcharge against the Council Members. Moscatiello appealed the 2003 audit to the trial court. The Council Members filed a motion to quash the appeal, asserting that the language of Whitehall's Home Rule Charter, which references awarding contracts for the "best responsible bid," supersedes the Borough Code's "lowest responsible bidder" requirement. By order dated April 17, 2007, the trial court denied the Council Members' motion to quash. Following a hearing on the merits, on May 6, 2008, the trial court concluded that Whitehall's awards for the three projects at issue were in contravention of the Borough Code, resulting in a \$62,635.55 material loss to

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<sup>2</sup> As to the East Barlind Drive Sewer Project, administered by the South Hills Area Council of Governments (SHACOG) (a consortium of local municipalities, including Whitehall), Whitehall rejected Osiris' low bid in favor of the next lowest bidder, Niando Construction, Inc. (Niando). The trial court denied Moscatiello's request for preliminary injunction because of the lack of relative harm and the availability of an adequate remedy at law, to wit, a surcharge action against the Whitehall Council Members. The trial court's decision was affirmed by this Court (*Moscatiello v. South Hills Area Council of Gov'ts and Borough of Whitehall*, 849 A.2d 319 (Pa. Cmwlth. 2004) (Table, No. 501 CD 03).

As to the 2003 Sanitary Sewer Repairs Project, Whitehall rejected Osiris' low bid in favor of the next lowest bidder, A. Merante Contracting, Inc. (A. Merante). The trial court granted a preliminary injunction that enjoined further work by A. Merante. The trial court also declared that Whitehall could not reject Osiris' bid, nor designate Osiris a non-responsible bidder. The trial court's decision was affirmed by this Court in *Moscatiello v. Whitehall Borough*, 848 A.2d 1071 (Pa. Cmwlth. 2004).

Whitehall, for which each Council Member was to be surcharged \$8,947.94. Both parties filed post-trial motions. After argument, the trial court, by order dated September 15, 2008, denied the post-trial motions and affirmed its May 6, 2008 decision. The Whitehall Council Members appealed to this Court.<sup>3</sup>

The Council Members argue that their motion to quash should have been granted because once a municipality enacts a Home Rule Charter, it is no longer governed by the Borough Code and, since Whitehall's Home Rule Charter has no provisions for surcharges, the trial court lacked subject matter jurisdiction to impose surcharges upon the Council Members. We agree.

The Pennsylvania Constitution states in pertinent part: "The General Assembly shall provide the procedure by which a home rule charter may be framed and its adoption, amendment or repeal presented to the electors." Pa. Const. art. IX, § 2. The General Assembly set forth the procedure for adopting a home rule charter form of government in the Home Rule Charter and Optional Plans Law (Law).<sup>4</sup> The Pennsylvania Constitution further states: "[a] municipality which has a home rule charter may exercise any power or perform any function not denied by this Constitution, by its home rule charter or by the General Assembly at any time." Pa. Const. art. IX, § 2. Section 2961 of the Law, 53 Pa.C.S. § 2961, also states:

A municipality which has adopted a home rule charter may exercise any powers and perform any function not denied by the Constitution of Pennsylvania, by statute or by its home rule charter. All grants of municipal power to municipalities governed by a home rule charter under this subchapter, whether in the form of specific enumeration or

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<sup>3</sup> This Court's "scope of review of a trial court decision is limited to determining whether the trial court abused its discretion, committed an error of law, or whether its decision is supported by substantial evidence." *Santangelo v. Borough of Norristown*, 789 A.2d 848, 850 n. 3 (Pa. Cmwlth. 2002).

<sup>4</sup> 53 Pa.C.S. §§ 2901-3171.

general terms, shall be liberally construed in favor of the municipality.

Section 2962(c)(2) of the Law, 53 Pa.C.S. § 2962(c)(2), specifically prohibits home rule municipalities from exercising “powers contrary to, or in limitation or enlargement of, powers granted by statutes which are applicable in every part of this Commonwealth.” Section 2962(e) of the Law, 53 Pa.C.S. § 2962(e), further provides that “[s]tatutes that are uniform and applicable in every part of this Commonwealth shall remain in effect and shall not be changed or modified by this subpart. Statutes shall supersede any municipal ordinance or resolution on the same subject.”

