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LOCAL GOVERNMENT SERVICES

SOLICITOR'S HANDBOOK

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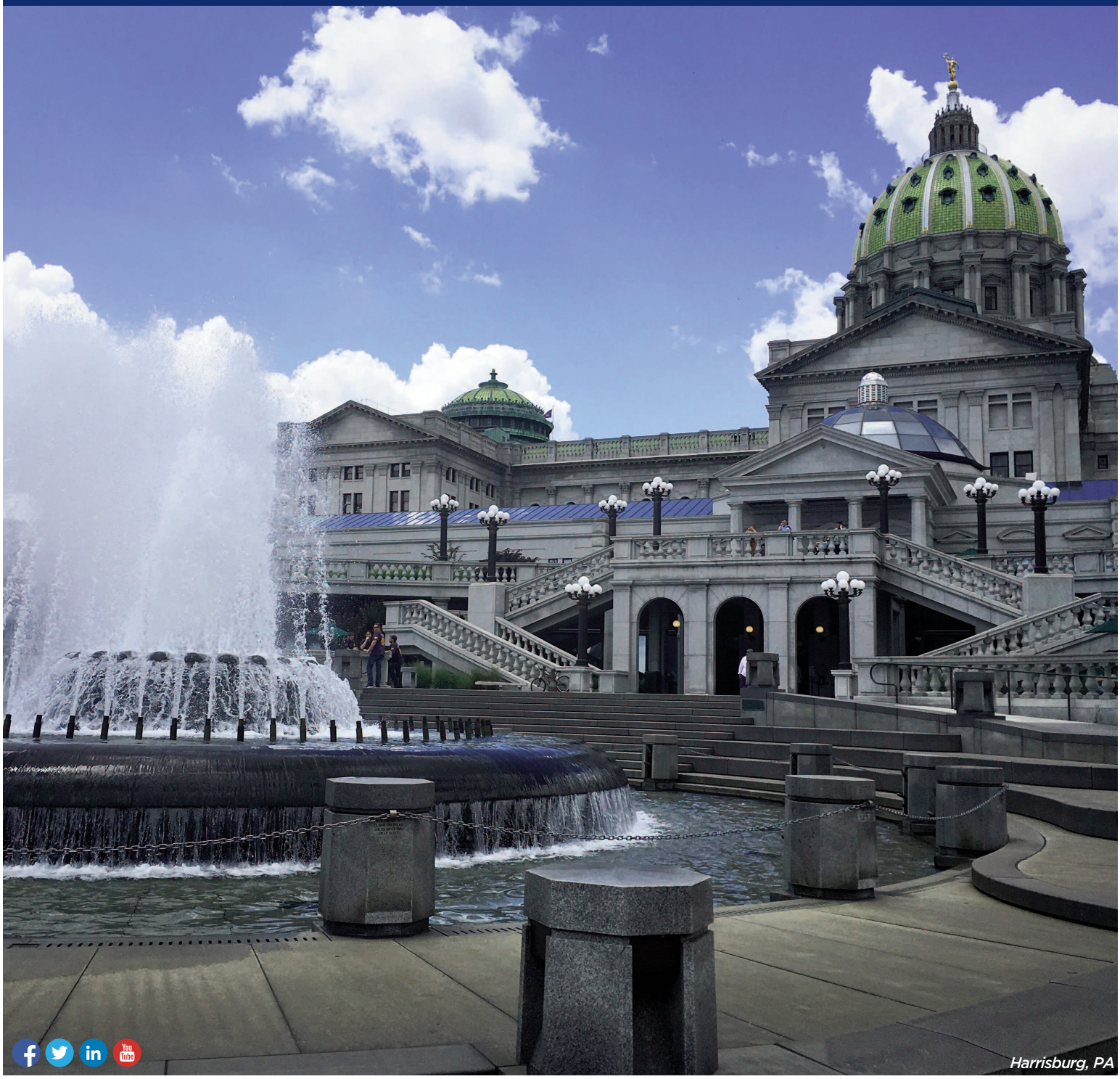

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Foreword

Due to the way Pennsylvania's local government system has evolved, the Commonwealth today has a large number of very small local governments. More than 80 percent of Pennsylvania's municipalities have populations under 5,000, a size generally accepted as the point where full-time municipal management becomes feasible. These small municipalities are ably served by dedicated elected and appointed officials. For the most part, they are conscientious in learning and performing their civic tasks. Large numbers of them take advantage of training and education programs offered through the Governor's Center for Local Government Services and the several municipal associations. But from time to time the occasion arises when professional advice and expertise is needed on the spot. The only professional source of assistance readily at hand in many places is the municipal solicitor.

Because of the pivotal role of the solicitor as the first recourse in rendering technical assistance to municipal officials, keeping solicitors up to date on municipal law takes on a critical perspective for the effective functioning of local governments. Periodically, colloquiums are offered by the Municipal Law Section of the Pennsylvania Bar Institute and the proceedings published by PBI. This publication was conceived as an introduction for attorneys new to municipal law practice. Project planning was done by George M. Aman III, Chair of the Municipal Law Section, PBI, Counsel to the Pennsylvania Municipal Authorities Association and of the firm of High, Swartz, Roberts & Seidel, Norristown and Thomas L. Wenger, Solicitor to the Pennsylvania State Association of Township Supervisors, and of the firm of Wix, Wenger & Weidner, Harrisburg.

Individual chapters of the Handbook have been prepared by practicing municipal solicitors with particular expertise in the field on which they are writing. In future editions, additional chapters will be added to cover subject areas not treated in this edition. The Governor's Center for Local Government Services would like to extend its appreciation to the editors and authors of the various chapters for contributing their time and expertise to this publication.

The material included in this publication is for the purpose of providing general information on subject areas of municipal law. Statements do not represent legal opinion on any particular issue, either by the author or by the Department of Community and Economic Development. Any viewpoints expressed within the individual chapters are solely those of the author. They do not represent positions or policy of the Department.

I. Municipal Codes and Other Enabling Statutes

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(updated March 2015)

Municipal entities in Pennsylvania are both constitutionally mandated and creatures of statute. The Pennsylvania Constitution empowers the state legislature to classify counties, cities, boroughs and townships by population[1] and requires it to provide for local governments "by general law."[2] The manner in which the state legislature has fulfilled those duties forms the basis for the local government structures with which we are familiar.

Dillon's Rule

Though municipalities are constitutionally required to exist, their powers are limited by statute. Municipal governments possess no sovereign power or authority, and exist principally to act as trustees for the inhabitants of the territory they encompass.[3] Their power and authority are generally within the control of the state legislature,[4] which has the power to mold them, alter their powers or even abolish their individual corporate existences. The clearest judicial statement of the limitations statutorily imposed on municipalities is known as Dillon's Rule, and is derived from an early municipal hornbook entitled *Dillon on Municipal Corporations*. The rule is often expressed as follows:

> Nothing is better settled than that a municipality does not possess and cannot exercise any other than the following powers: 1) those granted in express words; 2) those necessarily or fairly implied in or incident to the powers expressly granted; and 3) those essential to the declared objects and purposes of the corporation, not simply convenient but indispensable. Any fair, reasonable doubt as to the existence of power is resolved by the courts against the corporation and therefore denied.[5]

The clear statement of Dillon's Rule sustained generations of municipal lawyers, lending certainty to the advice they gave to clients.

General Powers Clauses

Contemporary solicitors find such certainty difficult for several reasons. First, the General Assembly has, in the latter part of the last century, enacted municipal code provisions with expansive language not easily interpreted using a Dillon's Rule-type analysis. For example, all municipal codes now contain "general powers" language allowing municipalities:

> To make and adopt all such ordinances, by-laws, rules and regulations not inconsistent with or restrained by the Constitution and laws of this commonwealth, as may be deemed expedient or necessary for the proper management, care and control of the [municipality] and its finances, and the maintenance of peace, good government and welfare of the [municipality] and its trade, commerce and manufacturers.[6]

How does one reconcile the legislature's determination that all municipalities should be able to accomplish not only what is necessary, but also what is expedient, with the charge of Dillon's Rule that municipalities should be denied powers that are "simply convenient" if those powers aren't indispensable?

Some commentators suggest that these additions to the various municipal codes have impliedly repealed Dillon's Rule,[7] but the Pennsylvania courts have not generally adopted that reasoning.[8]

Home Rule Law

A second, more frontal assault against Dillon's Rule limitations finds substance in a 1968 amendment to the Pennsylvania Constitution, which authorizes municipalities to adopt home rule charters.[9] This amendment expressly allows a home rule charter municipality to "exercise any power or perform any function not denied by [the] Constitution, by its home rule charter or by the General Assembly at any time." Obviously, a home rule charter turns Dillon's Rule on its head. Questions concerning power and authority are to be resolved in favor of a home rule municipality, while the historic presumption is against all other municipalities possessing such power and authority.

The 1968 Home Rule Amendment to the Pennsylvania Constitution was finally embodied in legislation with the 1972 passage of the Home Rule Charter and Optional Plans Law,[10] which both establishes a mechanism for the creation of either a Home Rule Charter or an Optional Plan for each municipality, and sets forth limitations upon the power of municipalities which choose to adopt a Home Rule Charter or Optional Plan.[11]

Despite forty years since the passage of the Home Rule Charter and Optional Plans Law, the limited number of municipal entities choosing to adopt them has constrained the development of a large body of case law concerning Home Rule Charter and Optional Plan communities. What is apparent, however, is the courts' ambivalence in deciding whether to impose greater liabilities and responsibilities upon those municipalities which opt to exercise greater power and authority.[12]

Municipal Codes

All municipalities (other than those adopting Home Rule Charters or Optional Plans) follow rules and procedures set forth in the various municipal codes.[13] Although these codes do not create a hierarchy among the various classes of municipalities,[14] neither do they create any degree of conformity.[15] The unique provisions of each code were crafted to meet the particular historical needs of the type of community it addresses, and a municipal lawyer opines to his client at his peril if he fails to assure that he is dealing with the proper code. Imagine the embarrassment of a solicitor to a township of the second class who, based upon his clear recollection of a recently repealed provision of the Borough Code, suggests that his client's governing body can approve a municipal equipment purchase after it has already been consummated. While a borough council was statutorily empowered to grant such retrospective approvals until the Borough Code's recent recodification,[16] a township board of supervisors could be surcharged for the very same action.[17]

Other Statutes

Unfortunately, even a thorough knowledge of the municipal codes themselves is seldom sufficient to render competent advice, as many other Pennsylvania statutes substantively impact municipal affairs. For example, there is an additional body of statutes generally codified into a general municipal law found at 53 P.S. §§ 101-11400 and §§ 54101-54251 which greatly impacts the authority of a municipality to operate, and regulates many of the procedures to which it must adhere. Many of these provisions will be discussed in the chapters which follow, and their impact is pervasive, regulating such things as the nature and limitations upon debt which can be incurred,[18] establishing procedural due process guidelines,[19] creating municipal claims and liens procedures,[20] impacting roadway activities,[21] regulating land use and development,[22] and requiring recycling of solid waste,[23] to name just a few. If all such laws were located in Title 53, the job of the solicitor would be substantially easier than it is. Unfortunately, relevant laws have found their way into a myriad of locations within Purdon's statutes. Though the scope of this monograph forbids a lengthy dissertation on the subject, several examples come quickly to mind. The Local Agency Law, which establishes procedural guidelines, is now found in Title 2. If one is concerned about a single individual holding two or more offices that may be incompatible, a perusal of Title 65 is in order.[24] If whistleblowers are a concern, Title 43 should be considered.[25] Procurement questions can lead one to Title 73 (anti-bid rigging),[26] Title 8 (bonding requirements),[27] Title 43 (Human Relations Act requirements),[28] Title 65 (the Sunshine Act),[29] federal statutes and the contracting provisions of the various municipal codes. The list is endless. In short, modern municipal practice may well be more diverse and complex than most other fields of law. The municipal lawyer, perhaps more than any other type of practitioner, needs to be a "jack of all trades," or assure that he or she has competent assistance from specialists in many diverse fields of practice. There are few road maps to follow through the extraordinary number of statutes that regulate the activities of our municipal clients. We have certainly strayed far from the simple pastoral township envisioned by Thomas Jefferson so long ago, that "wisest invention ever devised by the wit of man for the perfect exercise of self government and for its preservation."[30]

REFERENCES

1. Pa.Const. art. III, § 20.
2. Pa.Const. art. IX, § 1.
3. *Shirk v. City of Lancaster*, 313 Pa. 158, 169 A. 557 (1934).
4. In holding that the legislature may not overrule a fundamental component of municipal zoning authority, the Pennsylvania Supreme Court in *Huntley & Huntley, Inc. v. Borough Council of Borough of Oakmont*, 600 Pa. 207, 964 A.2d 855 (2009), suggested that some inherent municipal rights may be beyond legislative control.
5. *Kline v. City of Hamburg*, 362 Pa. 438, 68 A.2d 182 (1949); *Lesley v. Kite,* 192 Pa. 268, 43 A. 959 (1899); *Wentz v. City of Philadelphia,* 301 Pa. 261, 151 A. 883 (1930).
6. 8 Pa.C.S. § 1203; 53 P.S. § 6552; 53 P.S. § 66506; 53 P.S. § 37403.
7. Means, John M., "Local Government Use of General Powers," The Pennsylvanian (date and publisher unknown).
8. *See, inter alia, Knauer v. Commonwealth*, 332 A.2d 589 (Pa.Cmwlth. 1975); I*n re Appeal from Settlement and Audit of Auditors*, 460 A.2d 904 (Pa.Cmwlth. 1983); *but see Scottsdale v. National Cable Television Corp.*, 476 Pa. 47, 381 A.2d 859 (1977) (divided court, in an opinion written by Justice Packel, authorized municipal regulation of cable television franchising in primary reliance upon the general powers provisions in the Borough Code; proposition has not been cited by the appellate courts since that time except in the context of communications regulations).
9. Pa.Const. art. IX, § 2.
10. 53 Pa.C.S. § 2901, et seq.
11. 53 Pa.C.S. § 2962.
12. *See inter alia, Appeal of Upper Providence Police, Delaware County,* 514 Pa. 501, 526 A.2d 315 (1987), and *City of Wilkes-Barre v. Firefighters Local No. 104,* 596 A.2d 1271 (Pa.Cmwlth. 1991), which suggest that police collective bargaining units may be able to demand, and receive, from charter municipalities benefits not available from "conventional" municipalities; *contrast with Municipality of Monroeville v. Monroeville Police Dept. Wage Policy Committee,* 767 A.2d 596 (Pa.Cmwlth. 2001) and *Brotherhood of West Chester Police v. West Chester,* 798 A.2d 797 (Pa.Cmwlth. 2002), which reach an opposite result; see also City of Philadelphia v. Middleton, 492 A.2d 763 (Pa.Cmwlth. 1985) (Commonwealth Court concluded that a home rule municipality can assume tort duties and liabilities from which other municipalities are statutorily protected; conclusion was rejected by the Pennsylvania Supreme Court a decade later in *City of Philadelphia v. Gray*, 534 Pa. 467, 633 A.2d 1090 (1993)).
13. 8 Pa.C.S. § 101, *et seq.;* 53 P.S. § 55101, *et seq.*; 53 P.S. § 565101, *et seq.;* 53 P.S. § 35101, e*t seq.;* 16 P.S. § 1 (this discussion does not address cities of the first and second class, nor does it address certain statutory limitations on home rule charter and optional plan communities).
14. *See* 53 P.S. § 66506 (the powers of townships of the second class were subordinate to those of other municipalities until a 1987 amendment to the Second Class Township Code, which removed the language causing this difficulty).
15. This lack of uniformity may present a constitutional concern under Article IX, Section 1 of the Pennsylvania Constitution, which seems to require that the various codes "shall be uniform as to all classes of local government regarding procedural matters…" Uniformity is hard to discern, even with regard to those "statutes of general applicability," which regularly exempt first and second class cities from adherence to their provisions.
16. Formerly 53 P.S. § 46312.
17. *In re Lilly,* 341 Pa. 171, 19 A.2d 92 (1941).
18. Local Government Unit Debt Act, 53 Pa.C.S. § 8001, *et seq.*
19. Local Agency Law, 2 Pa.C.S. § 105, *et seq.*
20. Municipal Claims and Tax Liens Act, 53 P.S. § 7101, *et seq*.
21. 53 P.S. § 54201, *et seq.;* 53 P.S. § 1671, *et seq.*
22. 53 P.S. § 10101, *et seq.*
23. 53 P.S. § 4000.101, *et seq.*
24. 65 P.S. § 1, *et seq.*
25. 62 Pa.C.S. § 4501, *et seq.*
26. 43 P.S. § 1421, *et seq.*
27. 8 P.S. § 191, *et seq.*
28. 43 P.S. § 951, *et seq.;* see also 16 Pa. Code Ch. 49.
29. 65 Pa.C.S. § 701, *et seq.*
30. Thomas Jefferson, in a letter to Samuel Kevcheval. The Autobiography of Thomas Jefferson, p. 74 5 (1816).

II. Constitutional Provisions

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Municipal solicitors' involvement with constitutional issues generally falls into one of the following broad categories: (1) assisting municipalities in navigating their role within the framework of the Pennsylvania Constitution; and (2) resolving challenges to municipal actions that trigger potential state and/or federal constitutional concerns.

It is important to note that this section is not intended to comprehensively address all of the constitutional issues that municipal solicitors will face in their practices. Rather, it is merely intended to highlight many of the more commonly seen issues, some of which are addressed in more detail elsewhere in this publication.

The Constitutional Framework

Municipalities are "creations of the state with no powers of their own." They have only those powers "expressly granted to them by the Constitution of the Commonwealth or by the General Assembly, and other authority implicitly necessary to carry into effect those express powers."[1]

The General Assembly has the authority to alter or remove any powers granted and obligations imposed by statute upon municipalities.[2] But the General Assembly may not abrogate by statute the constitutional commands regarding municipalities' obligations and duties to their citizens.[3] In addition, the General Assembly has "no authority to remove a political subdivision's implicitly necessary authority to carry into effect its constitutional duties."[4]

The Pennsylvania Constitution prohibits the General Assembly from delegating its legislative power to any other entity.[5] However, the General Assembly may confer authority upon subordinate entities, such as municipalities, to implement policies that are appropriately and adequately established by it.[6] Over the years, as citizens' expectations of municipal governments have increased, the General Assembly's ability to deal with municipal government matters with specificity has decreased. As a result, statutory directives have become more general. In addition, depending on the subject matter, the General Assembly may confer more or less authority on those entities. For example, the General Assembly has held tight to its taxing power and provided municipalities with limited discretion and a narrow category of permitted taxes. Conversely, the General Assembly has, through the Municipalities Planning Code, afforded broad discretion to municipalities to manage land use.

The two fundamental rules: (1) municipalities have only those powers given them by the General Assembly – which has been modified somewhat by more generalized legislative direction and greater judicial acknowledgment of implied powers; and (2) the General Assembly may not delegate its legislative powers – which has been softened by the ability of municipalities to exercise delegated authority to implement sufficiently expressed legislative intent – should be touchstones for municipal solicitors when interpreting, testing and applying relevant statutes and municipal ordinances and actions.

Review of Pennsylvania Constitution's Local Government Provisions

The Pennsylvania Constitution contains an entire article – Article IX – dedicated to local government.[7] The sections in Article IX are of varying degrees of significance to municipal solicitors and are summarized below.

- **Section 1 –** This section requires that the General Assembly must provide for local governments. It also mandates that general laws be uniform as to all classes of local government when addressing procedural issues.

