Circuit Court for Anne Arundel County
Case No. C-02-CV-16-001785

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1182

September Term, 2016

DOUGLAS TROTTER, *et al.*

v.

LAWRENCE J. HOGAN, JR., *et al.*

Woodward, C.J.,
Nazarian,
Leahy,

JJ.

Opinion by Nazarian, J.

Filed: July 12, 2017

Douglas Trotter and Dale Watkins (collectively, the "Citizens") seek to challenge the constitutionality of Chapter 26 of the 2016 Laws of Maryland (the "Act"). That legislation changed the structure of the Baltimore City Board of Liquor License Commissioners (the "Liquor Board") by vesting authority over the appointment and removal of the board members in the Mayor of Baltimore City and the President of the City Council of Baltimore rather than the Governor. The Citizens sued Governor Lawrence J. Hogan, Jr.; Senate President Thomas V. "Mike" Miller, Jr.; Speaker of the House Michael E. Busch; Liquor Board members Albert J. Matricciani, Jr., Aaron J. Greenfeld, and Dana P. Moore;[1] former Mayor of the City of Baltimore Stephanie Rawlings-Blake; and President of the City Council Bernard C. Young,[2] seeking a declaration that the Act was unconstitutional and an injunction to stop it from taking effect. The Officials filed two motions to dismiss that the circuit court granted because it found that the Citizens lacked standing, that Senate President Miller and Speaker Busch were entitled to legislative immunity, and that the Act was constitutional. We agree that the Citizens lack standing, and we affirm the circuit court on that ground.

[1] We refer to the new Liquor Board members plus Governor Hogan, Senate President Miller, and Speaker Busch as the "State Officials."

[2] We refer to the former Mayor Rawlings-Blake and Council President Young as the "City Officials," and to the State Officials and City Officials collectively as the "Officials."

I. BACKGROUND

The Liquor Board issues liquor licenses and enforces liquor laws in Baltimore City. Md. Code (2016), § 12-204(a) of the Alcoholic Beverages Article ("AB"). Before the enactment of the Act in 2016, the Governor had the power to appoint and remove members of the Liquor Board in certain jurisdictions, including Baltimore City. *See* Md. Code (2016), § 12-202 of the Alcoholic Beverages Article ("Pre-amendment AB") (amended 2016); *see also* Md. Code (1981, 2011 Repl. Vol.), § 15-101 of Article 2B (repealed and recodified as Pre-amendment AB). The Liquor Board consisted of three regular members and one alternate who would serve if any regular member were absent or recused. Pre-amendment AB § 12-202(a)(1). If the Senate were in session, the Governor would make appointments to the Liquor Board with the advice and consent of the Senate, but if the Senate were not in session, the Governor would make appointments alone (subject to confirmation during the next Session). *Id*. § 12-202(2). Appointees were required to be residents and voters of Baltimore City with high character, integrity, and recognized business capacity, and at least one had to be a member of the Maryland Bar. *Id*. § 12-202(b). Liquor Board members' terms were staggered, lasted two years, and began on July 1. *Id*. § 12-202(d)(1)–(2). At the end of a term, members continued to serve until a successor was appointed. *Id*. § 12-202(d)(3). A member appointed after a term had begun served only for the rest of the term and until a successor was appointed. *Id*. § 12-202(d)(4).

On July 8, 2015, while the Legislature was out of session, Governor Hogan appointed Mr. Trotter and Benjamin Neil to the Liquor Board for a two-year term starting

on July 1, 2015. Governor Hogan also appointed Elizabeth Hafey for a one-year term and Harvey Jones as an alternate. At the beginning of the 2016 General Assembly, Governor Hogan submitted his appointees' names to the Senate for consent.

After hearings, the Senate Executive Nominations Committee voted against Messrs. Trotter and Neil and recommended that the Senate reject the appointments of Mr. Trotter, Mr. Neil, and Ms. Hafey. After the Executive Nominations Committee vote, Governor Hogan withdrew Mr. Jones's name as an alternate. On March 21, 2016, the Senate rejected the Governor's nominations of all three appointees, and the Liquor Board remained vacant.

Around this time, Senator Joan Carter Conway of Baltimore City introduced Senate Bill 1159, emergency legislation[3] relating to the Liquor Board vacancies. S.B. 1159, 2016 Leg., 436th Sess. (Md. 2016) (codified as amended at AB § 12-202). The stated purpose of Senate Bill 1159 was "to address an ongoing problem with filling vacancies" on the Liquor Board where the Senate failed to approve the Governor's appointees and where the Governor refused to name new appointees. H. ECON. MATTERS COMM., FLOOR REPORT, S. 2016-1159, Reg. Sess., at 3 (2016). Senate Bill 1159 proposed modifications to multiple sections of the Alcoholic Beverages statute:

> FOR the purpose of . . . requiring the Governor to make an appointment to fill a vacancy on the Board within a certain number of days after the vacancy occurs; repealing the requirement that the Governor appoint all of the members of the Board of License Commissioners for Baltimore City; requiring the Mayor of Baltimore City and the President of the City Council of Baltimore

[3] The Legislature afforded expedited passage to Senate Bill 1159 because it was an emergency bill.