Based upon the foregoing, this Court has held:

[A] presumption exists that the exercise [of power] is valid if no restriction is found in the Constitution, the charter itself, or the acts of the General Assembly. . . . [W]here a home rule charter [is] in direct conflict with a provision of [a state statute] . . . the state statute [will] prevail. Thus, we look for direct conflict between the home rule enactment and the Constitution, the home rule charter, or the statute.

*Wecht v. Roddey*, 815 A.2d 1146, 1151 (Pa. Cmwlth. 2002) (citations and quotations omitted). In addition, this Court has held that, once a borough adopts a home rule charter, it is a home rule municipality governed by the Law, and is no longer a borough governed by the Borough Code. *Danzilli v. Lomeo*, 944 A.2d 813 (Pa. Cmwlth. 2008). Thus, in the absence of direct conflict with a statute applicable throughout the Commonwealth, a home rule charter provision is presumed valid and, therefore, prevails over a Borough Code provision. In the instant case, therefore, this Court must determine whether there is a direct conflict between the home rule charter which does not authorize surcharge assessments against council members, and a statute applicable throughout the Commonwealth.

This case arises from Whitehall's annual audit, and the failure of the independent auditors to assess surcharges against the Council Members. Whitehall's Home Rule Charter does not specifically authorize surcharges to be assessed against Council Members. In the absence of a provision addressing surcharges in Whitehall's Home Rule Charter, the trial court simply applied Section 1196(c) of the Borough Code, 53 P.S. § 46196(c) (relating to the general powers and duties of independent auditors), which provides in pertinent part:

The amount of any balance or shortage, or of any expenditure of a kind, or made in a manner, prohibited or not authorized by statute, which causes a financial loss to the borough, shall be a surcharge against any officer against whom such balance or shortage shall appear, or who by vote, act, or neglect, has permitted or approved such expenditure . . . .

However, the trial court should have applied this provision only in the event that Whitehall's Home Rule Charter was in direct conflict with a provision of the Borough Code that has statewide applicability. That was not the case here.

This Court has not specifically held that the Borough Code is not generally applicable statewide. This Court did, however, make such a determination as to the Second Class County Code in *Wecht*, and as to the Second Class City Code in *Fraternal Order of Police, Fort Pitt Lodge No. 1 v. City of Pittsburgh*, 644 A.2d 246 (Pa. Cmwlth. 1994), based very simply on the fact that since those statutes do not apply in every part of the Commonwealth (i.e., there are numerous forms of government statewide), the home rule charter was not limited by them. Based upon that reasoning, we hold that, since the Borough Code does not apply to cities of the first, second or third class, nor townships of the first or second class, etc., it is not uniform and applicable in every part of this Commonwealth and would not, therefore, limit Whitehall's Home Rule Charter.

Moreover, examining the specific provision of the Borough Code at issue here similarly leads to the conclusion that it does not have statewide applicability. According to Section 1197 of the Borough Code, 53 P.S. § 46197, appeals may be taken from independent audits in the same manner as they can from audits by elected auditors, as set forth in Section 1044 of the Borough Code, 53 P.S. § 46044. According to Section 1044 of the Borough Code, the borough, any taxpayer thereof, or any officer whose account is audited, may appeal an audit. Because this section limits actions to the borough itself, the contracting municipality's taxpayers and audited officers, it clearly does not affect the general Commonwealth citizenry or have statewide applicability.

Finally, we recognize that, by Section 5.9 of Whitehall's Administrative Code (adopted pursuant to Article IV, Section 405 of Home Rule Charter), Whitehall has adopted and incorporated therein certain sections of the Borough Code. Reproduced Record (R.R.) at 107-8. Neither Whitehall's Charter nor Whitehall's Administrative Code, however, have expressly adopted Sections 1044, 1196(c) or 1197 of the Borough Code.

Based on the foregoing, it is clear that the Whitehall Home Rule Charter controls here. Since Whitehall's Home Rule Charter is not in direct conflict with a statute of statewide applicability, the trial court erred by looking beyond the Home Rule Charter and applying the surcharge provision in the Borough Code. Thus, the trial court improperly denied the Council Members' motion to quash.

For all of the above reasons, we reverse the order of the trial court.

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JOHNNY J. BUTLER, Judge

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ORDER

AND NOW, this 19<sup>th</sup> day of November, 2009, the September 15, 2008 order of the Court of Common Pleas of Allegheny County denying the Borough of Whitehall Council Members' motion to quash is reversed.

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JOHNNY J. BUTLER, Judge