- **Sections 2 and 3 –** These sections authorize home rule charters and optional plans of government. They are, in effect, enabling provisions.
- **Section 4 –** This section addresses county government and identifies county officers, their terms and salaries, and various matters relating to elections.
- **Section 5 –** This section provides the constitutional authority to municipalities to engage in cooperative agreements with other municipalities to jointly perform, delegate, or transfer any municipal function or responsibility. Intergovernmental cooperation is also addressed in the Intergovernmental Cooperation Act.[8]
- **Section 6 –** This section is similar to an enabling statute in that it requires that the General Assembly permit the establishment and dissolution of governments covering two or more municipalities.
- **Section 7 –** This section grants powers to area-wide governments or municipalities operating under an intergovernmental cooperation agreement. Like Section 6, this is very similar to an enabling statute.
- **Section 8 –** This section addresses consolidation, merger and boundary change of municipalities and required the General Assembly to adopt uniform legislation within two years of its enactment. In 1994, the General Assembly enacted the Municipal Consolidation or Merger Act, which does not cover boundary changes.[9] That leaves the initiative and referendum process (with some statutory provisions) as the sole means to accomplish a boundary change.
- **Section 9 –** This section governs the appropriation of public funds. Among other things, it prohibits municipalities from becoming stockholders in corporations and provides that the General Assembly may establish standards by which municipalities and school districts may receive financial assistance. It also prohibits the appropriation of public funds for private purposes. The application of this section has been largely limited to the resolution of specific factual circumstances rather than the development of clear legal principles. Nonetheless, it is an important provision for municipal solicitors when confronted with questions as to the legality of proposed expenditures. As a general rule, the more distance that a proposed expenditure has from conventional governmental expenditures and as a private interest becomes more discernible in the transaction, the doubtfulness of the constitutionality of the proposed expenditure increases.
- **Section 10 –** This section addresses local government debt and states that the General Assembly may set municipal debt limits. The subject of local government debt is more specifically addressed later in this handbook.
- **Section 11 –** This section governs reapportionment, which must take place in certain municipalities in the year following each census.
- **Sections 12 and 13 –** These sections apply exclusively to the City of Philadelphia and govern its debt and the abolition of certain countywide offices.
- **Section 14 –** This section defines the following terms as used in the Pennsylvania Constitution: municipality, initiative and referendum.

In addition, Article I, Section 27, a formerly little-cited or analyzed section of the Pennsylvania Constitution known as the Environmental Rights Amendment, came to prominence in a 2013 decision by the Pennsylvania Supreme Court. In that case, several municipalities and others challenged the constitutionality of Act 13 of 2012, which was a comprehensive rewrite of the statute governing oil and gas operations. Act 13 of 2012 established many statewide standards and prescribed where, with limited exceptions, oil and gas operations may and may not take place.

In that case, a plurality of the Supreme Court confirmed that a legal challenge under the Environmental Rights Amendment may proceed upon alternate theories that the government infringed upon citizens' rights to clean air and pure water and the presence of natural, scenic, historic and esthetic values of the environment or failed in its trustee obligations, which are both negative (prohibitory) and affirmative (implicating enactment of legislation and regulations). The Supreme Court also noted that the "General Assembly can neither offer political subdivisions purported relief from obligations under the Environmental Rights Amendment, nor can it remove necessary and reasonable authority from local governments to carry out" their constitutional duties. Those duties include the "duty to 'conserve and maintain' the public natural resources, including clean air and pure water, 'for the benefit of all the people.'" The plurality found that numerous of the provisions in Act 13 of 2012 violated the Environmental Rights Amendment.[10]

The long-term fallout from this decision is unknown. However, there have already been numerous lawsuits initiated challenging municipal action or inaction as being in violation of the Environmental Rights Amendment.[11] Therefore, municipal solicitors must be prepared to assist their municipal clients by ensuring that they conduct an appropriate analysis of how and whether their decisions will trigger a potential violation of the Environmental Rights Amendment.

Prominent Federal and State Constitutional Issues

In addition to the provisions in the Pennsylvania Constitution that govern the conduct of local governments, municipal solicitors must grapple with many other federal and state constitutional issues, including those in the areas identified below.

Freedom of Speech

The First Amendment bars governments from making any law abridging the freedom of speech. Many municipal actions face scrutiny as to whether they violate the rights protected by the First Amendment.

Prayer and other religious activity. The United States Supreme Court recently ruled that prayer at public meetings is acceptable, depending on the circumstances and the governmental body's involvement in the development and review of the content. In that case, the governmental body did not review, edit or endorse the content of the prayers and permitted all types of religions to offer prayers at meetings.[12]

A municipality's association with or conduct, endorsement or prohibition of any religiously oriented activity or display is also susceptible to challenge. These types of cases are usually driven by the facts of the particular case.[13]

Billboards. Ordinances that regulate outdoor signs and billboards, including the more novel electronic billboards, may trigger First Amendment challenges and implicate the right to enjoy one's private property.[14] The United States Supreme Court has opined that "while signs are a form of expression protected by the Free Speech Clause, they pose distinctive problems that are subject to municipalities' police powers. Unlike oral speech, signs take up space and may obstruct views, distract motorists, displace alternative uses for land, and pose other problems that legitimately call for regulation…"[15]

Courts have held that ordinances utilizing objective standards to regulate signs will be upheld if they are reasonably related to the "clearly permissible objectives of maintaining the aesthetics of an area" and addressing safety concerns by preventing distractions.[16] However, a "blanket prohibition on billboards without justification cannot pass constitutional muster."[17] A federal district court recently found township's sign ordinance to be a prior restraint on speech after the township denied applications for billboards containing religious messages.[18] But, the Third Circuit has upheld content-neutral ordinances that completely ban messages.[19]

Employees and Matters of Public Concern. Violations of the First Amendment are frequently asserted by public employees who are terminated, suspended or otherwise disciplined for making public statements. A public employee's statements are constitutionally protected if: (1) when the employee makes the statement, he or she is speaking as a citizen; (2) the statement involved a matter of public concern; and (3) the government employer did not have an adequate justification for treating the employee differently from any other member of the general public as a result of the statement he or she made.[20]

In one case the Supreme Court weighed whether statements by a municipal employee critical of her employers were sufficiently harmful to the legitimate interests of the government to warrant disciplinary action.[21] In another case, a police chief reported on an officer's criminal activity and was then demoted. The court held that was a matter of public concern worthy of First Amendment protection.[22] In still another, the Supreme Court held that public employees cannot be retaliated against for providing truthful testimony under subpoena.[23] These decisions are heavily dependent on the facts of the case, but are worth noting for the simple fact that any action by a municipal employer, affecting or in response to employee expression, may raise a red flag.

Campaign contribution bans also implicate First Amendment rights. The United States Court of Appeals for the Third Circuit recently upheld a municipal ban on campaign contributions by police because the purpose of the ban was to maintain the integrity and impartiality of the police force, not to restrict the employees' First Amendment

rights. Thus, the municipal interest trumped the employees' interest in speaking out on matters of public concern through their financial contributions.[24]

Public Meetings. Municipal efforts to regulate citizen comments at public comments are also frequently the subject of litigation. Public meetings are considered limited public forums in First Amendment jurisprudence because they are held for the limited purpose of governing a geographic area and discussing topics related to that governance. The regulation of speech at a limited public forum must be viewpoint neutral and reasonable in light of the purpose served by the forum in order to be constitutional.[25]

Adult Entertainment Industry. Another area where municipal regulations commonly lead to First Amendment challenges is the adult entertainment industry. Ordinances that prohibit or regulate the location or conduct of adult entertainment facilities are susceptible to challenge.[26] If the purpose of the regulation of expression is unrelated to the suppression of expression, then the municipality must meet a lesser standard than if it is actually attempting to regulate the expression.[27] For example, conditions that are placed on a change of use application to regulate the display and distribution of adult material to minors were found to be too restrictive.[28] Prior restraints have also been found unconstitutional.[29]

Regulating Specific Activities. Ordinances that impose permitting requirements for particular activities may raise First Amendment issues. Similarly, ordinances which govern the time, place and manner of particular activities may be questioned. Further, ordinances that might otherwise pass constitutional muster may be invalidated by overly stringent or haphazard application.[30]

Regulating Specific Classes of Persons. Ordinances that regulate the admission or exclusion of classes of persons to designated events or places may be subject to question. For instance, an ordinance limiting admission to certain dance halls to persons of a certain age range was challenged.[31]

Loitering. There are many instances in which anti-loitering ordinances have been held to unreasonably infringe on free speech.[32] Where anti-loitering ordinances generally run afoul of the Constitution is when the "impermissible applications of the [ordinance] are substantial when judged in relation to [its] plainly legitimate sweep."[33]

Equal Protection

Fourteenth Amendment equal protection challenges are another category of frequently recurring constitutional issues seen by municipal solicitors. An ordinance "will survive an attack based on the equal protection clause if the ordinance is reasonable, not arbitrary, and bears a rational relationship to a legitimate state objective."[34]

Any municipal action which differentiates between classes of people, such as residents versus nonresidents, is likely to give rise to an equal protection challenge.[35] Any classification based on age or sex is similarly vulnerable.

Tax enactments are a fertile source for classification issues. Courts have held that tax classifications must be rational and based on some legitimate distinction between the classes that provide a non-arbitrary and reasonable and just basis for the different treatment.[36] For example, in 1996, the Commonwealth Court struck down a municipal business privilege tax which imposed the tax upon merchants, but exempted professional and service businesses from the tax.[37] The court noted its willingness to credit any substantive distinction that justified the separate classifications. But in the absence of any reasonable basis for distinguishing those taxed from those not taxed, the court held that it had no option but to invalidate the ordinance.

Employer-employee relations are yet another area in which equal protection challenges are often raised. For example, compulsory testing as a condition of employment may raise equal protection and unlawful search questions.[38] But in another case, a mandatory urinalysis of a municipal firefighter was upheld.[39] Therefore, solicitors must be careful to ensure that the testing is necessary and appropriate.

Equal protection issues also arise in the context of employee terminations. Courts have held that municipal employees have personal or property rights in employment if they can establish a legitimate expectation of continued employment through a contract or statute.[40]

Land use regulations can involve equal protection arguments if their effect is to exclude or substantially impair an activity which is otherwise legal. For example, a church, excluded from a commercial zone in which it wanted to locate, argued that the permitted uses within the zone were "under-inclusive" and the ordinance violated its right to equal protection. The court upheld the ordinance.[41] However, the important point for the diligent solicitor is that virtually every municipal action that expressly or implicitly differentiates or excludes certain activities, uses or groups of people is susceptible to an equal protection challenge. The key, always, to sustaining such municipal action is to establish a rational basis for the differentiation in question.

Illegal Searches

As a general rule, in order for a search to be constitutional, police must obtain a warrant that is supported by probable cause and issued by an independent judicial officer prior to conducting the search. There are numerous exceptions to that general rule, including one for searches and seizures of automobiles. The Pennsylvania Supreme Court recently adopted the federal exception to the warrant requirement for automobile searches. As a result, in order for police to lawfully conduct a search of an automobile without a warrant, they must have probable cause and need no exigent circumstances beyond the inherent mobility of a motor vehicle.[42]

The United States Supreme Court also recently resolved the question of whether warrantless searches of cell phones are constitutional. The Court found that warrantless searches of cell phones do not further governmental interests and implicate greater individual privacy interests. With respect to the privacy issue, the Court noted that cell phones place "vast quantities of personal information literally in the hands of individuals" and a search of a cell phone "bears little resemblance" to a physical search and "would typically expose to the government far *more* than the exhaustive search of a house."[43]

Fourth Amendment challenges also arise in the context of municipal licensing efforts. For example, a court held that a municipal ordinance that required property inspections before issuance of a rental license was not facially unconstitutional because the municipality needed the property owner's consent prior to entering the premises. A property owner's refusal to provide consent would just mean that no license would be issued by the municipality, not that any constitutional rights had been violated.[44]

Use of Eminent Domain and Regulatory Takings

In 2005, the United States Supreme Court issued a landmark decision regarding eminent domain by municipalities. In that case, the Supreme Court held that municipalities exercising their eminent domain powers must meet the following two burdens: (1) that the takings of the particular properties were "reasonably necessary" to satisfy the municipality's intended public purpose; and (2) that the takings were for "reasonably foreseeable needs."[45] This decision gave a broad interpretation to the phrase "public use" in the Takings Clause.

In response, in 2006, the Pennsylvania General Assembly adopted the Property Rights Protection Act. Among other things, this statute prohibited the use of eminent domain in order to use the condemned land for private enterprise.[46] In 2014, the Pennsylvania Supreme Court determined that a "proper public purpose" exists under the statute only if the public is the primary and paramount beneficiary of the taking.[47]

Another area of constitutional concern centers upon the issue of regulatory takings. These usually arise in the context of restrictive municipal ordinances, most generally in the area of land use control. Generally, the municipality's intent is not to take the property affected, but rather to limit a certain activity or use of the property. In response, the property owner usually claims that the regulation so deprives him or her of the use of the property that it has been effectively taken and compensation should be paid.

The Pennsylvania Supreme Court set forth three conditions that must be met to determine whether a valid regulatory restriction constitutes a taking requiring just compensation for a landowner: (1) the interest of the general public, rather than a particular class of persons, must require governmental action; (2) the means must be necessary to effectuate that purpose; and (3) the means must not be unduly oppressive upon the property holder, considering the economic impact of the regulation, and the extent to which the government physically intrudes on the property.[48]

The Pennsylvania Supreme Court further explained the heavy burden on a landowner, holding that to sustain a regulatory, or *de facto*, taking claim, it must be shown that the landowner was substantially deprived of the use and enjoyment of its property.[49]

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III. Intergovernmental Cooperation

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Intergovernmental cooperation agreements represent, in many instances, an efficient, cost-effective way for local governments to provide services to their residents. They have been used by local governments more and more in recent years in a wide variety of areas.

The Pennsylvania Constitution authorizes local governments to "agree in the exercise of any function, power or responsibility with, or delegate or transfer any function, power or responsibility to, one or more other governmental units."[1]

The Intergovernmental Cooperation Act

The Intergovernmental Cooperation Act ("ICA") generally tracks the authorization set forth in the Pennsylvania Constitution,[2] but imposes additional requirements on local governments seeking to share services and functions. The ICA applies to any "local government," which is defined to include any "county, city of the second class, second A and third class, borough, incorporated town, township, school district, or any other similar general purpose unity of government" created by the General Assembly after July 12, 1972.[3] Municipal authorities do not fall within the ICA's definition of local government. However, they have broad authority through the Municipalities Authorities Act to contract with each other and local governments to perform services authorized under that act.[4] There is additional information on municipal authorities elsewhere in this handbook.

In order to enter into an intergovernmental cooperation agreement, local governments must adopt an appropriate ordinance.[5] The failure to adopt such an ordinance renders an intergovernmental cooperation agreement void.[6] Voters may also require a referendum election on a proposed intergovernmental cooperation agreement.[7]

It is important to note that the ICA requires that any intergovernmental cooperation agreement, regardless of scope or value, be memorialized through ordinances adopted by all parties to the agreement. Local governments throughout the Commonwealth have historically engaged in some intergovernmental cooperation arrangements through "handshake deals" that do not technically comply with the ICA. These deals, as a result, could expose the municipalities and elected officials to liability or negative publicity.

The ICA contains specific requirements for what must be included in the ordinance approving an intergovernmental cooperation agreement. The ordinance must specify: (1) the conditions of agreement; (2) the duration of the term of the agreement; (3) the purpose and objectives of the agreement; (4) the manner and extent of financing the agreement; (5) the organizational structure necessary to implement the agreement; (6) the manner in which real or personal property shall be acquired, managed, licensed or disposed of; and (7) that the entity created has the authority to enter into contract for group insurance and employee benefits, including Social Security, for any employees.[8] It is not necessary that a specific term of the agreement be spelled out; it is sufficient that the ordinance state that the agreement will continue until terminated by the parties.[9]

Local governments acting pursuant to an intergovernmental cooperation agreement must abide by the appropriate bidding requirements when soliciting bids for joint purchases.[10] However, local governments within a county may participate in or purchase off of a contract entered into by the county and vendors or suppliers of goods without having to comply with competitive bidding requirements (because the county already presumably complied with the requirements).[11] They may do the same with schools, colleges, universities and nonprofit human services agencies within the local government.[12]

Intergovernmental cooperation agreements take effect when the agreement has been adopted by ordinance by all cooperating local governments.[13]

Examples of Intergovernmental Cooperation Agreements

Councils of Government ("COGs") – Countywide and area-wide COGs are becoming increasingly prevalent in Pennsylvania. They enable local governments in the same geographic region to pool resources to offer a wide variety of municipal services and programs, including community development, police, emergency management, equipment sharing, fiscal services, municipal management and solid waste collection and disposal. There are currently dozens and dozens of COGs. The Pennsylvania Association of Councils of Governments is an excellent resource for information on COGs.

Joint Planning Commissions – The Municipalities Planning Code authorizes local governments to create joint planning commissions.[14]

Uniform Construction Code Boards of Appeals – The Pennsylvania Construction Code Act permits municipalities to enter into ordinances for the joint administration and enforcement of the law.[15]

Environmental Advisory Councils – One or more local governments may by ordinance establish an environmental advisory council to "advise other local governmental agencies, including, but not limited to, the planning commission, park and recreation boards and elected officials, on matters dealing with protection, conservation, management, promotion and use of natural resources.[16]

Investments – Municipalities are permitted to pool resources for investment purposes.[17] The Pennsylvania Local Government Investment Trust is an example of an intergovernmental cooperation agreement directed toward the investment of municipal funds. For more information, see www.plgit.com.

Insurance and Pension – There are numerous intergovernmental cooperation arrangements for the acquisition of defined benefit and defined contribution pension plans, health insurance and unemployment compensation insurance. Examples of such arrangements are the Pennsylvania Townships Health Insurance Cooperative Trust, Pennsylvania Municipalities Pension Trust, PSATS Unemployment Compensation Group Trust (more information on each can be found at www.psatsinsurance.org), and the Delaware Valley Health Insurance Trust (more information available at www.dvit.com).

Other Resources

DCED makes available the *"Intergovernmental Cooperation Handbook,"* which is an excellent resource for municipal officials and solicitors and available for download from DCED's website.

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IV. Meetings and Records

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Sunshine Act

Since the publication of the Third Edition of the *Solicitors' Handbook* in April 2003, the Sunshine Act, 65 P.S. §§ 701, *et seq*., has not been amended, with the exception of the definition of "agency," which was amended in 2004,[1] and amendments to the section relating to "Penalties" in 2011[2]. There have, however, been significant decisions by Pennsylvania appellate courts interpreting the Sunshine Act.

Open Meetings Required

The Sunshine Act requires open meetings. Section 704 of the Sunshine Act[3] provides:

> Official action and deliberations by a quorum of the members of an agency shall take place at a meeting open to the public unless closed under Section 707[4] (relating to exceptions to open meetings, 708[5] (relating to executive sessions) or 712[6] (relating to General Assembly meetings covered).All votes must be publicly cast, and all roll call votes recorded under Section 705.[7]

Definitions

Section 703 of the Sunshine Act sets forth the definitions of "official action," "agency," "meeting," and "deliberation" as follows:

"Official action"

(1) Recommendations made by an agency pursuant to statute, ordinance, or executive order.

(2) The establishment of policy by an agency.

(3) The decisions on agency business made by an agency.

(4) The vote taken by an agency on any motion, proposal, resolution, rule, regulation, ordinance, report, or order.

"Agency" The body, and all committees thereof authorized by the body to take official action or render advice on matters of agency business, of all the following: the General Assembly, the executive branch of the government of this commonwealth, including the Governor's Cabinet when meeting on official policymaking business, any board, council, authority or commission of the commonwealth or of any political subdivision of the commonwealth or any State, municipal, township or school authority, school board, school governing body, commission, the boards of trustees of all State-aided colleges and universities, the councils of trustees of all State-owned colleges and universities, the boards of trustees of all State-related universities and all community colleges or similar organizations created by or pursuant to a statute which declares in substance that the organization performs or has for its purpose the performance of an essential governmental function and through the joint action of its members exercises governmental authority and takes official action. The term shall include the governing board of any nonprofit corporation which by a mutually binding legal written agreement with a community college or State-aided, State-owned or State-related institution of higher education is granted legally enforceable supervisory and advisory powers regarding the degree programs of the institution of higher education. The term does not include a caucus or a meeting of an ethics committee created under rules of the Senate or House of Representatives.

"Meeting" Any prearranged gathering of an agency which is attended or participated in by a quorum of the members of an agency held for the purpose of deliberating agency business or taking official action."

"Deliberation" The discussion of agency business held for the purpose of making a decision.[8]

Public Notice Requirements
An open meeting, for purposes of Section 704 of the Sunshine Act, is a meeting for which there has been public notice provided by the agency, which the public can attend, and in which public participation is permitted. "Public notice" is defined in Section 703 of the Sunshine Act as follows:

"Public notice"

(1) For a meeting:

(i) Publication of notice of the place, date, and time of a meeting in a newspaper of general circulation, as defined in 45 Pa. C.S. § 101 (relating to definitions), which is published and circulated in the political subdivision where the meeting will be held, or in a newspaper of general circulation which has a bona fide paid circulation in the political subdivision equal to or greater than any newspaper published in the political subdivision.

(ii) Posting the notice of the place, date, and time of a meeting prominently at the principal office of the agency holding the meeting or at the public building in which the meeting is to be held.

(iii) Giving notice to parties under Section 709(c) (relating to public notice [to the media and individuals requesting notice of the meeting]).