> City to appoint all of the members of the Board in a certain manner; repealing the requirement that the Governor appoint members of the Board alone under certain circumstances; requiring the Mayor and the President of the City Council to appoint the members of the Board alone under certain circumstances; requiring the Mayor and the President of the City Council to make an appointment to fill a vacancy on the Board within a certain number of days after the vacancy occurs; repealing the requirement that the Governor designate a chair of the Board; requiring the Board to designate a chair from among the regular members of the Board; repealing the authority of the Governor to remove a member of the Board under certain circumstances and in accordance with certain requirements; authorizing the Mayor and the President of the City Council to remove a member of the Board under certain circumstances and in accordance with certain requirements; making certain provisions of this Act effective on a certain date subject to a certain contingency; making this Act an emergency measure; providing for the termination of certain provisions of this Act; and generally relating to the Board of License Commissioners for Baltimore City.

S.B. 1159 (emphasis omitted). If the Governor did not appoint and the Senate did not confirm four members to the board by April 12, 2016, Senate Bill 1159 authorized the Mayor to appoint two regular members to the board and the Council President to appoint one regular member and one alternate member, both with the advice and consent of the Senate if the Senate was in session. The Bill also would allow the Mayor and President to make appointments alone when the Senate was not in session, and it detailed the Mayor and President's removal power.

The Senate Education, Health, and Environmental Affairs Committee and the House Economic Matters Committee adopted favorable reports of Senate Bill 1159, and after

multiple readings and amendments, the Senate passed Senate Bill 1159 on March 17, 2016. The House of Delegates passed Senate Bill 1159 on March 22, 2016, and it became law on April 7, 2016, when it was presented to the Governor during the Session and he did not return the bill with objections within six days. And as emergency legislation, the statute took effect immediately. *See* 2016 Md. Laws, Chap. 26, § 13.

Former Mayor Rawlings-Blake and City Council President Young appointed Albert Matricciani, Jr., Dana Moore, and Aaron Greenfield to the Liquor Board on or around April 27, 2016. City Council President Young appointed Mr. Jones as an alternate member of the Liquor Board on or around June 9, 2016.

On May 31, 2016, the Citizens filed a complaint against the Officials, alleging that the Act violated the Maryland Declaration of Rights and the Maryland Constitution, and requesting declaratory and injunctive relief regarding the composition of the Liquor Board.[4] The City Officials moved to dismiss on July 1, 2016, and on July 7, 2016, the State Officials filed a motion to dismiss as well.[5] The Citizens opposed both motions, and

[4] The Citizens filed a Motion for Temporary Restraining Order and Preliminary Injunction on June 9, 2016, that the City Officials opposed, and the circuit court denied the motion on June 13, 2016.

[5] The State Officials also moved for summary judgment in the alternative, arguing that the Act was constitutional.

after a hearing, the circuit court entered two orders granting the Officials' motions to dismiss.[6] This appeal followed.

II. DISCUSSION

The Citizens appeal three of the circuit court's decisions:[7] *first*, that the Citizens lacked standing; *second*, that Senate President Miller and Speaker Busch are entitled to

[6] In the alternative, the circuit court granted summary judgment to the State Officials and denied the Citizens' request for a preliminary injunction and, out of an abundance of caution, declared the Act constitutional and the appointments valid.

[7] The Citizens phrased their Questions Presented as follows:

> **I. DID THE PROVISION OF SENATE BILL 1159 STRIPPING THE GOVERNOR OF THE APPOINTMENT POWER VIOLATE ART. 8 OF THE DECLARATION OF RIGHTS AND THE CONSTITUTION OF MARYLAND, ART. II, §§ 1, 9 & 10?**
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> **II. DID THE PROVISION OF SENATE BILL 1159 STRIPPING THE GOVERNOR OF THE REMOVAL POWER VIOLATE ART. 8 OF THE DECLARATION OF RIGHTS AND THE CONSTITUTION OF MARYLAND, ART. II, §§ 1, 9 & 15?**
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> **III. DID THE PROVISION OF SENATE BILL 1159 BESTOWING APPOINTMENT AND REMOVAL POWERS UPON THE MAYOR AND CITY COUNCIL PRESIDENT VIOLATE ART. 8 OF THE DECLARATION OF RIGHTS, AND THE CONSTITUTION OF MARYLAND, ART. II, §§ 1, 9, 10 & 15?**
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> **IV. DID PLAINTIFF TROTTER STILL HOLD OFFICE AFTER APRIL 27, 2016 AS THE BLLC APPOINTMENTS OF JULY 1, 2015 DID NOT**

immunity for legislative acts; and *third*, that the Act was constitutional. We agree with the circuit court that the Citizens lack standing, and thus, we do not reach the merits of the case.

The Citizens contend that they have taxpayer standing and rely on several cases, including *Citizens Planning & Housing Ass'n v. County Executive of Baltimore County*, 273 Md. 333 (1974), *superseded by statute on other grounds as stated in State Center, LLC v. Lexington Charles Ltd. Partnership*, 438 Md. 451 (2014), for the proposition that they can challenge legislation even when they are not directly injured by the alleged violation of a county executive's acts, but because they were injured indirectly by inefficient government operations that raise taxes.[8] This statement is correct in principle, but this principle of standing doesn't reach these plaintiffs.

REQUIRE CONSENT OF THE SENATE UNDER THE PLAIN MEANING OF ART. 2B, § 15-101(A),(D)(2)(iii)?

V. DO PLAINTIFFS HAVE STANDING TO BRING THE CASE?

VI. ARE THE STATE DEFENDANTS, WHO ARE NAMED IN THEIR OFFICIAL CAPACITY, IMMUNE FROM DECLARATORY AND INJUNCTIVE RELIEF?

[8] The Citizens also argue that they have standing by virtue of the judgments against them, that the circuit court's decision that the Act was constitutional conferred standing to them. This argument fails, however, because the circuit court first and foremost determined that the Citizens *lacked* standing and granted the Officials' motions to dismiss. The court addressed the constitutionality of the Act "out of an abundance of caution," which it was not required to do, because granting the motion to dismiss for lack of standing fully disposed of this case. And although their status as losing parties gives them standing to

"The common law taxpayer standing doctrine permits taxpayers to seek the aid of courts, exercising equity powers, to enjoin illegal and *ultra vires* acts of public officials where those acts are reasonably likely to result in pecuniary loss to the taxpayer." *State Ctr., LLC*, 438 Md. at 538. "[U]nder the taxpayer standing doctrine, a complainant's standing rests upon the theoretical concept that the action is brought not as an individual action, but rather as a class action by a taxpayer on behalf of other similarly situated taxpayers." *Id.* at 547. Taxpayer standing has two requirements:

> [A] party, as a taxpayer, may satisfy the "special damage" standing requirement by alleging both "1) an action by a municipal corporation or public official that is illegal or *ultra vires*, and 2) that the action may injuriously affect the taxpayer's property, meaning that it reasonably may result in a pecuniary loss to the taxpayer or an increase in taxes."

Id. at 540 (quoting *Kendall v. Howard Cty.*, 431 Md. 590, 605 (2013)). "[T]he taxpayer plaintiff is not required to allege facts which **necessarily** lead to the conclusion that taxes will be increased; rather the test is whether the taxpayer 'reasonably **may** sustain a pecuniary loss or a tax increase'—'whether there has been a showing of **potential** pecuniary damage.'" *Id.* at 559 (quoting *Inlet Assocs. v. Assateague House Condo. Ass'n*, 313 Md. 413, 441 (1988) (emphases added in *Inlet Assocs.*)). Thus, "the issue is not what 'type' of harm is sufficient necessarily, but rather . . . whether the type of harm is one that may affect complainant's taxes." *Id.* at 565. But "[p]erhaps the most frequent stumbling block for a taxpayer to bring a suit under the doctrine is that the challenged act must affect

pursue an appeal, it doesn't retroactively provide them with standing they otherwise didn't have.

potentially a tax that the taxpayer-plaintiff pays, *i.e.*, this nexus must be alleged sufficiently." *Id.* at 572. "[S]tanding cannot exist if the remedy sought would not decrease the taxpayer's monetary burden." *Id.* at 573. And "[t]he test is merely whether an increase in taxes is *reasonably* likely to occur." *Id.* at 577 (emphasis in original).

In *James v. Anderson*, 281 Md. 137, 142 (1977), the Court of Appeals held that the plaintiff's allegation of a "decrease in efficiency which would result from the alleged *ultra vires* acts" of a County Executive was "sufficient for a taxpayer of the county involved to maintain a suit." The plaintiff specifically alleged "that it would be more efficient for the courts and their supporting agencies to operate in close proximity, as is called for in the renovation project." *Id.* at 140.