(2) For a recessed or reconvened meeting:

(i) Posting a notice of the place, date, and time of the meeting prominently at the principal office of the agency holding the meeting or at the public building in which the meeting is to be held.

(ii) Giving notice to parties under Section 709(c).

Public notice of agency meetings must be given in accordance with Section 709(a) of the Sunshine Act, which requires: (1) public notice of the first regular meeting of the calendar or fiscal year not less than three (3) days prior to the meeting; (2) public notice of the schedule of remaining regular meetings; and (3) public notice of each special meeting or rescheduled regular or special meeting at least twenty four (24) hours in advance of the time of the convening of the meeting specified in the notice.[9]

Public notice is not required for an emergency meeting or a conference, as those terms are defined in Section 703.[10]

Minutes
Minutes must be kept of all meetings. Minutes do not have to be a stenographic record or all-inclusive narrative of all that occurred in the meeting. Under Section 706, minutes must include: (1) the date, time, and place of the meeting; (2) the names of members present; (3) the substance of all official actions taken and a record by individual members of the roll call votes taken; and (4) the names of citizens who appeared individually, and the subject matter of their testimony.[11]

Opportunity for Public Comment and Participation
Under Section 710.1(a),[12] the board or council of an agency must provide a reasonable opportunity at each advertised regular or special meeting for public comment by residents or taxpayers/ratepayers of the political subdivision or other agency regarding matters of concern, official action, or deliberation which are or may be before the board or council prior to taking official action. The public comment period may be at the beginning of the meeting. If the board or council determines that there is insufficient time for public comment, the public comment may be deferred to the next regular meeting, or to a special meeting occurring in advance of the next regular meeting. There is a limited exception to this rule if a body, prior to January 1, 1993, took public comment at a special meeting held for the specific purpose of public comment. However, the practice of taking public comment only at committee meetings, and not allowing public comment at city council meetings, was found to violate Section

710.1(a), even though this practice had been in place prior to 1993.[13] The agency may adopt reasonable rules, not in conflict with the intent of the Sunshine Act, for the conduct of its meetings, including public comment, and the maintenance of order.[14]

Exceptions to General Rule of Open Meetings
There are three (3) exceptions to the general rule of deliberation in an open meeting. They are: (1) executive sessions; (2) conferences; and (3) certain working sessions of a board of auditors. **Official action must still be taken in the open meeting.**

Executive Sessions
The most commonly utilized exception to the general rule of open meetings by a public agency is the "executive session." Section 708(a)[15] permits an "executive session" for:

(1) Personnel matters, including appointment, discipline, promotion, demotion, and performance evaluation, and discipline.

(2) Information, strategy, and negotiations sessions related negotiation and arbitration of a collective bargaining agreement, or, in the absence of a collective bargaining agreement, related to labor relations or arbitration.

(3) Consideration of the lease or purchase of real property up to the time an option to purchase or lease is obtained or up to the tine and agreement of sale is obtained if the agreement is obtained directly without an option.

(4) Consulting with an attorney or professional advisor regarding information or strategy in connection with pending or threatened litigation.[16]

(5) Review and discussion of agency business which, if conducted in public, would violate confidentiality laws or regulations, or lead to the disclosure of lawfully privileged information, including initiation and conduct of agency investigations or law enforcement investigations and quasi-judicial deliberations.[17]

(6) Discussion of academic admission or standings by boards or committees of state-owned or state-related colleges and universities.

The reason for the executive session must be announced, including the subject matter of actual or potential litigation or negotiation.[18]

Actions for Violation
In the event that a member of the public believes that a public agency has acted in violation of the Sunshine Act, he or she has thirty (30) days from the date of the suspected violation, or thirty (30) days from the date of discovery of such a suspected violation to file a legal challenge. Any action taken by an agency which was transacted at a meeting found by a court to have been unauthorized is void.[19] A violation may be cured by retaking the action at an open and advertised meeting.[20]

Penalties for Violation
Under Section 714, a conviction for violation of the Sunshine Act constitutes a summary criminal offense, subject to fines of not less than $100.00 and not more than $1,000.00, plus costs of prosecution for a first offense; and fines of not less than $500.00 and not more than $2,000.00 plus costs of prosecution, for another offense. The agency may not pay any fine or cost on behalf of its members, and may not reimburse its members for the payment of these fines and costs.[21]

Right-to-Know Law

The purpose of the Pennsylvania Right-to-Know Law (RTKL)[22] is to provide for access to public information and public records.[23] Initially enacted in 1957 as the "Open Records Act," the law has been significantly amended twice in its history to provide for greater public and media access to information on decisions made and transactions entered into by government agencies, to account for changes in technology, and to provide for procedures for appeal lacking in the original version, and to set forth penalties for violations.

Impact of 2008 Amendment The RTKL was significantly amended in 2008 to cover all executive, independent, and local agencies, and, with respect to nineteen (19) categories of documents, the legislative branch. The RTKL now defines three (3) broad classes of documents as generally subject to disclosure; namely "public records," "financial records," and "legislative records."[24] These are far more expansive than the prior definitions, which required production of items such as minutes, orders, decisions, and contracts, but were far less clear and detailed as to other classes of documents. The 2008 amendment created a presumption that an agency record is a public record subject to disclosure, placing the burden of proof on the agency that the document falls under one of the exemptions from disclosure set forth in the RTKL. Now, documents in the hands of third parties which relate to contracts with a public agency may be subject to disclosure, and emails and other electronic communications between agency members regarding agency business, even if conducted from private accounts, may be considered public for purposes of RTKL.

The agency has an obligation to have in place a procedure for records requests which is posted on its bulletin board and on its internet website if it has one, to name an Open Records Officer (ORO) responsible for timely responses (initial response in five (5) business days), and to provide all responses within the time deadlines set forth in the RTKL. The amendment created the Pennsylvania Office of Open Records (OOR) within the Pennsylvania Department of Community and Economic Development to hear and decide appeals from determinations on records requests, to provide information and training to officials on rights and obligations under RTKL, and to set fee schedules and limits.[25]

Significantly, the 2008 RTKL amendment provided for the following:

- Agency designation of an ORO to render initial determinations on document requests. The ORO receives all requests, and grants, extends, or denies these requests.[26]
- Increased civil penalties for denials of access to public records made in bad faith of up to $1,500.00, and penalties of up to $500.00 per day for failure to comply with a court order to produce public records until the records are provided, plus court costs and counsel fees.[27]
- Granted immunity in most cases to an agency, public official or public employee resulting from compliance with or failure to comply with the RTKL (e.g., a good faith immunity). Actions taken by an agency pursuant to a written public record retention and disposition schedule are not subject to civil or criminal penalties.[28]
- Created thirty nine (39) categories of exceptions from the broad definition of "public records," and clarified exemptions contained in case law.[29]
- Broadened the definition of "requester" from "citizen of the Commonwealth of Pennsylvania" to "a person that is a legal resident of the United States," and included agencies in that definition.[30]

Commonwealth or Local Agency Response to Request
A valid request for public records under the RTKL which will enable the requester to exercise his or her rights under the RTKL, must be: (1) be in writing, preferably, although not required to be, on the Uniform OOR form (which form must be accepted by the agency); (2) be addressed to the agency ORO; and (3) contain sufficient specificity to enable the agency to know what records are being sought.[31] Under the RTKL, the agency may, but is not required to, fulfill verbal or anonymous requests. Such requests will not trigger appeal rights.[32]

An agency receiving a request for documents is required to do the following:

(a) Provide within five (5) days, copies of the record, in accordance with agency policies and the RTKL on availability of documents, copying costs, certification of copies, etc.

(b) Provide a written response seeking an extension of up to thirty (30) days to the five (5) day response time.

(c) Issue a denial of the request, which must include:

  i. A description of the record which had been requested.

ii. The reason for the denial, including a citation to supporting legal authority.[33]

iii. If the denial was based upon solicitor or other legal review which concluded that the record was not a public as defined in the RTKL, the denial must set forth the reasons for the determination that the record is not a "public record."

iv. The name, title, business address, business telephone number, and signature of the public official or employee issuing the denial.

v. Date of response.

vi. Appeal procedure from the denial, including appeal to the OOR or the county district attorney (for criminal or police record denials), and the name of the OOR Executive Director, OOR address, and time limit for appeal.[34]

Time Limit for Agency Response
An agency must make a good faith effort to determine if the record is a public record, and respond as quickly as possible under the circumstances existing at the time, not to exceed five (5) business days. If the agency does not respond within that time, the request is deemed to be denied.[35]

Exceptions to Time Limits
The agency may not be able to provide the records requested within the time set forth in Section 901, above, and upon such a determination by the agency ORO, the agency must send the requestor written notice of the need for an extension of up to thirty (30) days following the five (5) business days permitted for response under Section 901.

Section 902(a) sets forth the following as acceptable reasons for an extension by the agency:

1. The request requires redaction of non-public information before the document can be provided in accordance with Section 706 of the RTKL;[36]
2. The request requires retrieval of a record stored at a remote location;
3. The agency cannot timely respond due to bona fide staffing limitations;
4. Legal review by the agency solicitor is necessary to determine whether the record is a "public record," "financial record," or "legislative record" subject to disclosure under the RTKL;
5. The requester has not complied with the agency's policies regarding access to public records;
6. The requester is refusing to pay fees authorized by the RTKL; or
7. The extent or nature of the request precludes response within the required time period.[37]

In the event that the documents are not provided by the expiration of the thirty (30) day extension period, the request is deemed to be denied.[38]

Allowable Fees
Section 1307 sets forth allowable fees for services provided by agency officials under the RTKL.[39] Fees for copying must be reasonable and based upon prevailing local fees for duplication services. An agency may charge per copy for certified copies, when certified copies are requested. An agency may not charge to scan and/or email documents to a requestor. An agency may charge the actual cost for postage, facsimile/microfiche or other media, as well as for specialized documents.

If there is a request for a transcript, such as a zoning hearing, the requestor should be referred to the stenographer or other person that prepared the transcript, in deference to the proprietary and other potential legal interests of the person or entity preparing the transcript.

The requester must pay in advance the actual fees owed, or the agency estimate of the fees where the actual fees are not known, where these known or estimated fees are $100 or more. The prepayment request can specify a reasonable period of time in which the requester must make such prepayment. Failure to make a payment by the date required will result in the request being deemed withdrawn.

Where an estimated fee is paid and the estimated fees are subsequently calculated to have been lower than the actual fees, the agency must provide the requester a statement showing how the actual fees were calculated, and the requester will promptly pay the difference.

Where an estimated fee is paid by a requester and the estimated fees are subsequently calculated to have been higher than the actual fees, the agency must provide the requester a statement showing how fees were calculated, and will pay the difference to the requester.

Where fees are known or estimated to be $100 or more, these fees must be paid in order to receive access to the record requested.[40] Any requester who has unpaid amounts outstanding in relation to RTKL requests where production was made by any such agency, may not be granted access to records under other RTKL requests until such prior amounts due have been paid in full.

No charge shall be made for solicitor review of the record to determine whether the requested records are public records subject to production.

Exemptions from General Rule Requiring Disclosure
Section 708(b)[41] created specific classes of documents which are not required to be disclosed in response to a request, and which, in some of the cases, such as when disclosure violates confidentiality requirements under state or federal law, may not be disclosed to a requestor.[42] The following types of records are exempt from access:

- Where disclosure of a record would result in loss of federal or state funds by an agency or the commonwealth, or would be reasonably likely to result in a substantial and demonstrable risk of physical harm to or personal security of an individual.
- Where disclosure of a record in connection with the military, homeland security, national defense, law enforcement or other public safety activity would be reasonably likely to jeopardize or threaten public safety, or the record is designated as classified by an appropriate Federal or State military authority.
- Where disclosure of a record creates a reasonable likelihood of endangering the safety or physical security of a building, public utility, resource, infrastructure, facility or information storage system or public resource.
- Where disclosure of a record on computer hardware, computer software or networks might be reasonably likely to jeopardize computer security.
- A record of an individual's medical or psychiatric history or disability status, including results of drug tests.
- Personal identification information, including Social Security number, driver's license number, personal financial information, home, cellular or personal telephone numbers, personal email addresses, spouse's name, marital status, beneficiary information, and the home address of a law enforcement officer or judge.[43] The exemption does not include information relating to name, position, salary, compensation, employment contract or length of service of a public official or agency employee. An agency may redact the name or other identifying information relating to an individual performing undercover or covert law enforcement activity.
- Letters of recommendation or references regarding the qualifications of an individual (does not apply to information prepared for individuals appointed to fill a vacancy in an elected office or an appointed office requiring Senate confirmation).
- Employee performance ratings and reviews.
- The results of civil service or similar tests administered by a commonwealth, legislative or judicial agency. The results of such tests shall not be disclosed by a local agency if restricted by a collective bargaining agreement.
- Applications submitted by employees not hired by an agency.
- Written criticisms of an employee.
- Grievance material.

- Information on discipline, demotion or discharge except records regarding final agency action leading to demotion or discharge.
- Labor and collective bargaining negotiation strategies (does not include final agreements or arbitration awards).
- An exhibit entered into evidence at an arbitration proceeding.
- Drafts of bills, resolutions, amendments, statements of policy, ordinances and regulations prepared by or for an agency.
- A record that reflects the internal, predecisional deliberations of an agency, its members, officers, officials and employees. This exemption applies to agencies subject to the Sunshine Act, but does not apply (1) to written or internet applications requesting commonwealth funds, or (2) to the results of public opinion surveys, polls, etc.[44]
- A record that constitutes or reveals a trade secret or confidential proprietary information.
- Notes and working papers prepared by or for a public official or employee used solely for the individual's personal and with no official purpose.
- The identity of an individual making a lawful donation to an agency.
- Unpublished lecture notes and manuscripts and similar document of a community college or an institution of the State System of Higher Education or faculty members or employees thereof.
- Academic transcripts.
- Examinations and exam questions, scoring keys and answers. This exemption includes licensing exams and exams given in public and private schools and colleges.
- An agency record relating to or resulting in a criminal investigation. This exemption does not apply to information contained in a police blotter and utilized or maintained by the Pennsylvania State Police, local, campus, transit or port authority police or other law enforcement agency, or information contained in a traffic report.[45]
- An agency record relating to a noncriminal investigation including records or parts of records (except for time response logs) pertaining to audio recordings, telephone or radio transmissions of EMS personnel, including 911 recordings. This exemption does not apply to a 911 recording or a transcript of a 911 recording if an agency or court determines the public interest in disclosure outweighs the interest in nondisclosure.
- DNA and RNA records.
- Autopsy records of a coroner or medical examiner. This exemption does not limit the reporting of the name of the deceased and the cause and manner of death.
- Draft minutes of a meeting until the next regularly scheduled meeting of the agency or minutes of an executive session.[46]
- Real estate appraisals, engineering estimates, or environmental reviews made for or by an agency relative to leasing, acquiring or disposal of property, the purchase of public supplies or equipment or construction projects prior to the agency making a decision on the matter.
- Records of library and archive circulation. Library archived and museum materials, including rare books, and documents donated with restrictions on access.
- Locations of archeological sites or endangered plant or animal species if not already public knowledge.
- Procurement proposals prior to the award of a contract or the opening and rejection of bids.
- Financial information of a bidder or offeror requested in an invitation to bid or request for proposals.
- Identity of members and records of an agency proposal evaluation committee established under the Procurement Code.

- Communications between an agency and its insurance carrier (this does not, however, apply to contracts with an insurance carrier or to financial records relating to the provision of insurance, which are financial records of the agency).
- Information relating to individuals who apply for or receive social services.
- Correspondence between a person and a member of the General Assembly requesting assistance on constituent services. An exception to this exemption is for correspondence between a member and a lobbyist under the Lobbyist Disclosure Act.
- A record identifying the name, home address or date of birth of a child 17 years of age or younger.

A document is presumed to be fully public and subject to complete disclosure; any document must be reviewed in light of this presumption.

No Requirement to Create Records that do Not Exist.
The RTKL does not require an agency to create a public record that does not already exist, nor is an agency required to compile, maintain, format, or organize a public record in a manner in which does not currently exist. An agency is required to provide a public record to a requester in the medium requested if the record exists in that medium. Otherwise, the public record should be provided in the medium in which it exists. If a public record only exists in one medium, the agency not required to convert that public record to another medium, except that if the public record is only available in an electronic form, the agency must print it on paper if the requester so requests.[47]

Disruptive Requests
An agency is permitted to deny access to a record if the requestor has made repeated requests for the same record and the repeated requests have placed an unreasonable burden on the agency.[48]

Appeal Rights
If the agency denies a request, partially denies a request, or there is a deemed denial due to an untimely response, the requestor has fifteen (15) business days from the mailing date of the agency's response, or from the date of the deemed denial to file an appeal to the OOR. The appeal must state the grounds upon which the requestor asserts that the document is a public record.[49]

The OOR must respond to the appeal within thirty (30) days of receipt of the appeal. The OOR will seek the response of the agency and ask for reasons for the denial within seven (7) days. An agency's response may require an affidavit of the ORO or other appropriate officials, and will require citation to legal authority justifying the denial. The decision of the OOR will either grant the appeal and require the agency to take further action, or deny the appeal, and require no further agency action. The OOR may require in camera review of documents or a hearing before an appeals officer. Further appeal may be taken for local agencies to the court of common pleas of the county/judicial district in which the agency is located,[50] or for commonwealth agencies to the Commonwealth Court of Pennsylvania.[51] Appeals to the Commonwealth Court must be filed within thirty (30) days of the mailing date of the final decision.

The OOR as a Resource
The OOR's website can be found at www.openrecords.pa.gov. This website contains the text of the RTKL, OOR advisories, forms, and a searchable database of opinions since 2009. The website also features training materials and up-to-date information on this evolving area. It is a valuable resource which should be reviewed regularly by any solicitor assisting in the review of and response to requests for information under the RTKL.

REFERENCES

1. *See* P.L. 743, No. 88, § 1, July 15, 2004.
2. *See* P.L. 270, No. 56, § 1, July 7, 2011.
3. 65 P.S. § 704.
4. 65 P.S. § 707.
5. 65 P.S. § 708.
6. 65 P.S. § 712.
7. 65 P.S. § 705.

8. 65 P.S. § 703; *see also Smith v. Township of Richmond,* 82 A.3d 407 (Pa. 2013) (meeting held for information gathering/fact-finding purposes did not constitute "deliberation").
9. 65 P.S. § 709.
10. 65 P.S. § 703 (defining "conference" as a training program, seminar, or session arranged by a Federal or State agency to provide information on matters related to official responsibilities and an "emergency meeting" as one called to address a real or potential emergency involving a clear and present danger to life or property).
11. 65 P.S. § 706.
12. 65 P.S. § 710.1(a).
13. *Alekseev v. City Council of City of Philadelphia,* 607 Pa. 481, 8 A.3d 311 (2010).
14. 65 P.S. § 710.
15. 65 P.S. § 708(a).
16. *Trib Total Media, Inc. v. Highlands School Dist.,* 3 A.3d 695 (Pa.Cmwlth. 2010) ("litigation" exception does not permit the governing body to bring opposing counsel into the executive session for purposes of conducting settlement negotiations, as the purpose of the executive session for pending or threatened litigation is the preservation of attorney-client privilege and confidentiality).
17. *Kennedy v. Upper Milford Tp. Zoning Hearing Bd.,* 834 A.2d 1104, 575 Pa. 105 (2003) (zoning hearing board is a quasi-judicial body when it sits and hears evidence so may deliberate in executive session); *In re Arnold,* 984 A.2d 1 (Pa.Cmwlth. 2009) (land use decision must be by vote in a public meeting, but the written decision does not have to be issued in the public meeting).
18. *Butler v. Indian Lake Borough,* 14 A.3d 185 (Pa.Cmwlth. 2011).
19. 65 P.S. § 713.
20. *Association of Community Organizations for Reform Now v. SEPTA,* 789 A.2d 811 (Pa.Cmwlth. 2002), *appeal denied*, 803 A.2d 736, 569 Pa. 695 (2003).
21. 65 P.S. § 714.
22. 65 P.S. §§ 67.101-67.3104.
23. 65 P.S. § 67.101.
24. 65 P.S. § 67.102 ("public records" are broadly defined as records of an agency which are not specifically exempt under the RTKL, federal law, state law, regulation, or judicial order or decree, and not protected by privilege; "financial records" include accounts, vouchers, and contracts dealing with receipt or disbursement of agency funds or acquisition, use, or disposal of services, supplies, materials, or property and include salary and expense payments to public officials and employees;" and "legislative records" are enumerated records of a legislative agency, standing committee, or subcommittee or conference committee of a legislative agency").
25. 65 P.S. § 67-1310.
26. 65 P.S. § 67-502.
27. 65 P.S. § 67-1305.
28. 65 P.S. § 67-1306.
29. 65 P.S. § 67-708.
30. 65 P.S. § 67-102.
31. 65 P.S. § 67-702; s*ee also Pennsylvania Gaming Control Bd. v. Office of Open Records,* No. 67 MAP 2013, 2014 Pa. LEXIS 2929 (Pa. Nov. 10, 2014) (OOR correctly decided that a request for records was not denied for failure to respond, as the requestor did not address the request to the ORO, and that this invalidated the request, albeit only insofar as it related to any rights that he would have had to treat the ORO's failure to respond to a deemed denial so as to allow the requestor to avail himself of appeal rights afforded by the RTKL; also held that a written request to be valid, a requestor must address the request to the ORO).
32. 65 P.S. § 67-702.
33. 65 P.S. §§ 67-301(b) and 67-302(b) (intended use of the record is not a proper reason for the denial, and the agency may not inquire into the reason for the request).
34. 65 P.S. § 67-903.
35. 65 P.S. § 67-901.
36. 65 P.S. § 67-706.
37. 65 P.S. § 67-902(a).
38. 65 P.S. § 67-902(b).
39. 65 P.S. § 67-1307.
40. 65 P.S. § 67-901.
41. 65 P.S. § 67-708(b).
42. 65 P.S. § 67-707(a) (RTKL allows for disclosure of a document which is not a public record, legislative record, or financial record of the agency; if the document was provided by a third party, that third party must be notified that it is the subject of a request and of the identity of the requestor).

43. *Pennsylvania State Educ. Ass'n ex rel. Wilson v. Commonwealth,* 110 A.3d 1076 (Pa.Cmwlth. 2015) (holding that RTKL violated constitutional due process principles by not providing third parties with notice and an opportunity to be heard before disclosing their personal identification information and requiring that agencies provide such notice and opportunity).
44. *See LaValle v. Office of General Counsel,* 564 Pa. 482, 769 A.2d 449 (2001).
45. 18 Pa.C.S. § 9101, et seq. (governs requests for police and criminal records and records containing criminal history information; appeals from denials of such records are made to the district attorney).
46. Office of Open Records Advisory Opinion 2009-003 (Feb. 17, 2009) (stating OOR's position that even though the official record of the meeting is contained in the approved minutes, audio recordings of the meetings made by the agency secretary, even if only to assist in preparation of the minutes, are subject to disclosure).
47. 65 P.S. § 67-705.
48. 65 P.S. § 67-506(a)(1).
49. 65 P.S. § 67-1101(a)(1).
50. 65 P.S. § 67-1302.
51. 65 P.S. § 67-1301.

V. Enforcing Ordinances

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There are numerous methods to enforce municipal ordinances, and the method and procedure depend on the statute under which the ordinance has been enacted and the type of ordinance enacted under that statute. The Pennsylvania Municipalities Planning Code (MPC) provides for civil enforcement, but the required procedures are different for zoning ordinances enacted under MPC Article VI,[1] and subdivision and land development ordinances enacted under MPC Article V[2]. Police power ordinances enacted under the Borough Code or the Second Class Township Code vary in enforcement. Certain types of ordinances discussed further below are enforced through summary criminal proceedings while others are enforced through a civil penalty procedure. Ordinances enacted under other municipal codes are generally enforced through summary criminal proceedings. Municipalities also have the option to seek equitable relief to restrain or prevent violations or bring properties into compliance with ordinances.

Solicitors for home rule municipalities should review the ordinance being enforced and the municipal charter to determine the proper enforcement mechanism. The Home Rule Charter and Optional Plans Law[3] allows home rule municipalities flexibility in matters other than those items specifically listed in the statute.[4] Home rule municipalities are governed by the MPC,[5] and home rule municipalities cannot define or provide for punishment of felonies or misdemeanors[6]. Home rule municipalities are not bound by the limitations of any municipal code concerning the method of ordinance enforcement or limitation on the amount of a fine or civil penalty.

A municipality cannot be compelled to enforce an ordinance by mandamus.[7] There is generally no right of citizens to enforce ordinances. Section 617 of the MPC provides a private right to enforce a zoning ordinance, but citizens must strictly follow the requirements to be entitled to maintain a private enforcement action.[8]

Negligent enforcement of an ordinance will not impose liability upon the municipality; such negligence is not one of the exceptions to immunity under the Political Subdivision Tort Claims Act.[9]

The most conservative course of action is for the governing body to authorize commencement of any enforcement action other than citations issued by police officers. This will eliminate a claim that the zoning officer or other enforcement officer went beyond his or her authority. However, a mayor in a city of the third class may direct the solicitor to file an enforcement action.[10]

An ordinance may specifically authorize an enforcement officer to take actions such as filing summary criminal proceedings. If an ordinance authorizes an enforcement officer to issue citations, the governing body must formally appoint a person or entity, such as the municipal engineer, as the enforcement officer or the citation will be invalid.[11]

Commonwealth Court appears to be more flexible in considering authorization to enforce ordinances in non-criminal proceedings. Commonwealth Court agreed that a municipal authority was authorized to enforce a mandatory sewer connection ordinance where that ordinance specifically identified the municipal authority and stated that the authority owned and operated the sewer system.[12] The action was filed by the landowner after the sewer authority had terminated water service for failure to pay the sewer rates the municipal authority billed after the landowner failed to connect to and use the sewer system.

The municipality's enforcement power is limited. Self-help, such as chaining and padlocking of an adult bookstore, which was operated in violation of zoning ordinance to prevent access, is not authorized.[13]

A municipality which obtains an award of fees and costs incurred in an enforcement action has only a judgment and cannot file a municipal lien for this sum.[14]

Summary Criminal Proceedings

The Borough Code and Second Class Township Code provide that ordinances "regulating building, housing, property maintenance, health, fire, public safety, parking, solicitation, curfew, water or air or noise pollution, enforcement" shall be enforced by a criminal action in the same manner provided for the enforcement of summary offenses under the Pennsylvania Rules of Criminal Procedure.[15] The Third Class City Code also provides for summary criminal enforcement of ordinances.[16]

Even though "prosecutions under municipal ordinances are civil actions, not criminal actions, the Pennsylvania Rules of Criminal Procedure govern these summary actions, and defendants in municipal enforcement actions are afforded the same protections as defendants in criminal proceedings."[17] The alleged violator must be afforded the same protections afforded defendants in criminal proceedings.[18] However, the defendant is not entitled to appointment of counsel in summary proceedings.[19]

Prosecution is instituted by citation by a "law enforcement officer."[20] A municipal code enforcement officer is considered a law enforcement officer.[21] Most municipal codes also expressly authorize police officers to enforce ordinances.[22]

Rule 403 of the Pennsylvania Rules of Criminal Procedure sets forth requirements for citations. A separate citation must be filed for each violation and for each defendant, even if the defendants are husband and wife and even if the violation relates to property held as tenants by the entireties.[23] The municipality is not obligated to file citations against both husband and wife where a violation relates to property held by the entireties.[24]

A corporation or an unincorporated association may be a defendant.[25] "A person is legally accountable for any conduct he performs or causes to be performed in the name of a corporation or an unincorporated association or in its behalf to the same extent as if it were performed in his own name or behalf."[26] A sole shareholder and sole officer of a corporation cannot be personally convicted unless the municipality introduces evidence sufficient to pierce the corporate veil or evidence that the shareholder personally participated in the violation.[27]

For summary criminal prosecution of an ordinance, a solicitor of a city or township of the first class must obtain permission from the district attorney to prosecute the ordinance violation.[28] The Borough Code and Second Class Township Code expressly provide that the solicitor may assume charge of the prosecution without the consent of the district attorney.[29]

Fourth Amendment issues are relevant to ordinance enforcement. For example, in *Commonwealth v. Feineigle*, the court held that a fire marshal standing at the entrance of a commercial garage with the door wide open and the contents in plain view did not conduct an illegal search when he took photographs of the contents of the building. Portions of a commercial business which are open to the general public can be subject to warrantless administrative inspections. A municipality was able to obtain a search warrant after the owner of an automobile repair and body shop refused to allow the annual inspection under a fire prevention code, but a court order authorizing future inspections without obtaining new warrants was invalid.[30] A municipality cannot make it a violation of an ordinance such as a rental regulation ordinance to refuse to allow an inspection without a search warrant.[31]

A citation must "accurately describe the gravaman of the offense."[32] Commonwealth Court discussed the level of detail needed in a citation in *Commonwealth v. Halstead*.[33] Solicitors should review that opinion if asked to assist in preparing citations.

The municipality has to prove all of the elements of the violation.[34] Always present a certified copy of the ordinance or, if the ordinance is extensive, the provision(s) violated and the penalty provision at the hearing. The certification should meet the requirements of 42 Pa.C.S. § 6103(a). Although a court is permitted to take judicial notice of an ordinance, it is not required to act on its own to obtain a copy of the ordinance.[35]

Circumstantial evidence can support a conviction.[36] Remember to cross-examine the defendant if he or she testifies.

The court's evaluation of evidence presented in an action for violation of erosion and sedimentation control regulations in *Gaster v. Department of Environmental Resources* demonstrates the procedure which should be followed by solicitors.[37]

Nuisance ordinances are common subjects of summary criminal enforcement proceedings. In order to obtain a conviction under a nuisance ordinance there must be evidence demonstrating that the condition of the defendant's property constituted a nuisance in fact.[38] Proof that the condition of the property violates a general prohibition in the ordinance is not sufficient for conviction.[39] Municipalities cannot, under a nuisance ordinance, simply prohibit unlicensed and uninspected vehicles.[40] If the municipality has enacted a property maintenance code, the municipality does not have to prove the condition constitutes a nuisance in fact to secure a conviction.[41] Instead, the municipality must prove the conditions which the property maintenance code prohibited existed, such as that the vehicle was unlicensed, that it had been stored on the premises, and that it had not moved in the number of days established in the ordinance. Violation of a zoning regulation is not and of itself a nuisance.[42]

A landowner cannot defend a nuisance ordinance complaint on a claim of nonconforming status because the "concept of a preexisting nonconforming use is one that is unique to the area of zoning."[43]

Appeals from summary convictions are *de novo*.[44] There must be a separate appeal for each citation; a convicted defendant cannot file a single notice of appeal from multiple summary convictions. Appeals from multiple citations can be consolidated for trial.[45]

Once a verdict is rendered on a summary offense charge brought to enforce an ordinance, double jeopardy attaches and the defendant cannot be retried.[46] A municipality may not appeal from an order of a court of common pleas finding a person not guilty of violating an ordinance.[47]

When imposing a fine after a conviction, the magisterial district judge and, on appeal, the trial court is to consider factors in addition to the penalty provisions of the ordinance. In the property maintenance code context, when determining whether a fine is excessive the court may also consider the value of the property and the feasibility and cost of repairs. The magisterial district judge and the trial court may also consider the history and character of the defendant and the defendant's attitude.[48]

Proceeding in equity for injunctive relief does not preclude filing of the citations.[49] The double jeopardy clause in the Fifth Amendment prohibits a second criminal punishment for the same criminal offense, not equitable relief.

Similarly, a municipality has the authority to institute summary criminal proceedings for a violation of an ordinance governing trash collection as a result of the refusal to pay the collection fees. Even after conviction for ordinance violation and payment of penalties, property owners would still be indebted for refuse collection charges and interest.[50]

Civil Enforcement under Municipal Codes

Each municipal code has different provisions governing civil enforcement of ordinances. The Second Class Township Code provides that "when the penalty imposed for the violation of an ordinance enacted pursuant to the provisions of this act is not voluntarily paid to the township, the township shall initiate a civil enforcement proceeding before" a magisterial district judge.[51] That section further states, "In any case where a penalty for a violation of a township ordinance has not been timely paid and the person upon whom the penalty was imposed is found to have been liable therefor in civil proceedings, the violator shall be liable for the penalty imposed, including additional daily penalties for continuing violations, plus court costs and reasonable attorney fees incurred by the township in the enforcement proceedings." There is nothing in the Second Class Township Code that specifically addresses how the penalty is initially imposed.

The Borough Code provides that "if the penalty is not paid, the borough shall initiate a civil action for collection in accordance with the Pennsylvania Rules of Civil Procedure."[52] There is no specific procedure for the initial assessment of the civil penalty.

The Borough Code provides that "council may delegate the initial determination of ordinance violation and the service of notice of violation to a qualified officer or agent."[53] The Second Class Township Code similarly authorizes the board of supervisors to "delegate the initial determination of ordinance violation and the service of notice of violation to such officers or agents as the township shall deem qualified for that purpose."[54] This implies that the enforcement officer may be granted the power to make an initial penalty assessment.

Townships of the second class and boroughs are exempt from payment of costs to file the civil enforcement action.[55] A township of the second class may recover its attorneys' fees in a civil enforcement action.[56] A borough may recover attorneys' fees if the ordinance being enforced authorizes recovery of attorneys' fees.[57]

First Class Township Code

The provisions of the First Class Township Code regarding enforcement of ordinances are inconsistent. Section 3301 provides that enforcement proceedings "may be commenced by warrant or by summons, at the discretion of the justice of the peace before whom the proceeding is begun. . . All proceedings shall be directed to and be served by any policeman or constable of the township, . . . Warrants shall be returnable forthwith, and, upon such return, like proceedings shall be had in all cases as in summary convictions."[58] Section 3304 provides in part, "No fine or penalty shall exceed three hundred dollars for any single violation of any ordinance."[59] However, Section 1502(II) authorizes the board of commissioners "[t]o prescribe fines and penalties, not exceeding one thousand dollars for a violation of a building, housing, property maintenance, health, fire or public safety code or ordinance and for water, air and noise pollution violations, and not exceeding six hundred dollars for a violation of any other township ordinance, which fines and penalties may be collected by suit brought in the name of the township before any justice of the peace, in like manner as debts of like amount may be sued for by existing laws, and to remit such fines and penalties."[60]

Land Use Ordinances

Section 616.1(a) of the MPC requires that to enforce a zoning ordinance a municipality "shall initiate enforcement proceedings by sending an enforcement notice."[61] The enforcement notice must meet all of the requirements of Section 616.1 to be valid.[62] The notice is not required to contain any information other than that specified in Section 616.1.[63]

If the enforcement notice is appealed to the municipal zoning hearing board, the municipality has the burden to go first and present a case in support of the enforcement notice.[64] The municipality does not meet this burden merely by setting forth the procedural history of the case and stating the municipality's position.[65]

A landowner cannot defend an enforcement notice by arguing that the zoning ordinance is invalid because Section 916.1 provides the exclusive method to challenge the validity of a zoning ordinance or portion of a zoning ordinance.[66]

If the municipality sends the enforcement notice and the recipient does not appeal, there is a conclusive determination of the violation that cannot be challenged in a subsequent civil enforcement action.[67] The magisterial district judge cannot conduct a de novo review of the violation question and the magisterial district judge and the court of common pleas, upon appeal, are limited to the imposition of a fine.[68] The defendant cannot in the court of common pleas after an appeal from the magisterial district judge judgment raise affirmative defenses to the enforcement notice. The municipality in that case obtained judgment on the pleadings with the court noting that because the defendant had not appealed the enforcement notice the municipality "was certain to succeed with respect to the underlying violation."[69]

Original jurisdiction of civil enforcement actions is before a magisterial district judge.[70] The action is commenced by a civil complaint, not a criminal complaint or citation.[71] The "MPC rests in the magisterial district judge the power to levy fines once the violation is finally adjudicated by the zoning hearing board."[72] The Commonwealth Court has held that the provisions of Section 617.2 require that municipalities commence enforcement actions before magisterial district judges in order to obtain awards of attorneys' fees or civil penalties, which weighs in favor of

bringing a civil enforcement action instead of proceeding directly with an equity action.[73] Where property is owned by the entireties, both spouses should be named as defendants. If only one spouse appeals from a magisterial district judge judgment, then the other spouse must be joined in the appeal as an indispensable party.[74]

Subdivision and land development ordinances may also be enforced by civil enforcement actions; there is no requirement in MPC Article V to first serve an enforcement notice.[75] Section 515.1(b) also grants municipalities the authority to "refuse to issue any permit or grant any approval to further improve or develop" property where there is a subdivision or land development ordinance violation.

Because the enforcement action for violation of a zoning ordinance or a subdivision and land development ordinance is explicitly civil, the municipality has certain advantages. Unlike summary criminal proceedings, the burden of proof for a violation of an ordinance is not the criminal standard of beyond a reasonable doubt. The defendant can be compelled to testify. The municipality may appeal an unfavorable determination of the magisterial district judge to the court of common pleas. If the defendant files an appeal to the court of common pleas, the municipality can add a count for equitable relief in the complaint. The municipality may also appeal if the magisterial district judge refuses to award attorney fees or impose daily penalties.

The action seeking daily penalties and attorneys' fees is not rendered moot by bringing the property into compliance.[76]

The municipality may recover attorneys' fees for all facets of the enforcement proceedings, including the appeal of the enforcement notice to the zoning hearing board and through the court system. While the award of attorneys' fees must be reasonable, reasonableness is not dependent on the fine recovered, and an award of attorneys' fees can be made even if a nominal civil penalty is awarded.[77] A person challenging attorneys' fees as unreasonable or relating to non-land use ordinance counts in a consolidated enforcement action had the burden to establish a basis for segregating hours identified in the municipal solicitor's invoice.[78]

Equity Actions

Violation of an ordinance is per se irreparable harm, and the municipality is not required to demonstrate a specific harm "above and beyond the violation of the ordinance itself."[79] There is no requirement to exhaust a statutory remedy, such as summary criminal proceedings, to bring an equity action to enforce an ordinance.[80] An equity action may also be used to obtain an order authorizing inspection of a property to determine if there are violations of a zoning ordinance or conditions upon a zoning approval.[81]

In the zoning context, the failure to appeal the enforcement notice, "standing alone constitutes a reasonable basis for the issuance of the preliminary injunction."[82] The Commonwealth Court has noted that in an action seeking to correct or abate a zoning ordinance violation, the municipality "is instituting a suit in equity, upon which the equitable maxims have a bearing, as they do in every request for equitable relief."[83]

Equity actions provide the most complete relief. "Where deliberate and substantial violations of a zoning ordinance are found, it is appropriate to order removal of nonconforming structures."[84] An injunction will bind future owners of the land when they have notice of it.[85] However, the remedy requested must not "be harsher than the minimum necessary to properly abate the nuisance."[86]

The disadvantages of an equity action are time and expense. Any proceeding before the court takes time, and politically the municipality may not have time. If a preliminary injunction to halt the violation cannot be obtained -- and obtained quickly -- the citizens will accuse the governing body of doing nothing. The cost in staff time lost is far greater, and the solicitor's fees are generally much greater. The procedure can become a nightmare, and if the solicitor is not commonly litigating equity actions, costly mistakes can be made.

Other Enforcement Mechanisms

Many municipalities are using other mechanisms to attempt to enforce ordinances, particularly property maintenance codes, nuisance ordinances, and other ordinances addressing blight. Many property maintenance code

ordinances are now providing for the issuance of tickets with a set penalty for common violations such as high weeks or accumulations of trash. A ticket is essentially an offer to accept a guilty plea. If the person issued the ticket pays the ticket, there is a guilty plea to the ordinance violation. If the person does not pay the ticket, the ordinance must be enforced using methods discussed above for summary criminal proceedings.

The General Assembly amended the Crimes Code to add Section 7510, which is entitled "Municipal Housing Code Avoidance."[87] The term "municipal housing code" includes any building, housing or property maintenance code ordinance. The violation is a misdemeanor, but a person may be convicted of this crime only if he has been convicted of a fourth or subsequent violation of the same subsection of the housing code for the same property, the violation has continued, the violation proposes a threat to health, safety or property, and no attempt has been made at compliance.

The General Assembly also added the Neighborhood Blight Reclamation and Revitalization Act, sometimes referred to as Act 90 of 2010, to the General Local Government Code.[88] A useful provision of this statute is Section 6131, which is entitled "Municipal Permit Denial." A municipal permit by definition includes building permits, occupancy permits, and land use approvals other than decisions relating to substantive validity.[89] A municipality may deny a municipal permit application if the applicant owns real property in the municipality where there is a final and unappealable tax, water, sewer or refuse collection delinquency or there is a "serious violation" of a "code" and the owner has taken no substantial steps to correct the violation within six months after notice.[90] A serious violation is one that "poses an imminent threat to the health and safety of a dwelling occupant, occupants in surrounding structures or a passerby." A code is a building, housing, property maintenance, fire, health, or public safety ordinance; zoning and subdivision and land development ordinances are specifically excluded.[91] An application for a permit to correct the code violation cannot be denied under this provision.[92] The property with the delinquency or the unsafe property does not have to be the same property for which the landowner has filed a permit application.