Here, the Citizens alleged that they had taxpayer standing because of a decrease in efficiency. But their complaint failed altogether to allege how the transfer of Liquor Board appointment authority would cause this to happen—they cite only the elimination of gubernatorial oversight:

> [The Citizens we]re each citizens and residents of Baltimore City, Maryland, pa[id] taxes, including real property taxes, to the City of Baltimore and State of Maryland, and have taxpayer standing to bring this constitutional challenge. The Enactment [of Senate Bill 1159] eliminated Gubernatorial oversight of the [Liquor Board] commissioners and will make the [Liquor Board] less efficient in carrying out its functions and responsibilities and more costly to operate; and, therefore, it will result in an impairment and depreciation in the value of [the Citizens]' real property and the property tax base of the City and State, thereby causing a prospective and threatened pecuniary loss incident to the increase in the amount of taxes [the Citizens] and other such taxpayers will be constrained to pay.

The circuit court determined that the Citizens could not bring a constitutional challenge as taxpayers where they failed to allege potential pecuniary damage and a nexus between that potential damage and the challenged act. The court found it "hard to think that the economic havoc that is alleged would exist by the local appointment power when so many other jurisdictions in Maryland successfully exercise the same power at the local level." We agree. The Citizens don't allege any cost or revenue impact from the Act, nor that the legislation changed anything about the scope, mission, expenses, or composition of the Liquor Board. Nor have they attempted to draw any connection between the Act and the alleged increase in their taxes. We agree with the circuit court that the Citizens failed to plead the requirements of taxpayer standing, and affirm its decision to dismiss the complaint on that basis.[9]

[9] Although the circuit court determined that the Citizens lacked standing pursuant to a motion to dismiss, even if we were to look outside of the complaint, the Citizens have not alleged facts that could support a finding that they risk "potential pecuniary loss." The fiscal note to Senate Bill 1159 projected exactly no state, local, or small business fiscal impact. DEP'T OF LEGIS. SERVS., FISCAL AND POLICY NOTE, S. 2016-1159, Reg. Sess., at 1 (2016); S. EDUC., HEALTH, & ENVTL. AFFAIRS COMM., FLOOR REPORT, S. 2016-1159, Reg. Sess., at 1 (2016). Nor have they alleged that switching the appointment power from the Governor to the City Officials would cause property values to drop and tax bills to increase. To the contrary, multiple other jurisdictions in Maryland grant Liquor Board appointment power to local officials rather than to the Governor with no fiscal impact. *See* AB §§ 10-201 (City of Annapolis members appointed by the Mayor and City Council), 13-202 (Baltimore County members appointed by the County Executive), 16-202 (Carroll County members appointed by the County Commissioners), 17-202 (Cecil County members appointed by the County Commissioners), 18-202 (Charles County members appointed by the County Commissioners), 19-202 (Dorchester County Board of License Commissioners composed of the County Council), 22-202 (Harford County members appointed by the County Executive), 23-203 (Howard County Board of License Commissioners composed on the County Council), 24-202 (Kent County Board of License Commissioners composed of the County Commissioners), 25-202 (Montgomery County

Individually, Mr. Trotter argues that he has standing because he suffered a particularized injury, *i.e.*, that he "was divested from office as a consequence of the unconstitutional appointment of the new commissioners by the Mayor and City Council President." He argues that "the restoration of the appointment powers to the Governor *might* result in [his] reappointment" and that even "[i]f Senate Bill 1159 were found unconstitutional, [he] had an *expectation* that the Governor would appoint him again." (Emphases added.) But although Mr. Trotter alleged that, in addition to taxpayer standing, he "is an aggrieved party as the Enactment effectuated his unconstitutional removal from office," the circuit court found that Mr. Trotter was not actually removed from office. And he wasn't: the Governor appointed Mr. Trotter to the Liquor Board as a recess appointee in 2015, the Senate considered whether to confirm his appointment during its 2016 session, as required by law, *see Nesbitt v. Fallon*, 203 Md. 534, 543–44 (1954) (holding that a recess appointment to the Liquor Board requires Senate confirmation), and rejected it. *Id.* From that point forward, Mr. Trotter had no right to remain in his position. So his alleged injury bears no relationship to the enactment of the Act—his right to sit on the Liquor Board evaporated with the Senate's vote, and the possibility that the Governor might appoint him

members appointed by the County Executive), 27-202 (Queen Anne's County members appointed by the County Commissioners).

again is pure speculation. This leaves him no individual stake in the outcome of this case, and thus no standing.[10]

JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY AFFIRMED. APPELLANTS TO PAY COSTS.

[10] Furthermore, we agree with the circuit court that Senate President Miller and Speaker Busch, as legislators sued for their roles in enacting legislation, were entitled to immunity as an additional ground for dismissing the Citizens' complaint against them. Members of the Legislature are absolutely immunized from suit for legislative acts, Md. Decl. of Rts. art. 10; *Mandel v. O'Hara*, 320 Md. 103, 107, 113–14 (1990); *Blondes v. State*, 16 Md. App. 165, 174–75 (1972); *see also* Md. Const. art. 3, § 18 (granting legislative immunity for words spoken in debate), and the enactment of legislation is a quintessential legislative act.