Act 90 also contains provisions for dealing with out of state landowners and association and trust landowners as well as attachment of assets where there is a serious violation of a code.[93]

Where an ordinance requires a permit or a license, revoking the permit or license is also an option. The Commonwealth Court rejected an argument that because a municipal code granted the ability to impose fines for violations of its ordinance it could not revoke a license for violation.[94]

Additional Information

Further information may be obtained from the Pennsylvania State Association of Township Supervisors and the Pennsylvania State Association of Boroughs.

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26. 18 Pa.C.S. § 307(e)(1).
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28. Pa.R.Crim.P. No. 454(C) which provides in part: "When the violation of an ordinance of a municipality is charged, an attorney representing that municipality, with the consent of the attorney for the commonwealth, may appear and assume charge of the prosecution."
29. 8 Pa.C.S. § 1117; 53 P.S. § 66103.
30. *Commonwealth v. Feineigle,* 690 A.2d 748 (Pa.Cmwlth. 1997); *Warrington Tp. v. Powell,* 796 A.2d 1061 (Pa.Cmwlth. 2002).
31. *Commonwealth v. Tobin,* 828 A.2d 415 (Pa.Cmwlth. 2003).
32. *Commonwealth v. Famiano,* 915 A.2d 1273, 1275 (Pa.Cmwlth. 2007).
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VI. Ethical Considerations for the Municipal Solicitor

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Status of Solicitors under Pennsylvania Ethics Act

With the 1989 amendments to the Pennsylvania Ethics Act, full-time and part-time solicitors for political subdivisions, (defined in the Ethics Act to include authorities), were added to the Public Official or Public Employee subsection of the financial disclosures provision of the Ethics Act, requiring the filing of financial disclosure forms.[1] Under the definition provision of the Ethics Act, the solicitor is separately defined, and not included within the definition of public official.[2]

Whether the solicitor is a public official or public employee under the Ethics Act is addressed by the courts both before and after the 1989 Amendments. Generally, municipal solicitors will not be considered a public official or public employee for purposes of the conflicts of interest provisions of the law.[3] There is a distinction for salaried employees of the state as these attorneys have been found to be "public employees" and subject to the Ethics Act.[4]

The Pennsylvania Supreme Court has looked at the constitutionality of attorneys being subject to the Ethics Act and found that though it has full authority to regulate the conduct of attorneys, the requirements of the Ethics Act are not in conflict with that authority, and the financial disclosure requirement "is not incompatible with any of the rules applicable to attorneys in this commonwealth."[5]

Status under the Pennsylvania Rules of Professional Conduct

The Pennsylvania Supreme Court regulations for all licensed and practicing attorneys in the Commonwealth are set forth in the Rules of Professional Conduct (the Rules).[6] The Rules themselves do not contain provisions specifically related to solicitors, but government attorneys are discussed in several of the comments. The Scope of the Rules indicate that government lawyers may, in certain cases, have responsibilities to represent the "public interest" and may have broader authority concerning legal matters which would ordinarily repose in the client in private practice. Some of the ethical issues most commonly faced by municipal solicitors are outlined in this chapter.

The Rules should be read along with the applicable City Code, Township Codes, Borough Code or County Code, which will also set forth some of the solicitor's responsibilities and limitations. Some of these state that the legal affairs of the municipality shall be "under the control of the solicitor," but this may be intended to restrict the use of other lawyers without specific authorization.

The charters of home rule municipalities sometimes have even more detailed provisions regulating the position of the solicitor. For example, The Ethics Committee of the Pennsylvania Bar Association (Ethics Committee) addressed a situation in which a Home Rule Charter provides that the Mayor appoints the solicitor as chief legal advisor to the Mayor and City Council, and when the Mayor and Council were in opposing positions, the solicitor could represent only the Mayor while Council retained outside legal representation.[7]

The scope of the solicitor's discretion also can be limited by other laws, such as the Sunshine Act. For instance, it was held that there was no implied power in a county solicitor to settle a claim without the approval of the county commissioners.[8]

Retention of Solicitor: Potential for Future Conflicts of Interest

Like all clients, there is the potential that there will be conflicts between municipal clients and other clients. The Rules recognize that municipalities have broader series of adverse interests than many other types of entities.[9] This indicates the greater possibility of conflicts arising than with other types of clients. This is reflected in the existence of a more liberal Rule than for private entities, applicable to the subject of successive government and private employment.[10]

A common type of conflict for the municipal solicitor arises in representing developers or other property owners who have applications from time to time before various boards and commissions in the municipality. The conflict of interest Rules prohibit direct conflicts and also indirect ones.[11] An indirect conflict arises if the representation of the client would be materially limited by the lawyer's responsibility to another client. This Rule may be implicated in representing an applicant in a proceeding before the zoning hearing board where the lawyer is the municipal solicitor, even if there is a different solicitor for the zoning hearing board.

Any lawyer who is considering becoming a municipal solicitor therefore should consider the potential impact on their practice and their partners' practices. However, the mere possibility of a conflict does not itself preclude multiple representation.[12] The critical question is the likelihood that an actual conflict will arise, and if so, will interfere with the lawyer's judgment in considering action on behalf of the client. The Ethics Committee provided that when a firm represented a developer and an authority that the firm could, with informed consent of all parties, represent the authority in contract negotiations with the developer, even though these current clients could have opposing interests. It was understood that the developer would not use the firm in question but would use separate legal counsel for its representation in the matter.[13]

Identification of the Client and Current Conflicts of Interest

Sometimes determining who the municipal client is can itself be a complex issue.[14] The question of who the client is can arise when there is a potential conflict of interest between two municipal entities, and to determine the potential conflict, the solicitor must look at the relationship between the entities. In a district court decision, it was determined that a solicitor for the county corrections facility could not take the deposition of a county commissioner in a matter unrelated to the corrections facility, even though the county had its own named solicitor. The court found that the county, and not just the corrections facility, was the lawyer's client; and the lawyer could not take an adverse role to the county.[15]

Representing multiple municipal clients can itself create conflicts. The Ethics Committee has determined that it is not a conflict of interest to represent both a township and a municipal authority created by it.[16] The Ethics Committee has also found that there is no per se conflict in serving as a county solicitor and also as a municipal solicitor for a municipality in that same county.[17] Similarly, it may be permissible for attorneys in the same firm to act as county solicitor and solicitor to the county planning commission.[18]

A more difficult question arises in representing adjoining municipalities, where agreements must be negotiated between them. The Rules, in a comment, state that: "A lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest, even though there is some difference of interest among them."[19] Thus, an attorney should be able to represent more than one party in a group of municipalities working to develop a regional police force.

Conflicting Positions within the Municipality: Commingling of Roles

In the course of a solicitor's duties, actual conflicts of interest may arise from the multiple agencies that exist in a single municipality and the multiple rules of a solicitor. For example, an early case held that it was improper for the same individual to serve as a zoning board solicitor and at the same time to appear before that zoning board as the

municipality's solicitor to oppose an application for a variance.[20]

In a more recent case the court held that it was improper for different attorneys from the same firm to act simultaneously as counsel to the board of supervisors in its adjudicatory role and to present a case in opposition to a zoning application.[21]

Conflicts between Officials; Representation of Individual Officers

When conflicts arise among elected officials, the solicitor has a duty under the Rules to explain to all concerned that his client is the municipality, as an entity, rather than any individual officer.[22] Thus, while under the Rules, a solicitor may represent individual officers, that may only occur in compliance with the Rules relating to conflicts of interest.[23] Under the latter Rule, solicitors may represent the individuals if they reasonably believe that the representation will not adversely affect the performance of their duties to the municipality, and if the municipality consents after full disclosure and consultation. Depending on the type of claim against an officer, the consent might be appropriate or not. The Rule relating to obtaining of consent to a conflict provides that if a hypothetical disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, then the lawyer involved cannot properly ask for such an agreement.[24] In that case, a lawyer was permitted to represent individual township supervisors in the defense of a recall proceeding brought by residents, even though in a related proceeding he had represented both the township and the individual supervisors, where the township itself was not a party in the second case and the board had authorized the providing of a defense.[25] That inquiry dealt with a case similar to the Birmingham Township case, but the defense was against a claim under the Ethics Act. The Ethics Committee advised about the importance of obtaining authorization from the governing body after full disclosure.

Conflicts when Municipality is a Former Client

The duty to a client exists after the representation of a client has terminated.[26] After representing a government agency, an attorney may not represent a private in any matters in which that attorney was personally involved, with the agency's informed consent.[27] A Pennsylvania Ethics Opinion found that a former solicitor could, without the municipality's consent, represent the former manager in unemployment compensation hearing. This was because the attorney, when acting as municipal solicitor, did not draft, participate in, or negotiation the terms of the manager's employment agreement.[28]

Duty in Event of Possible Illegal Action by Official

The solicitor has obligations to the municipality as his client, if he knows that an official is engaged or about to engage, in an action which is in violation of his obligations to the municipality or a violation of law, and which could harm the municipality.[29] The Rule lists a series of steps that may be taken, leading ultimately to withdrawal from the representation. The actions to be taken by the lawyer, where the client is a private corporation, involve balancing the nature of the violation against the need to minimize disruption of the organization and the risk of revealing confidential information. In the public context however, the Rules remind attorneys serving government agencies that their representation involves public business.[30] This comment points out that in this context, a balance different than in the private sector may be appropriate between maintaining confidentiality and assuring that the wrongful official action is prevented or rectified.

Other Aspects of Retention

With increasing competition in the profession, there has been a tendency for municipalities to engage in competitive negotiation about fees with potential solicitors. In submitting a proposal to act as solicitor, certain factors should be borne in mind, as revealed by the Rules. First, considering the expected amount of income from the appointment, the attorney should consider the amount of time required to obtain or maintain an appropriate level of expertise in this specialized field. The comment to Rule 1.1 (Competent Service) makes the point that a lawyer should engage in continuing study and education. Some of this study should be devoted to acquiring and maintaining expertise in municipal law.

Second, there should be a retention letter specifying the scope of the representation. The scope of services may be limited by agreement with a client, and certain specialized items could be excluded.[31] Some municipalities have ended the earlier practice of requiring the solicitor to attend every public meeting of the governing body, and this point could be covered in a retention letter.

Third, in the proposal or in a retention agreement, the basis of the fee and the amount (if fixed) should be stated. The applicable rule specifies that in the absence of a preexisting relationship, the basis or rate of the fee "shall be communicated to the client in writing..."[32] Of course, the applicable code should be consulted, because an hourly rate basis for compensation may not be permitted under it. Two of the codes require that the solicitor receive a "fixed annual salary."[33] A retention letter may provide for additional compensation when services outside the scope of the appointment are requested, unless the applicable Code prohibits it.[34]

The Political Context

The Rules and good practice indicate the importance of maintaining the solicitor's role as a professional one, not mingling that role with any political activities of the solicitor. Any political contributions by the solicitor are subject to restrictions of the Ethics Act.

The Rules permit a lawyer to provide non-legal services to a client. Applicability of the Rules to non-legal services depends upon whether they are combined with, or separated from, the legal services. If the non-legal services are not carefully segregated, the providing of such services will be subject to regulation by the Rules.[35] This would include applicability of the conflict rule *(Rule 1.7)*, and all the other duties described in the Rules. Non-legal services, of course, must be of a type authorized by the applicable Code. Public funds probably may not be used to influence legislation, and so the solicitor could not be paid for services as a lobbyist.[36]

In giving advice to the municipality, however, the solicitor may refer to other considerations in addition to the law itself in giving advice.[37] The Rule mentions economic and political consequences of a proposed course of action. Advice in this area would be covered by the attorney-client privilege, if properly identified and protected.

While normally an attorney may not give advice unless asked, if a proposed course of action threatens serious adverse legal consequences, the solicitor may have a duty to volunteer advice.[38]

Additional Resources

For additional resources, see the following: (1) The Role of the Municipal Solicitor," Thomas L. Wenger, Esquire, in PBI Municipal Law Colloquium, 1997, at page 504; (2) "Ethical Issues in Municipal Law," Thomas D. Rees, Esquire, in PBI Municipal Law Colloquium, 1995, at page 863; (3) "The New Rules of Professional Conduct As They Apply to Municipal Solicitors," James R. Mall, Esquire, PBI Municipal Law Colloquium, 1988, at page 446; and (4) Temin, Michael L. and Wilkinson, Thomas G., eds. Pennsylvania Ethics Handbook. 4th ed. Pennsylvania: PBI Press, 2014.

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11. Pennsylvania Rules of Professional Conduct 1.7(a) and 1.7(b).

12. Comment to Pennsylvania Rule of Professional Conduct 1.7.
13. See Pennsylvania Bar Ass'n Ethics Inquiry 2012-010, March 1, 2012.
14. Comment 6 to Pennsylvania Rule of Professional Conduct 1.13.
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VII. Municipal Tort Liability

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The Political Subdivision Tort Claims Act

Under Pennsylvania law, suits brought against local agencies are subject to the limitations set forth in the Political Subdivision Tort Claims Act (PSTCA).[1] The PSTCA provides, with certain exceptions, that "no local agency shall be liable for any damages on account of any injury to a person or property. . . ."[2] Its purpose is to limit the government's liability for its tortious acts.[3]

The effective date of the PSTCA was January 25, 1975 and it applies to causes of action accruing after that date.[4] The Philadelphia Code had prohibited the city from pleading immunity in cases arising out of police negligence. On December 4, 1990, that section was repealed. Philadelphia's waiver of its immunity protection in the Philadelphia Code was, in any event, held to be invalid in *City of Philadelphia Police Dept. v. Gray*, and this decision is retroactive to the effective date of the PSTCA.[5]

The PSTCA affords immunity to local agencies, including municipalities, with eight enumerated statutory exceptions: 1) vehicle liability; 2) care, custody or control of personal property; 3) real property; 4) trees, traffic controls and street lighting; 5) utility service facilities; 6) streets; 7) sidewalks; and 8) care, custody or control of animals.[6] Two prerequisites, however, must be satisfied for an exception to apply. First, the damages must be otherwise recoverable under common law or a statute creating a cause of action, but for the defense of Section 8541 or Section 8546.[7] Second, the injury must have been "caused by the negligent acts [not acts or conduct constituting a crime, actual fraud, actual malice or willful misconduct] of the local agency or an employee thereof acting within the scope of his office or duties with respect to" one of the eight exceptions listed in Section 8542(b).[8]

The defense of governmental immunity is an absolute unwaivable defense and is not subject to any procedural device that could render the governmental agency liable beyond the exceptions granted by the legislature.[9]

Although immunity is an affirmative defense and should be pled in new matter, the court will consider governmental immunity on preliminary objections, so long as the opposing party does not object and the defense is clear on its face.[10]

Coverage of the PSTCA

The PSTCA applies to "local agencies" as that term is defined in the statute. The courts will look to legislation creating the entity to determine if it is a local agency.[11]

Courts apply a two-prong approach to determine whether a given entity is within the ambit of the PSTCA. Under the first prong, courts determine whether the entity meets the statutory definition of "local agency," and under the second prong, courts consider the PSTCA's purpose.[12]

Local Agency "Local agency" is defined as "[a] government unit other than the Commonwealth government."[13] A "government unit" is defined as "any government agency," which includes "any political subdivision, municipal authority and other local authority, or any officer or agency of any such political subdivision or local authority."[14]

[T]he Judicial Code does not define "local authority," but . . . the Statutory Construction Act describes it as "a municipal authority or any other body corporate and politic created by one or more political subdivisions pursuant to statute."[15] A township is a "local agency" and thus is subject to the provisions of the PSTCA.[16] Likewise, a borough is a "local agency" entitled to governmental immunity, unless one or more of the enumerated exceptions apply.[17]

By its terms, Section 8541 does not directly apply to individuals. Section 8545, however, concerning "official liability," speaks to the liability of an employee of a local agency. Specifically, Section 8545 provides that "[a]n employee of a local agency is liable for civil damages on account of any injury to a person or property caused by acts of the employee which are within the scope of his office or duties only to the same extent as his employing local agency and subject to the limitations imposed by this subchapter."[18] Thus, in limiting the liability of the employee of a local agency to the liability of the local agency for which he or she is acting, the PSTCA links concepts of official liability to concepts of governmental immunity.[19]

Purpose of the PSTCA - The second question is whether the entity is so intertwined with government that extending immunity to the entity would serve the purpose of the PSTCA. To determine whether immunizing an entity would serve this purpose, courts consider whether:

1) a political subdivision created the entity;
2) the entity assists a political subdivision in serving its citizens;
3) a political subdivision appoints the entity's board of directors;
4) a political subdivision exercises substantial control over the entity;
5) the entity's assets would vest in a political subdivision if the entity were to be dissolved;
6) the entity's employees participate in any benefit plans exclusively reserved for employees of political subdivisions;
7) the entity's sole source of income is a political subdivision; and
8) a political subdivision indemnifies the entity, its employees, officers, and directors from claims and liabilities arising from services the entity provides.[20]

Volunteer fire companies have been the subject of much litigation in this regard. A volunteer fire company is entitled to governmental immunity under the PSTCA where: (1) the fire company is a nonprofit organization duly organized and existing under the laws of Pennsylvania; and (2) the fire company submits sufficient documentation to establish that it is the official fire company for the borough in which it was located.[21] Volunteer fire companies and their members are treated as local agencies entitled to tort immunity only for acts committed or omitted during their performance of public firefighting duties.[22]

A fire-rescue service that was created, maintained, and governed by a city to benefit the health, safety, and welfare of the public is a unit of local government, and its members are entitled to immunity from suit while in the performance of their duties.[23]

The most recent case is *Regester v. Longwood Ambulance Company, Inc.*[24] Appyling the test used in *Eger v. Lynch,* where a volunteer fire company was legally recognized by ordinance as provider of fire protection, and an agreement to provide fire protection and ambulance services was in effect at time of incident, the *Regester* court found that a volunteer fire company was a "local agency" under the PSTCA.[25]

A non-profit corporation incorporated by the city for the sole purpose of managing the city's gas works where the city's control of the corporation is pervasive is a "local agency."[26] However, independent contractors performing services under contract to a local agency are not local agencies.[27]

The PSTCA applies to tort actions, not contracts. Thus, the PSTCA is inapplicable in a class action brought against a water authority alleging breach of implied warranty of merchantability, water having been recognized as goods under the Uniform Commercial Code.[28]

Damages Recoverable Under Common Law. A plaintiff must first establish the damages would be recoverable under common law or by statute before looking into question of whether there is immunity.[29] Thus, considering various factors, including public policy, the Pennsylvania Supreme Court has determined that a local agency has no common law duty to a driver who flees from a police officer.[30]

Where a plaintiff is basing her claim against a township on its alleged negligence in failing to install a traffic signal at an intersection between a state highway and a local road, she may not proceed unless she shows that there was a duty of care on the part of the municipality related to the installation of a traffic control device. Specifically, the plaintiff must demonstrate that: (1) the municipality had actual or constructive notice of the dangerous condition that caused the injuries; (2) The pertinent device would have constituted an appropriate remedial measure; and (3) the municipality's authority was such that it can fairly be charged with a failure to install the device.[31]

For the aforementioned test to apply, a township road must have been involved in the accident. It is not enough that a township road was "part of the intersection" in which the accident occurred.[32] Further, with respect to the third element above, the applicable statute may require local municipalities to seek PennDOT approval of the proposed traffic control device. As such, the evidence must show that PennDOT approval, more likely than not, would have been forthcoming.

The PSTCA does not provide a basis for imposing municipal liability for crimes or willful misconduct. Thus, while individual employees may be sued for such conduct, if they are the actors, those who are not the actors may not be sued.[33]

Exceptions to Immunity

Once it is determined that a municipality may be held liable under statutory or common law, then it must be determined whether the conduct at issue fits within one of the eight narrowly construed exceptions to immunity. Because the legislature's intent in both the Sovereign Immunity Act and PSTCA is to shield government from liability, except as provided for in the statutes themselves, courts apply a rule of strict construction in interpreting these exceptions.[34] Thus, the courts are required to interpret the exceptions to governmental immunity narrowly against injured plaintiffs.[35]

Motor Vehicle Exception The first question that must be asked is what constitutes a motor vehicle. Bicycles are not motor vehicles.[36]

The next question is whether the vehicle is in operation. The word "operation," in this context, means "to actually put in motion," and does not include "preparing to operate a vehicle, or acts taken at the cessation of operating a vehicle."[37]

The Commonwealth Court recently made determinations regarding the term "operation" of a motor vehicle. In that case, Anthony Mannella alleged that a port authority bus driver negligently deployed the bus wheelchair ramp unevenly with the ground without properly securing it, causing him to fall out of his wheelchair and sustain serious injuries. The port authority filed a motion for summary judgment, contending that Mannella's injuries did not fall under the motor vehicle exception to immunity as the bus and/or the ramp was not in operation at the time of the incident. The trial court denied the port authority's motion, and on appeal, the Commonwealth Court reversed, stating:

> [w]e have declined to apply the vehicle liability exception in cases that did not involve the actual movement of the vehicle, including in the area of public transportation, consistently holding that a passenger's act of alighting from the steps of a bus does not involve the "operation" of a bus for purposes of the vehicle liability exception to sovereign immunity.

The court further stated that it has "consistently held that to fall within the vehicle exception, the injuries must be caused by a moving vehicle or a moving part of that vehicle. Because neither the bus nor the wheel chair ramp was moving at the time of the accident, the vehicle liability exception did not apply."[38]

Prior to *Mannella*, the Pennsylvania Supreme Court determined that a dispatcher's directions do not constitute "operation" under the vehicle exception.[39] In *North Sewickley Tp. v. Lavalle*, the Commonwealth Court held that there was no operation of the vehicle where beams of light from the parked police car's overhead lights and

headlights to plaintiff's eyes allegedly caused plaintiff to wreck his motorcycle into the vehicle. In addition, in *White by Pearsall v. School District of Philadelphia*, the court ruled that the motor vehicle exception was inapplicable because there was no operation where a school bus driver stopped his bus and waved an exiting student across the street in front of the bus, and the student was thereafter struck by another motorist.

However, the Pennsylvania Supreme Court held that a city's negligent maintenance and repair of fire department's rescue van was "operation of motor vehicle" within the meaning of the motor vehicle exception to governmental immunity. Therefore, the city was not immune from suit brought by patient who alleged that he was severely injured when the wheels on the van into which he was placed fell off while the van was en route to the hospital, despite the fact the van was not negligently driven.[40]

In *Gale v. City of Philadelphia*, an individual was taken into custody by the Philadelphia Police Department, handcuffed, and placed in the back of a police cruiser. Inexplicably, said individual commandeered the police cruiser, drove it onto the Benjamin Franklin Bridge, and struck a vehicle operated by the plaintiff. There, the court held that the motor vehicle exception to governmental immunity did not apply to police who were not operating a cruiser at the time of accident.[41]

Section 8541(b)(1) was amended in 1995 to preclude a finding of liability to those in flight, fleeing apprehension, or resisting arrest by a police officer or knowingly aiding others to do so. This amended exception results in a finding of immunity on the part of the city, even given operation of a vehicle, when the plaintiff was fleeing at the time of the incident at issue. However, in a police pursuit case, where an innocent third party is injured when struck by a fleeing felon, it is a jury question whether the negligence of the police is a substantial factor in causing the injuries.[42]

Personal Property Exception. Under the personal property exception, a local government will incur liability for:

> damages on account of an injury . . . to property . . . if the injury occurs as a result of . . . [t]he care, custody or control of personal property in the possession of the local agency. The only losses for which damages shall be recoverable under this paragraph are those property losses suffered with respect to the personal property in the possession or control of the local agency.[43]

Where funds were not in the possession or control of the local agency, but rather there was a failure of auditors to detect embezzlement, this exception was not applicable.[44]

In *Rousseau v. City of Philadelphia*, the court indicated that under certain circumstances, "the negligent undertaking of a fiduciary duty on the part of a governmental agency with respect to a loan fund . . . could give rise to a cause of action in tort." The court concluded that when a city holds loan funds in escrow, and disposition of those funds is subject to the borrower's approval then the borrower cannot claim that the funds are in the possession or control of the city for the purposes of liability under the personal property exception to governmental immunity.[45]

Claims for personal injury are not recognized under this exception.[46]

Real Property Exception - A claim under the real property exception to governmental immunity must arise from the property itself, or the care, custody or control of it. This exception is unavailable when the claims arise from the negligent maintenance of personalty, such as bleachers, gymnasium mats, or tables.[47]

The first question here is whether the property at issue is real property vs. personalty. In *Cureton ex. rel. Cannon v. Philadelphia School Dist.*, pulleys on a scroll saw in a high school shop class amputated a portion of a student's finger. The court determined that the scroll saw was realty, taking into account the nature of the saw, the status of it with respect to the realty, the manner of annexation, and the use for which the scroll saw was installed.[48] In *Rieger v. Altoona Area School Dist.*, the court held that gym mats not affixed to the real property were personalty; thus, even assuming that a failure to provide mats in the cheerleading practice area amounted to negligence causing injury to cheerleader, the conduct did not fall within the real property exception of the PSTCA.[49] In *Blocker v. City of*

Philadelphia, the Supreme Court held that an unattached bleacher could not be a fixture of real property, but in *Mellon v. City of Pittsburgh Zoo*, the court found that the old mechanical walkway at the Pittsburgh Zoo, permanently affixed to the ground, was realty.[50]

The next question for determination is whether property at issue is in the possession of the local agency. The power to inspect and regulate does not constitute sufficient control over a privately owned building to constitute possession.[51]

The third question is what or who caused the plaintiff's injuries. The real estate exception can only be applied where the plaintiff proves that an artificial condition or defect of the land itself causes the injury, and not merely one that facilitates an injury caused by the acts of others. Acts related to care, custody and control of the real property itself come within the exception.[52] Acts that constitute negligent supervision of people on land do not come within the exception.[53]

Two other points should be noted. First, it was previously held that the defective condition must be of the real estate, not on the real estate. There is no longer an "on-off" analysis to determine whether negligence falls within the real property exception.

In *Repko v. Chichester School Dist.*, the Commonwealth Court explained there are two approaches that can be used in determining whether to apply the real estate exception under the PSTCA:

> [T]here are two approaches that can be used to determine whether to apply the real estate exception to immunity under the [Political Subdivision] Tort Claims Act, and that, at times, deciding which approach to apply under a given set of facts is challenging. Under the *Blocker* approach, the determinative inquiry is whether the injury is caused by personalty, which is not attached to the real estate, or by a fixture, which is attached. Under the *Grieff* approach, the determinative inquiry is whether the injury is caused by the care, custody or control of the real property itself. Both approaches have been applied by the courts.[54]

Second, the language specifically provides that intentional trespassers are not entitled to recover.[55]

Trees, Traffic Controls and Street Lighting Exception - This exception covers any dangerous condition of trees, traffic signs, lights or other traffic controls, street lights or street lighting systems under the care, custody or control of the local agency. Under this provision, when a municipality installs a traffic-control device, the municipality may be held liable for negligently maintaining the device.[56] The necessary elements for establishing a duty of care on the part of a municipality related to the installation of a traffic control device include: (1) the municipality's actual or constructive notice of the dangerous condition; (2) the pertinent device would have constituted an appropriate remedial measure of the dangerous condition; and (3) the municipality's authority was such that it can fairly be charged with the failure to install the traffic control device.[57]

One issue in this regard is what constitutes a traffic control. In *Glenn v. Horan*, the court held that a faded crosswalk, not augmented by warning signs or street lighting, which caused or substantially contributed to the death of a pedestrian struck by an automobile while crossing the street, is a traffic control device.[58] Crosswalks serve the dual purpose of guiding pedestrians and warning motorists of the presence of pedestrians at the crossing points.[59]

As for the tree exception to governmental immunity, the exception does not apply where a tree falls across the road and results in a motorist's death where there is no evidence that the tree was on township property or an open portion of the township's road right-of-way and there is no evidence that the township had performed work on the tree in question or that the tree was rotted.[60]

The exception can apply, even if it is a state highway at issue, if the local agency exercises discretionary authority over it and does so in an inadequate or insufficient fashion.[61]

The plaintiff has the burden to prove the local agency had actual or constructive notice of the dangerous condition.[62]

Expert testimony may be necessary to help the jury if the area at issue is beyond the ken of the ordinary lay person,

but that testimony only needs to eliminate some of the variables involved, so that the jury itself can determine duty, breach, and causation.[63]

Utility Service Facilities Exception - This exception covers any dangerous condition of the facilities of steam, sewer, water, gas or electric systems owned by the local agency and located within the rights-of- way. The term "sewer" as used in the statute includes storm-drainage systems as well as sanitary sewers, and liability may be imposed upon a local agency for damage resulting from a dangerous condition created by the negligent maintenance of a storm-drainage system.[64]

For the utility service facilities exception to local agency's immunity from tort liability to apply, the allegedly dangerous condition must have derived or originated from, or had its source as, the local agency's realty.[65] Moreover, in order for a claimant to recover under the utility exception, a claimant must prove a dangerous condition of a utility system that is not only owned by a city but also located within the city's rights-of-way. Thus, a city was not held to be liable for injuries caused when the plaintiff, a polio sufferer, tripped over a mound of dirt covering a plumber's ditch, where it was not shown that the mound of dirt was on city property.[66]

The plaintiff has the burden of proving ownership on the part of the local agency.[67] The utility exception was found to be applicable, however, in *Primiano v. City of Philadelphia,* where a water meter that failed was located on a "strip of land" even if that strip of land was in the plaintiff's basement.[68]

Actual or constructive notice of the alleged dangerous condition of the utility services must be shown even if the local agency created the dangerous condition in the first place.[69]

Streets Exception - This exception covers any dangerous condition of streets owned by a local agency. This also applies to commonwealth streets on which the local agency has a duty to undertake or does undertake activities.[70]

Contrary to the real estate exception, the "on-off" distinction remains in this area, and there will not be any liability for dangerous conditions on the streets.[71] The courts appear to be interpreting "dangerous condition of the street" very narrowly. Thus, a local agency's failure to install a guardrail along a curve in a road, where an intoxicated driver went off the road, was not a dangerous condition of the road, bringing the streets exception into play.[72]

The fact that a street was not being used as a street, but rather was blocked off for a fundraiser, does not take the street out of the streets exception and into the real property exception.[73]

Sidewalks Exception - This exception covers a dangerous condition of sidewalks within the right of way of streets owned by the local agency. Liability will not attach for sidewalks adjacent to state roads, unless the local agency owns the property abutting the state highway.[74] A sidewalk adjacent to a school district driveway is not abutting a public right of way.[75]

The Pennsylvania Supreme Court determined that, for purposes of the sidewalks exception clause, a state highway running through local agency property is considered a local-agency-owned street. Accordingly, the court held any injuries occurring on a sidewalk adjacent to a state-designated highway fell within the "right of way of a street owned by the local agency" and, therefore, the sidewalks exception clause applied.[76]

The "off-on" distinction still is relevant to the sidewalks exception. Specifically, liability depends first on the legal determination that an injury was caused by a condition of government realty itself, deriving, originating from, or having the realty as its source, and, only then, the factual determination that the condition was dangerous. What is necessary, therefore, to pierce the agency's immunity is proof of a defect of the sidewalk itself. Such proof might include an improperly designed sidewalk, an improperly constructed sidewalk, or a badly maintained, deteriorating, crumbling sidewalk. If the dangerous condition did not derive, originate from or have as its source the sidewalk, the dangerous condition was on the sidewalk, not of the sidewalk, and thus is insufficient to create liability for the local agency.[77]

Liability, when imposed pursuant to this exception, is secondary to the liability of the abutting landowner or tenant responsible for the care, custody and control of the sidewalk.[78]

Animal Exception - This exception covers the care, custody and control of animals, but it only applies to domesticated animals, not wild animals. Thus, a dolphin that is owned by a zoo and that inflicts an injury is a wild animal and does not bring the exception into play.[79]

In addition, the exception applies only if the local agency has possession or control over the animals, such as police dogs or horses. The fact that a township had investigated prior attacks by a dog owned by a private citizen, and had even temporarily quarantined the dog on one of the occasions, did not create "possession or control" of the dog, when the dog attacked its owner's guests.[80] Likewise, the authority to inspect, isolate, segregate and quarantine animals is not to be equated with actual possession or control of the animals.[81]

Damages and Limitations on Damages

Section 8553 provides for several limitations on damages that may be recovered against a local agency. These limitations are not waived by purchase of liability insurance in amounts greater than the limitations of the act.[82] These limitations are:

a. Pain and suffering may only be covered in cases of death, permanent loss of bodily function, permanent disfigurement or permanent dismemberment where medical expenses are in excess of $1,500.

b. Total liability is limited to $500,000.

c. Punitive damages are not recoverable against the local agency.

The Pennsylvania Supreme Court has interpreted the phrase "permanent loss of a bodily function" to mean that, as a proximate result of the accident, the injured claimant is unable to do or perform a bodily act or bodily acts which the claimant was able to do or perform prior to sustaining the injury, and the plaintiff must prove that this loss of bodily function will exist for the rest of his life.[83] Residual pain alone is not sufficient to qualify for pain and suffering damages against a local agency unless the residual pain is actually manifested as a permanent loss of bodily function.[84]

Generally, the courts look to the functional capacity of the injured party, assess the extent of the limitation, and look at whether or not the pain is intermittent or constant. If the injured party has returned to their normal pre-injury activities, even with residual pain, the courts have refused to allow the lawsuit to continue and have granted summary judgment.

In *Smith v. Endless Mountain Transportation Authority,* the Commonwealth Court upheld the trial court's grant of summary judgment stating that the plaintiff's failure to demonstrate that her residual pain prevented her from resuming her pre-injury activities meant that she had not sustained a permanent loss of a bodily function justifying the grant of summary judgment. The courts have also held that if a plaintiff places restrictions on his or her activities because he or she is afraid of being re-injured this self-imposed limitation is insufficient to establish a permanent loss of a bodily function.[85]

In *Gloffke v. Robinson,* the Commonwealth Court rejected an equal protection challenge based upon this provision, as compared to the sovereign immunity statute, which is not so restrictive, requiring only pain and suffering.[86] The Commonwealth Court has held that, where material issues of fact exist about whether the plaintiff has suffered a permanent loss of bodily function, summary judgment is inappropriate.[87] In *Alexander v. Benson,* the Commonwealth Court upheld a trial court's decision to deny a post-trial motion and leave intact the jury's finding that the minor plaintiff did not suffer a permanent disfigurement, even with conceded evidence of a permanent scar, as "[s]uch a determination was strictly within the jury's purview."[88]

Damages must be offset by insurance benefits received or to which the plaintiff is entitled. Disability retirement benefits are not deducted.[89] These deductions must be made from the jury verdict, not from the statutory limits.[90]

The Pennsylvania Supreme Court has held that a government vehicle exclusion for uninsured motorist benefits in an automobile insurance policy is unenforceable since it violates the Motor Vehicle Financial Responsibility Law.[91]

Issues Related to Claims against Employees of Local Agencies

Acts within the Scope of Employment - The PSTCA provides that an employee is liable for injuries caused by acts within the scope of the employee's duties only to the same extent as the employing local agency and subject to the same limitations. (However, see willful misconduct below).

The following defenses are available to the employee under Section 8546: (a) defenses of common law; (b) conduct was authorized or required by law, or employee reasonably believed in good faith that it was; and (c) the act giving rise to the claim was within policy-making discretion of the employee.[92]

Section 8547 requires a local agency to provide a defense to the employee sued because the conduct was within the scope of the employee's duties.[93] However, the employee must comply with the requirements, including notice, in Section 8547, and the lawsuit at issue must involve conduct arising from negligent acts.[94]

Section 8548 provides that if employees acted within the scope of their duties or reasonably believed they were acting within the scope of their duties, they are entitled to indemnity from the local agency for the judgment.[95] The employee's claim for indemnity is not subject to the limitation of damages provisions discussed above.[96] Recapture of defense costs is appropriate in such a case, but the local agency must have been given the opportunity to defend and participate in any settlement negotiations.[97] For purposes of applying this provision, the definition of "employee" is construed broadly. For example, foster parents are employees of CYS, for purpose of CYS indemnifying foster parents in wrongful death action.[98]

Because the statute is intended to protect public employees from financial loss, the statute does not require the local agency's insurance company to indemnify the personal insurance company of the employee.[99]

Willful Misconduct - Section 8550 states that employees of a local agency are not immune for acts of willful misconduct.[100] In such cases, willful misconduct is not synonymous with intentional tort. The statutory provision does not create another exception to immunity, that is, the local agency may not be liable for the willful or malicious conduct of its employees.[101] Where the employee's misconduct is willful misconduct, there is no duty to indemnify.[102] The damage limitations (above) are inapplicable.

"Willful misconduct," for purposes of the statutory exception to the defense of governmental immunity, has the same meaning as the term "intentional tort."[103] To engage in "willful misconduct" for purposes of the PSTCA, a governmental employee must desire to bring about the result that followed his or her conduct or be aware that it was substantially certain to follow.[104] For example, neither members of a township board of supervisors, nor a township engineer, nor a township code enforcement officer engaged in any willful misconduct in connection with their involvement with and inspection of a developer's subdivision development, and, thus, they were protected by governmental immunity under the PSTCA when the developer filed suit against them and alleged that they engaged in tortious conduct to impede the developer's subdivision development. The developer did not claim that the board members, the engineer, or the officer intended to cause the developer harm by their conduct, and their actions constituted performance of their job duties.[105]

Recreation Use of Land and Water Act

The Recreation Use of Land and Water Act (RULWA) provides an additional basis for local agency immunity. The RULWA protects landowners from liability by expressly negating ordinary common law duties to keep the land safe or to warn of dangerous conditions. The purpose of the act "is to encourage owners of land to make land and water areas available to the public for recreational purposes by limiting their liability toward persons entering thereon for such purposes."[106]

In order to encourage owners of land and water areas to make these areas available to the general public for recreation, the RULWA provides the owners with immunity from negligence liability so long as the land and water area is provided to the public for recreational purposes free of charge and any injuries occurring on the land or water are not the result of a "willful or malicious failure to guard or warn against a dangerous condition, use or activity."[107] "The need to limit owner liability derives from the impracticality of keeping large tracts of largely undeveloped land safe for public use."[108]

The immunity applies to both publicly and privately owned land, but only owners of unimproved lands are protected by the RULWA.[109]

Immunity is denied for injuries occurring on improved property.[110] However, where there is a giant sliding board in a county park, the RULWA was inapplicable, even though the entirety of the park was largely unimproved land.[111] The courts continue to focus in particular on the area where the incident occurred. In *Pagnotti v. Lancaster Tp.*, the court focused on the low head dam from which the minor deceased plaintiff slipped and drowned, even though the facility at issue was a pool club purchased by the township. The township did not know about the dam before the incident and had not developed it as an improvement to the property. Thus, immunity was afforded.[112]

Immunity is abrogated if the landowner willfully or maliciously fails to guard or warn against a dangerous condition, use, structure or activity.[113] However, the PSTCA may still be used for a finding of immunity.

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VIII. Introduction to Labor Law in the Public Sector

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In Pennsylvania, many employees are at-will and are not members of a union. However, for those employees that are in a union, they are covered by either the Policemen and Firemen Collective Bargaining Act (Act 111) or the Public Employee Relations Act (PERA or Act 195). Act 111 covers police officers and paid firefighters and Act 195 covers employees who are not public safety employees. This implicates three issues.

First, once unionized, the employer is required to bargain with the union which is considered the exclusive representative of the employees regarding all terms and conditions of employment except those which are managerial prerogatives and not subject to bargaining. The terms and conditions of employment are set forth in a contract known as a collective bargaining agreement or a CBA.

Second, once unionized, a union and its members possess the right to have any disputes regarding the terms of a collective bargaining agreement heard through a neutral third party in a process known as interest arbitration. This means that an employer's actions in interpreting and applying the terms of a CBA can be reviewed and, in some cases, modified or overturned.

Finally, apart from the right to bargain and enforce a contract through interest and grievance arbitration, unions also have the right to enforce the terms of the Pennsylvania Labor Relations Act (PLRA) before the Pennsylvania Labor Relations Board (PLRB or Board). The PLRA enforces a neutral playing field with respect to the actions of both management and labor organizations and enumerates those actions which constitute unfair labor practices in violation of the PLRA. As a practical matter, this means that once a union is certified (and, in many circumstances, while the employer knows that a union is being organized) an employer cannot unilaterally set or change the terms or conditions of employment that are subject to bargaining without first bargaining with the union.

Unionization under Act 111 and Act 195

Under Act 111 and Act 195, the formation of a union typically follows a representation election conducted by the PLRB. Once a representative is certified by the Board, the certification exists until and unless the Board declares the union to no longer be the certified representative.

Until the Board issues an order declaring the union to no longer be the certified representative no private agreement will substitute for such an order. This is the case whether or not a collective bargaining agreement is in place or whether a prior agreement has expired. Because the certification of a union is reserved exclusively to the Board, it is not a function of the collective bargaining agreement. Thus, although a valid collective bargaining agreement may have expired, this does not mean that the union has "gone away" or no longer exists.

What is Bargainable?

Act 195 defines collective bargaining as "the performance of the mutual obligation of the public employer and the representative of the public employees to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder and the execution of a written contract incorporating any agreement reached. . ." However, this obligation does not compel either party to agree to a proposal or require the making of a concession.

Under Act 195, public employers do not have "to bargain over matters of inherent managerial policy, which . . . include the functions and programs of the public employer, standards of services, overall budget, utilization of technology, organizational structure, and selection and direction of personnel." Public employers, however, must "meet and discuss policy matters affecting wages, hours, and terms and conditions of employment . . . upon request by public employee representatives."

Act 111 defines "terms and conditions" as "including compensation, hours, working conditions, retirement, pensions and other benefits. . ." Careful thought must be given to whether or not a matter is subject to bargaining or not. One cannot simply assume that a particular issue is automatically subject to bargaining because to do so subjects a municipality's managerial prerogative to a claim that the right not to bargain over that particular issue has been waived by the employer's prior agreement to bargain.

Collective Bargaining under Act 111

While an employer and a union may always reach a voluntary agreement regarding the terms of a collective bargaining agreement, public safety employees are not afforded the right to strike. As such, where the employer and a union cannot reach a voluntary agreement regarding the terms of a collective bargaining agreement, Act 111 provides for mandatory interest arbitration, whereby the determination of the majority of the arbitration board is final on the issues in dispute and binding upon the public employer and on the police officers or firefighters involved. The determination constitutes a mandate to take the action necessary to carry out the determination of the arbitration board. If either party refuses to comply with the terms of the arbitration award, the party in compliance may have a cause of action to assert against the party in noncompliance.

Time Limits for Bargaining under Act 111 - Under Act 111, collective bargaining must commence at least six months before the start of fiscal year in which the contract expires. Commencing bargaining can be accomplished through the submission of a letter generally stating an intent to negotiate a new collective bargaining agreement. Depending on the year, a demand to commence bargaining must be submitted on or before the end of June.

Under Act 111, either party may demand to proceed to arbitration if negotiations have reached an impasse. Negotiations are deemed to be at an impasse after the expiration of at least 30 days after bargaining has been requested. Notwithstanding the above, a request for arbitration must be made at least 110 days before the start of the fiscal year.

A declaration of impasse must include the following: (a) the identity of the party's partial arbitrator for interest arbitration purposes; (b) a brief identification of the party's issues in dispute; and (c) some issues, such as changing healthcare carriers/providers, must be set out with more specificity. Within five days of receipt of the demand for arbitration, the opposing party must respond and provide, at a minimum, the identity of the party's partial arbitrator.

Both the time limit to commence bargaining and to demand arbitration are mandatory, and police and fire unions lose their right to proceed to interest arbitration if they fail to meet either of the time provisions of Act 111.[1]

What Happens to the CBA in the Meantime? Under Act 111, collective bargaining agreements are said to be continuous in nature. What that means is that, upon the expiration of the contract, the terms remain in effect until and unless a new agreement is negotiated between the parties or an interest arbitration panel issues a new award.

The terms and conditions as set forth in the expired agreement remain in effect until a new agreement is reached. This includes the obligation to process grievances and to arbitrate grievances which arise under the contract. An employer cannot make unilateral changes to a collective bargaining agreement simply because the old contract expired.

Collective Bargaining under Act 195

Unlike employees covered by Act 111, most employees covered by Act 195 are afforded the right to strike. As such, they do not have the right to the resolution of a contract through binding arbitration and must strike in order to put pressure on an employer to settle the terms of a contract. Like Act 111, there are certain time limits that apply to the initiation of collective bargaining.

The time limits prescribed by Act 195 are relative to the public employer's "budget submission date," which is defined as follows:

> [T]he date by which under the law or practice a public employer's proposed budget, or budget containing proposed expenditures applicable to such public employer is submitted to the Legislature or other similar body for final action. . . .[2]

Thus, the "budget submission date" for your municipality is the date on which the proposed municipal budget for the following calendar year must be submitted to the municipality's governing body (i.e., to Borough Council, Board of Supervisors or Board of Commissioners). Typically, that date is some time before December 31 of the year immediately prior to the calendar year at issue (i.e., on or before December 31, 2013, for the budget for 2014 or on or before December 31, 2014, for the budget year 2015). However, the time limits described below conservatively assume that your municipality's budget submission date falls on December 31. Naturally, if your budget submission date is actually earlier, the time limits set forth below would expire earlier in the year.

Act 195 time limits are mandatory. The Supreme Court has held that the bargaining timetable prescribed by Act 195 is mandatory.[3] Thus, a union waives its right to proceed to binding interest arbitration if it fails to comply with any of these requirements. In that event, the existing contract automatically extends for another year, or longer, if the union again fails to meet the time limits for the following year.

Strike Prerequisites. Prerequisites for a lawful strike by a non-uniformed bargaining unit are as follows:

1. ***No later than 171 days prior to the budget submission date —*** The union must commence negotiations or at least request bargaining.[4] Although there is no explicit statutory requirement for when negotiations must commence or be requested by the union, it could be credibly argued that the other time requirements specified under Act 195 produce an implied statutory requirement that negotiations commence no later than 171 days prior to the budget submission date. This is because the parties are required to commence mediation where no agreement has been reached within twenty-one (21) days after negotiations commenced.[5] Because such mediation must be commenced no later than 150 days prior to the budget submission date, theoretically, negotiations must commence 171 days prior to the budget submission date (21 days + 150 days = 171 days). No court has specifically addressed this issue, and it is unclear whether a union completely waives its right to proceed with the mediation and interest arbitration process because it requested negotiations less than 171 days prior to the budget submission date. Because mediation must commence no later than 150 days prior to the budget submission date, it is clear that negotiations must commence prior to that date as well, absent an agreement to the contrary.
2. ***No later than 150 days prior to the budget submission date —*** The union must submit a request for mediation to the Pennsylvania Bureau of Mediation.[6] If an agreement has not been reached within twenty (20) days after mediation has commenced, but no later than 130 days prior to the budget submission date, the Bureau of Mediation must notify the PLRB that no such agreement has been reached.[7] Upon being notified of this fact, the PLRB may, in turn, appoint a fact-finder to hold a hearing and prepare a report with recommendations for a settlement of the matter. However, the Pennsylvania Supreme Court has held that the PLRB lacks the authority to appoint this fact finder any later than 130 days prior to a municipality's budget submission date.[8]
3. ***No later than 130 days prior to the budget submission date —*** The Bureau of Mediation must notify the PLRB that no agreement has been reached, and the PLRB must, in turn, appoint a fact-finder or fact-finding panel.[9]
4. The union may not lawfully strike during the pendency of the mediation and fact-finding processes outlined in sections 801 and 802 of Act 195, or where the union has failed to comply with and exhaust those processes.[10] The express language of Act 195 itself states that "strikes by public employees during the pendency of collective bargaining procedures set forth in sections 801 and 802 of [Act 195] are prohibited."[11]
5. That section further provides that a strike by public employees is not prohibited if it "occurs after the collective bargaining processes set forth in sections 801 [relating to mediation] and 802 [relating to fact-finding panels] of Article VIII of this act have been completely utilized and exhausted."[12] Although there is

no decision which directly addresses the issue, there is legal authority indicating that the fact public employees have not invoked, utilized and/or exhausted the meditation process may constitute grounds for enjoining a strike commenced under such circumstances.[13] However, it is likely that a court issuing an injunction on this basis would also issue an order requiring the union to participate in negotiations and/or proceed with the mediation procedures set forth under Act 195.[14]

6. In addition, public employees may not engage in a work stoppage or other strike activity where such conduct poses a "clear and present danger or threat to the health, safety or welfare of the public."[15] In this regard, courts have held that dangerous sanitary conditions, for example, constitute a sufficient justification for judicial relief.[16]
7. Where a strike does create such a threat, a public employer may, and is, in fact, ***statutorily required,*** to seek equitable relief from the courts in order to alleviate that threat or danger.[17] Such relief would include an injunction directing the employees to refrain from strike activity and to return to work. However, because injunctions are typically viewed as an extraordinary legal remedy, a court will ordinarily require that the threat of danger actually be imminent rather than merely a remote possibility. In other words, mere conjecture that a strike by your trash-collection employees could *potentially* endanger the health, safety and/or welfare of the public at large would be insufficient. Under the language of Act 195, the threat or danger must be "clear ***and present***," and, prior to issuing an injunction, the court would probably require some tangible proof that the situation warrants court intervention *at that particular moment*.

Act 195 Employees Who Are Entitled to Binding Interest Arbitration. A limited number of employees covered by Act 195 do not have the right to strike at all (similar to police officers), but may submit an impasse in collective bargaining negotiations to binding interest arbitration. The interest arbitration panel will then decide the terms of the new contract. These employees are colloquially referred to as "Act 195 Specials," and consist of prison guards, mental-health institution workers, certain court-related and court-appointed employees. In order to preserve the right under Act 195 to proceed to binding interest arbitration, the union representing Act 195 Specials must meet the following three statutory deadlines:

1. ***No later than 171 days prior to the budget submission date —*** the union must commence negotiations or at least request bargaining.[18]
2. ***No later than 150 days prior to the budget submission date —*** the union must submit a request for mediation to the Pennsylvania Bureau of Mediation.[19]
3. ***No later than 130 days prior to the budget submission date —*** the union must demand binding interest arbitration under Act 195.[20]

Grievance Arbitration

Under both Act 111 and Act 195, a union possesses the right to have their grievances adjusted or heard by an independent third party. Under Act 111, a union "shall have the right to an adjustment or settlement of their grievances or disputes in accordance with the terms of this act." A similar right is also recognized under Act 195. As such, the right to adjust grievances outside of bargaining exists and provides for a substantial body of arbitral law regarding the adjustment of grievances.

The Role of the Pennsylvania Labor Relations Board

Besides the right to interest and grievance arbitration, unions organized under the terms of Act 111 and Act 195 also have the right to avail themselves of the unfair labor practice provisions of the PLRA, which is enforced by the PLRB. The PLRA was enacted to protect private employees in Pennsylvania who are not covered by the federal National Labor Relations Act.

The PLRA provides that "employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection." If a union claims that those rights have been interfered with then it may claim that an employer has engaged in an unfair labor practice and seek redress from the PLRB. The PLRB has substantial "make whole" powers designed to redress a violation of the PLRA.

The PLRA declares it to be an unfair labor practice for an employer to:

(a) interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in the PLRA;

(b) dominate or interfere with the formation or administration of any labor organization or contribute financial or other material support to it, provided that an employer shall not be prohibited from permitting employees to confer with the employer during working hours without loss of time or pay;

(c) discriminate in regard to hire or tenure of employment, or any term or condition of employment, to encourage or discourage membership in any labor organization;

(d) discharge or otherwise discriminate against any employee because they have filed charges or given testimony under the PLRA;

(e) refuse to bargain collectively with employee representatives; or

(f) deduct, collect or assist in collecting from the wages of employees any dues, fees, assessments or other contributions payable to any labor organizations, unless authorized to do so by a majority vote of all the employees in the appropriate collective bargaining unit taken by secret ballot, and unless the employer thereafter receives the written authorization from each employee whose wages are affected (as modified by the Public Employee Fair Share Law).

The PLRA also recognizes that unions can commit unfair labor practices against employers in violation of the PLRA. In that case, the PLRA declares it to be an unfair labor practice labor organizations, its agents or employees acting in concert to:

(a) intimidate, restrain, or coerce any employee for the purpose and with the intent of compelling the employee to join or to refrain from joining any labor organization;

(b) during a labor dispute, join or become part of a sit-down strike, or without the employer's authorization, seize or hold or to damage or destroy the employer's property;

(c) intimidate, restrain or coerce any employer by threats of force or violence or harm to any employer or their family with the intent of compelling the employer to accede to demands, conditions and terms of employment, including the demands for collective bargaining;

(d) picket or cause to be picketed a place of employment by a person or persons who is not or are not an employee or employees of the place of employment; engage in a secondary boycott, or hinder or prevent by threats or intimidation the use of equipment or services; or

(e) call, institute, maintain or conduct a strike or boycott against any employer or industry or to picket any place of business or the employer or the industry on account of any jurisdictional controversy.

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IX. Employment Law: Individual Rights

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The Employment At-Will Rule and Its Limitations

In Pennsylvania, non-union, non-civil service public employees are employees at-will.[1] Under the employment at-will rule, a public employer may dismiss an employee at any time, for any reason, or for no reason, with or without notice, without incurring liability for breach of contract or otherwise.[2] Exceptions to the employment at-will rule arise only when the legislature has explicitly created a right to tenure as an integral part of a comprehensive governmental scheme.

A municipal employment contract must be founded upon explicit statutory authority, proper as to form, and executed by officials with proper authority.[3] An enforceable employment contract must also contain either an agreement to employ an individual for a definite term or restrictions on the employer's right to discharge; written or oral statements (including provisions on compensation and benefits) alone do not give rise to employment tenure.[4]

Under the Pennsylvania Constitution, Article 6, § 7, appointed civil officers may be removed at the pleasure of the appointing body. Where the power to remove a public officer is discretionary, courts will not inquire into the grounds for removal.[5]

The employment at-will rule is not absolute, however. A public employer may not freely discharge an employee where a statute or constitutional principle protects the employee against discharge,[6] or where the discharge violates a clear mandate of public policy.[7]

This chapter deals with key statutory and constitutional issues that are unique to public employment--civil service protection, protection against political discrimination, deprivation of constitutional rights, the veteran's preference and whistleblower protection. Other limitations on the employment at-will rule, such as the anti-discrimination laws[8] and the public policy exception to the at-will doctrine,[9] apply to both public and private employees and are therefore beyond the scope of this chapter.

Overview of the Civil Service System

The civil service system began in the late 1800's to counter the "spoils system" in which political affiliation often determined an individual's ability to obtain public employment. Pennsylvania has established civil service systems for certain municipal employees, principally for police personnel.

Although some degree of civil service or tenure protection exists for employees in every class of Pennsylvania municipality, these protections vary greatly by class of municipality. A municipal attorney with a specific civil service problem should take care to consult the civil service statute for the correct class of municipality (and, where applicable, the municipality's home rule charter). Case law applicable to any other class of municipality will be relevant only if the statutory provisions for the two municipal classes are identical. Generally, though, no employee with civil service protection may be discharged in any manner or by any means other than those specified by the statutes regulating civil service.[10]

All cities and all boroughs, incorporated towns and townships of the first class with three or more police officers have civil service laws; all townships of the second class and all boroughs, incorporated towns and townships of the

first class with fewer than three police officers are subject to the Police Tenure Act.[11] Townships and towns provide civil service or tenure protection only for police. Borough civil service laws cover police and fire personnel. Cities' civil service laws cover a wider group of employees.

Although the details of each civil service system may vary by class of municipality, all civil service systems contain the following elements: (1) hiring and promotion on merit, often after a competitive examination and creation of a list of eligible candidates; (2) protection against dismissal or other adverse employment action except for good cause or budgetary constraints; and (3) procedural rights prior to most adverse employment actions, including a hearing before a civil service commission or the municipal governing body.[12]

The Police Tenure Act deals only with adverse employment actions and does not regulate hiring.

The municipality may take final action to discharge, suspend or demote an employee with civil service or tenure protection only after a hearing. Typically, a protected employee may be subject to these sanctions only for good cause, such as neglect of duty, violation of law, inefficiency, intemperance, disobedience of orders or improper official or personal conduct.

The governing body or municipal administration has the duty to notify the employee of the charges against the employee and the time and place of the hearing. The hearing takes place before the municipality's civil service commission or governing body, depending upon the class of the municipality. The employee's supervisor or the municipal governing body may have the power to suspend an employee for a limited period of time, pending the hearing and decision on the discharge, suspension or demotion.

In a civil service or tenure hearing, the employee has the right to representation by counsel. The municipal solicitor may not both present the case against the employee and advise the commission or governing body on the suspension or dismissal. Therefore, the municipality must engage separate counsel, either to present the case against the employee or to advise the decision-maker.

Constitutional Guarantees in Hiring, Discipline and Discharge

Political Discrimination - Since 1976, federal courts have applied the United States Constitution to restrict or prohibit adverse actions against non-civil service employees for political reasons. The First and Fourteenth Amendments to the United States Constitution prohibit public employers from discrimination in hiring, transfer, promotion, recall, furlough and discharge on the basis of political affiliation.[13] Political affiliation is not limited to political party affiliation. The United States Constitution also prohibits discrimination by one faction of a political party against another faction.[14] Independent contractors and employees are protected from political discrimination.[15] The United States Constitution does not protect against discharge of "no-show" employees who obtain employment as a political reward.[16]

The United States Constitution's prohibitions do not pertain to confidential or policy-making employees. Political affiliation may constitute a job requirement for confidential or policy-making employees. The test to determine which jobs are policy-making is fact-sensitive. Courts have concluded that the following employees are confidential or policy-making employees: city managers,[17] municipal solicitors,[18] public information officers,[19] assistant prosecutors[20] and parks superintendents[21]. By contrast, assistant public defenders[22] and police officers[23] are not confidential or policy-making employees.

A municipal policy prohibiting employees from running for public office is a legitimate restriction on First Amendment rights.[24]

The remedy for an employee who is a victim of political discrimination is an action under the Civil Rights Act, 42 U.S.C. § 1983, which prohibits deprivation of constitutional rights under color of state law. Public officials may be individually liable for actions taken in official capacities to dismiss employees for political affiliation.[25] A successful plaintiff may recover attorney fees under 42 U.S.C. § 1988. Although the Civil Rights Act is a federal law, an employee may bring an action against a government employer in either federal or state court under Section 1983.

Due Process Guarantees - The Fourteenth Amendment prohibits municipalities from depriving individuals of life, liberty or property without due process of law. Public employee discharges may implicate both property and liberty interests, requiring procedural due process in the form of notice and a hearing prior to discharge.

State law applies in determining whether a public employee has a property interest. A public employee has a property interest in public employment only when the employee has a contract of tenure with the governing body or a contract providing for termination only for cause. In Pennsylvania, all public employment is at-will unless a statute specifically allows a municipality to alter an employee's at-will status.[26] An at-will public employee has no property interest in continued employment and the decision to terminate an at-will employment therefore does not constitute an "adjudication" under the Local Agency Law.[27]

An employee with a property interest in continued employment has the right to prior notice of the reasons for contemplated dismissal, a chance to respond to the employer's charges, and a hearing prior to final action on the dismissal. The hearing need not be a formal, trial type hearing; the hearing need only give the employee a chance to present the employee's side of the story.[28] A tenured public employee does not have a constitutional right to notice and a hearing prior to a suspension after the employee is charged with a felony.[29] A public employee's exercise of the Fifth Amendment privilege against self-incrimination in a pre-termination hearing does not constitute substantial evidence of misconduct.[30]

A public employee's discharge may violate the employee's liberty interest in two situations. First, the employee's liberty interest may be violated to the extent that the discharge is in retaliation for an employee's exercise of First Amendment rights.[31] The First and Fourteenth Amendments allow government employees to make limited public comment on matters of public concern.[32] This right is balanced against the employer's right to an orderly workplace.[33] Items of public concern include the allocation of public funds, operations of government offices affecting the public, broad policy issues, merits of candidates for public office or violations of the law.[34] The comments may not interfere with the government agency's right to carry out government responsibilities or with the employees' ability to carry out job responsibilities, or with essential and close work relationships.[35] Accordingly, any comment made pursuant to an employee's official duties is not protected because the employee is not acting as a citizen.[36] The right does not extend to comments on matters of personal interest, rather than public concern.[37] An at-will public employee is not necessarily protected against discharge for the speech activities of another member of the employee's family.[38] Also, a policymaking employee has less First Amendment protection for speaking out on issues of public concern than a lower level employee.[39] Similarly, a hearing examiner has less First Amendment protection, even when commenting on matters of public concern outside official duties, if the comments may lead to concerns about lack of impartiality.[40]

A discharge may also violate an employee's liberty interest when the discharge stigmatizes the employee, making it harder for the employee to obtain new employment. A discharge in which the employer makes highly critical statements about the employee's competence would constitute a stigmatic discharge.[41] The mere fact that a municipality dismisses an employee by public vote at a public meeting does not violate the employee's liberty interest.[42] Nor does a newspaper publication of the facts leading to a public employee's forced resignation.[43]

Municipal residency requirements have passed constitutional muster in Pennsylvania. Such requirements have a rational relationship to a legitimate governmental interest and do not impair the right to travel.[44]

Employee Searches - The issue of searches of public employees has constitutional implications. The United States Constitution prohibits unreasonable searches of and seizures from public employees.[45] This prohibition sets limits on municipalities' rights to test employees for drugs and alcohol.[46] More recently, this prohibition has been tested when search employees' electronic equipment such as computers and cell phones.

Drug tests typically occur under one of the following circumstances: pre-employment or pre-promotion screening; periodic, pre-announced testing; random testing; testing based on reasonable suspicion of drug use; or testing after an unusual event, such as an accident. The rules for drug testing of public employees differ with each circumstance.

The United States Constitution permits pre-employment or pre-promotion screening and periodic, pre-announced testing of employees.[47] Unannounced drug testing is permissible where the employer has "reasonable suspicion" of

drug use.[48] Unannounced, random testing may take place in highly regulated or safety-sensitive employment (e.g., the transportation industry or police forces).[49] The United States Constitution permits drug testing of all individuals at an accident site.[50] A test with the employee's free and voluntary consent is constitutional.[51]

Under certain circumstances, an employee may be able to challenge a discharge for refusal to submit to a drug test. The United States Court of Appeals for the Third Circuit has upheld the claim of an employee who was discharged for refusing to submit to a urine test for drugs and a personal search that impinged upon personal privacy.[52] This decision has implications for the public sector, because of the constitutional concern for privacy and due process rights of public employees. The termination of a public employee for a positive drug test may implicate an employee's property and liberty interests under the Fourteenth Amendment due process guarantees.[53]

A city's search of an employee's pager, commenced in order to review the limits on pager use, was not unreasonable when the search found unauthorized use of the pager for personal texts, and led to the employee's discipline.[54]

Veteran's Preference

Certain statutory protections apply to the hiring of public employees, most notably the veteran's preference.[55] In Pennsylvania, a municipal employer may establish qualifications bearing a reasonable relationship to the employment position, and require all applicants to meet all qualifications before awarding the veteran's preference.[56] The veteran's preference applies to both civil service and non-civil service hiring, but not to promotion.[57] The "veteran" need not be a veteran of a foreign armed conflict. Status as an honorably discharged member of the military is necessary to establish veteran status.[58]

Whistleblower Protection

The Pennsylvania Whistleblower Law[59] prohibits employers from discriminating or retaliating against public employees who report wasteful expenditures, illegal activities or wrongdoing, either to public authorities or to the employer. The Whistleblower Law covers public employers, employers in publicly chartered or funded organizations, and private employers acting as agents for public employers.[60]

The Whistleblower Law requires the employee to plead, and prove, retaliation for (a) making a good faith report of the employer's waste or wrongdoing, or (b) for participating in an official investigation.[61] To constitute a "good faith report," the report must be supported by credible evidence.[62] The Whistleblower Law defines "wrongdoing" as a violation which is not of a merely technical nature of a federal or state statute or regulation, a political subdivision ordinance or regulation, or a code of conduct or ethics designed to protect the public or the employer.[63] The reported wrongdoing in question must be committed by the agency or its employees, not by third parties.[64]

The employee must state a causal connection between the **employee's** report of wrongdoing and the **employer's** retaliation.[65] For example, an employee will state a claim under the Whistleblower Law by alleging a shift change, reduction in duties, harassment and eventual transfer and demotion in response to a report of irregularities.[66] By contrast, an employee will not state a claim where the only allegation is that the employee generated a report of wrongdoing that was requested by the employer; the employee did not initiate the report of wrongdoing and therefore has no rights under the Whistleblower Law.[67]

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X. Police Regionalization

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Introduction

As of the end of 2013, there were 34 regional police departments (RPDs) comprised of 102 municipalities in Pennsylvania. These RPDs began forming in 1979. As a result of declining sources of revenues and increased expenses, municipal leaders are constantly examining how they provide police services, as well as the benefits of regionalization. There are approximately 1,300 municipalities served solely by the Pennsylvania State Police, with another approximately 400 municipalities providing part-time police coverage, with the Pennsylvania State Police covering the remainder of the hours. Currently about 72 percent of municipal police departments have ten or fewer full-time officers with half of those having five or fewer full-time officers (it is generally accepted that the minimum number of police officers necessary to provide an efficient 24/7 police force is ten full-time officers).

Sources of Funding

DCED provides grants of up to $93,000 a year to be used by two or more municipalities that regionalize their police operations. In addition, House Bill 2014-2296 proposed the dedicated monies to fund grants for RPDs. The Pennsylvania Commission on Crime and Delinquency also has grants available.

In a recent mandated survey on regionalization, concerns over determining control of the department and distribution of costs were identified as the most difficult issues to resolve when considering regionalization. The next ranked issue regarding regionalization was pensions. The difficulty with pensions results from different pension benefits between combining departments as well as unfunded pension obligations. For example, Act 600 makes it difficult for cities of the third class to participate in the regional department because their benefit requirements, including contribution rates, are different.

Benefits of regionalization have been reported to include improvements in police coverage, training opportunities and use of technologies. It has been reported, however, that generally the initial impacts of regionalization increase costs for the first three years. Over the long term, it is generally accepted that regionalization results in cost savings. Studies have shown that when all costs were accounted for, RPDs cost approximately 25 percent less than similarly situated individual municipal police services. Where municipalities do see increased costs, it is usually attributed to the fact that municipality goes from no or part-time police services to full-time police services once regionalized.

Assessing Feasibility and Developing a Plan

The first step to regionalizing police is to determine the feasibility of forming a RPD and developing a plan to establish the oversight unit. This would typically be a separate board or commission comprised of elected officials from the participating municipalities.

This initial step requires gathering of data and information from all sources including the municipalities, existing police departments within those municipalities, local agencies associated with police departments, the elected officials, and the public. A study committee should be formed in order to gather the information and data. This committee should also be dedicated to building a community consensus from the different constituents for regionalization. The work of this group should be done in public forums.

In order to be recognized as the RPD, and come within the ambit of both statutes giving our duties to RPDs as well as protections of running a police department, the agreement between the municipalities must be made pursuant to the Intergovernmental Cooperation Act.[1] The general authorization for forming a RPD is conferred in Section 2303, which authorizes local governments to jointly cooperate to perform functions, powers or responsibilities. The statute requires joint agreements to be entered into to effectuate the formation of the RPD.[2] Each local municipality is required to pass an ordinance in order to delegate functions, powers and responsibilities to another governmental unit.[3]

This statute sets forth the matters which must be contained within the ordinance. The contents of the ordinance must include:

(1) The conditions of the agreement;

(2) Duration of the agreement;

(3) Purposes and objectives of the agreement;

(4) Manner and extent of financing of the agreement;

(5) The organizational structure necessary to implement the agreement; and

(6) The manner in which real or personal property shall be acquired.[4]

All commonwealth departments and agencies are required to deem the RPD a legal entity.[5]

One of the first issues which must be worked out is the manner of representation by each municipality on the newly formed board. The regional police commission which serves as an advisory board to participating municipalities once formulated would develop budgets, conduct meetings, make policy for the department, pay invoices, and make uniform terms of employment. The board or commission is usually comprised of one elected representative from each of the communities participating in the program. However, different arrangements can be made. A board should have an odd number of members. To accommodate this, other members can be added from a municipality on a rotating basis.

The next important consideration is funding. Several different methods of cost distribution have been utilized. Population can be used as a sole factor for cost distribution. Population as a factor can also be combined with land area and/or road mileage. Another method utilized is to assess the valuation of real property or revenues in tax collected in conjunction with population. Another method which is utilized is known as the police protective unit (PPU). This method determines cost share having one PPU equal ten hours of officer time. Each community within the RPD purchases a number of units it desires and therefore has direct control over the amount of and cost of the police services it receives.

Pensions are mandated for police officers in Pennsylvania. The three difficulties encountered with pensions when trying to form a RPD are (1) municipalities may be subject to different statutory requirements; (2) municipalities may have different benefits in their existing police officer pensions; and (3) existing pensions may not be fully funded.

There are several pertinent municipal pension laws which must be considered when forming a RPD:

1. **Act 1956-600 - Municipal Police Pension Plan Law.** Act 600 requires boroughs, towns and townships to establish pension fund with member contributions between five percent and eight percent of salary pending on whether an officer is covered by Social Security. Super-Annuation is 25 years of service and age 55, and under certain circumstances a date can be set also;
2. **Act 1931-317 - Third Class Cities.** Third class cities are required to provide a defined benefit pension plan for its police officers under the Third Class City Code;
3. **Act 1915-259 - Second Class Cities;**
4. **Act 1959-400 - Second Class A City;**
5. **Act 1974-15 - Pa. Municipal Retirement Law.** This law allows a municipality to establish a plan with a transfer of plan to the Pennsylvania Municipal Retirement System (PMRS).

6. **Act 1984-205- Municipal Pension Plan Funding Standard and Recovery Act.** This law requires certain funding and reporting requirements for pension plans and sets forth a way in which municipalities must calculate and pay annual contributions to the plan.

In addition to different statutory requirements, pension benefits may be different among different municipalities as a result of collective bargaining agreements and arbitration awards. This can include medical benefits for retirees, sick leave, accumulation of retirement benefits and accrual of vacation time.

A regional police commission must formally adopt a police pension plan document and select a method of administering the plan. The participating municipalities must adopt ordinances which establish the regional police pension fund and establish the benefit structure. Time served with the original municipality must be credited to the regional pension plan. The plan document should address the intent of the municipality to: 1) terminate all existing police pension funds and transfer unallocated assets to the regional police pension fund; 2) relinquish all claims to transfer police pension; 3) pay each municipality's pro-rata share of the regional police commission pension fund cost in a manner consistent with the provisions of Act 205; 4) transfer service credits of the police officers initially employed by the regional police commission or employed by the participating municipality; and 5) grant unqualified authority and responsibility to the regional police commission for the development of the police pension plan and the administration of the associated pension funds.

In terminating existing police pension funds, obligations of retired members, other beneficiaries and vested members must be provided for in the new plan.

Labor and Employment Issues to Consider

Court decisions involving RPDs have mostly involved labor and employment questions. The Pennsylvania Supreme Court examined the extent to which Act 111 and other collective bargaining agreement issues interplay between RPDs and participating municipalities. In *Borough of Lewistown*, the Pennsylvania Supreme Court determined that a participating municipality is a joint employer of the police officers employed by a RPD with the RPD. The rationale in *Borough of Lewistown* was that the municipalities delegated to the board of the RPD all employment related functions regarding the RPD and that the municipalities are joint employers because they act through their designated representatives on the board of the RPD. As a result of being found a joint employer, a participating municipality is found to have participated in collective bargaining and related arbitration proceedings even though the only municipal party present was the RPD.[6]

The United States Court of Appeals for the Third Circuit reviewed the effect of regionalization upon a police officer's former status with the participating municipality. In *Dombrowsky v. Banach,* the court looked at whether the Police Tenure Act[7] applies to a regional police commission. The court held that the Police Tenure Act does not apply to RPDs because the Police Tenure Act provides protection for officers employed by towns and boroughs, but does not apply to officers employed by regional police departments. The court also determined that the RPD was not a successor to the former employer which would have been one of the participating municipalities.[8]

REFERENCES

1. 53 Pa.C.S. § 2301, *et seq.*
2. 53 Pa.C.S. § 2303.
3. 53 Pa.C.S. § 2305.
4. 53 Pa.C.S. § 2307.
5. 53 Pa.C.S. § 2316.
6. *Borough of Lewistown v. Pennsylvania Labor Relations Bd.,* 558 Pa. 141, 735 A.2d 1240 (Pa. 1999).
7. 53 Pa.C.S. § 811, *et seq.*
8. *Dombrowsky v. Banach*, 557 Fed. Appx. 107 (3d Cir. 2014).

XI. Municipal Procurement

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Introduction

Procurement can be defined as the acquisition of goods and services by municipal governments and includes the purchase or lease of such varied items as gasoline, office supplies, legal services, contracts for the construction of buildings, paving of highways and design of sewage treatment plants.

While some general principles are applicable to every public procurement, there is no uniform procurement system applicable to all Pennsylvania municipal bodies. The Commonwealth Procurement Code,[1] except for the provisions contained in Part 2 thereof and provisions concerning cooperative purchasing, has not been extended to include municipalities.

The first step in considering any municipal procurement issue is to determine the nature of the procuring body (e.g., municipal authority, county of the second class, etc.). The second step is to consult the proper enabling statute to determine the extent of the body's power to procure and the manner in which that power must be exercised. The third step is to investigate special statutory provisions to determine their applicability.

The public policy behind municipal procurement requirements is not solely to secure work or supplies at the lowest possible price, but also for the "'purpose of inviting competition, to guard against favoritism, improvidence, extravagance, fraud and corruption in the awarding of municipal contracts ... and are enacted ... not for the benefits or enrichment of bidders .... "'[2]

Competitive Bidding Requirement

Effective January 1, 2012, the bidding threshold for purchases by various types of municipal entities was increased from $10,000 to $18,500. The threshold for telephonic quotes was increased from $4,000 to $10,000.[3] The limits are adjusted annually based on the Consumer Price Index for the 12-month period ending September 30. In 2015, the bidding threshold is $19,400.00 and the telephonic quote threshold is $10,500.00.

There are requirements apply to public contracts where competitive bidding is required by statute. Statutory provisions for competitive bidding are mandatory.[4] Where a municipality evades the public bidding requirements, the public officials may be subject to criminal prosecution.[5]

Requirements apply to public contracts where, although competitive bidding is not required by statute, the public contracting body announces its intention to follow competitive bidding procedures.[6]

In any competitive bid there must be a common standard for all bidders. The term "lowest bidder" implies a common standard under which all bids will be received. The term "common standard" implies that there are: 1) previously prepared specifications; 2) freely accessible for all competitors; and 3) on which, alone, the bids shall be based.[7] "[T]he representation by the public that a bid will be let to the lowest bidder implies that a common standard will apply throughout the process. Common specifications are obviously required; but so also are common treatment of bidders in the bidding process [citation omitted] and an award of a contract which conforms to the specifications on which the bids are taken."[8]

Inherent in competitive bidding is a requirement that a public body shall prescribe a common standard in the bid specification and that the contract will be awarded based on that common standard.[9] The integrity of the bidding

process is violated and its purpose frustrated where there is no common standard on which bids are based.[10] Fairness lies at the heart of the bidding process, and all bidders must be confronted with the same requirements and be given the same fair opportunity to bid in free competition with each other.[11] Alternative specification bids are permissible and are calculated to allow the responsible government entity to weigh the costs and benefits of different types of proposals after the costs are known.[12]

There are two requirements for a valid bid: responsiveness and responsibility. Public bodies have limited discretion to decide whether or not a bidder is responsible. Courts will not interfere in municipal actions involving discretion in the absence of proof of fraud, collusion, bad faith or arbitrary action equating to an abuse of discretion. On judicial review of municipal actions involving discretion, absent proof of fraud, collusion, bad faith or abuse of power, a court will not inquire into the wisdom of municipal actions and judicial discretion will not be substituted for administrative discretion.[13]

Determining responsiveness, i.e. whether the requirements contained in the bid invitation are met, is not a discretionary matter. "These requirements are mandatory and the administrative body cannot decide in its discretion whether the bidder's effort at meeting the requirement was sufficient."[14] A bid is responsive if it does not vary the price, quantity, quality or delivery schedule terms of the invitation to bid. If the bid seeks to vary any of these items, then it is a nonresponsive bid and must be rejected.[15]

The responsiveness of a bid is determined at bid opening and must be ascertained from the bid itself, not from extrinsic evidence. Once a bid is determined to be non responsive, it may not be made responsive after opening, regardless of the reason for nonconformance.16

"Fundamental to the process of awarding public contracts is that once a bid has been opened, it cannot be modified."[17] A bidder cannot correct a defect in its bid proposal after the opening of bids on a public contract. However, certain defects in a bid proposal may be waived provided that the defect is a mere irregularity and that no competitive advantage is gained by the non-responsive bidder.[18] In reversing the Commonwealth Court's determination that a bid bond submitted with a lower rating than required by the bidding document rendered the bid non-responsive, the Supreme Court analyzed the concepts of materiality and competitive advantage and established a two-part test to determine whether a non-compliant bid may be accepted or cured: 1) whether the effect of a waiver would be to deprive the municipality of its assurance that the contract will be entered into, performed and guaranteed according to its specified requirements; and 2) whether it is of such a nature that its waiver would adversely affect competitive bidding by placing a bidder in a position of advantage over other bidders or by otherwise undermining the necessary standard of competition.[19]

Set forth below are examples of violations of the common standard requirement which render an award of contract invalid:

1) Specifications set forth in a bidding document are mandatory and must be strictly followed for the bid to be valid. Violation of bid instructions constitutes legally disqualifying error and a public agent may reject a bid for such error.[20]
2) Ambiguity in the instructions to bidders violates the common standard requirement. Such ambiguity cannot be cured by ex parte explanations from officials of the public body.[21]
3) Ambiguity can provide grounds for an injunction against the granting of the contract.[22]
4) Ambiguity can also support a decision to reject all bids and readvertise.[23]
5) Private negotiations with some bidders to the exclusion of others before the contract is awarded constitute precisely the type of favoritism and unfair advantage that competitive bidding is intended to prevent.[24]
6) Acceptance of a revised bid after bid opening violates the principle of law that bidding be fair, open, honest and without favoritism.[25]
7) Municipalities must also adhere to the requirements of the bidding document. A municipality must strictly comply with its bid instructions regarding the procedure for bid acceptance in order to perfect its right to collect upon the bid bond.[26]

8) A bidder must follow instructions and submit its bid at the designated place of receipt by the time and date set forth in the instructions to bidders.[27] The failure of a bidder to submit a timely bid makes the bid non responsive and it should be returned unopened.

Municipalities typically insert language in a bidding document that reserves the right to waive defects in bids. This type of provision does not overcome the body of common law in Pennsylvania that requires bids be responsive to the specifications. The following cases give examples of bid defects that were found not to be waivable informalities:

1) An unsigned bid is not a minor defect.[28]
2) An invitation for bids which requires a listing of material suppliers in exactly the format required by the invitation for bid is not a minor technicality.[29]
3) A bid that does not certify that it can accept and market recyclables for the full term of the contract and is missing an asset page from its financial statement contains "material discrepancies" which are not "technicalities."30
4) Proposing the disposal of solid waste at a landfill, which is not in authorized by the county flow control ordinance is a substantial and material deviation and not a technical defect.[31]
5) Where a bidder proposed to provide a "credit," which was not authorized by the specifications, to the city if it did not exercise its rights to salvage replaced water valves, which credit caused the bidder to be the lowest bidder, the city did not have the right to waive the irregularity because it gave a competitive advantage to the bidder over another bidder.[32]
6) Where a bidding document requires that the price include shipping to a designated location and the bidder's price is FOB factory, the defect is material and cannot be waived or cured.[33]
7) Where a bid document stated that the failure to provide the required Consent of Surety at the time of bid submittal would preclude the bid from being considered, any deviation from the requirement is a non-waivable defect.[34]

In the following cases, the court held that the waiver of a bid defect by the public body did not violate competitive bidding rules:

1) A bidder's failure to include an asset page pursuant to bid instructions and public body's allowing bidder to belatedly submit the asset page did not require rejection of bid for defect.[35] Note: The court specifically limited its holding to the precise factual posture of the case and stated that the case was of no precedential value except in identical factual circumstances.
2) Relying upon McCloskey, the trial court held that a borough's post bid¬ opening recalculation of the base bid submitted by a bidder to "correct" the bidder's math, its waiver of a bid instruction requirement of an equipment list at the time of bid opening and its allowing the bidder 24 hours to provide the equipment list were waivable defects in the bid. The decision was affirmed by the Commonwealth Court.[36]
3) The submission of a bid bond from a surety company which maintained a Best rating of "B" instead of the higher "A" rating required by the bidding document was a defect that could be waived because it was not material nor did the bidder who submitted the bid bond from the lower rated surety company gain a competitive advantage.[37]

In addition to being responsive to a bid, the bidder must also be responsible. Unlike responsiveness, responsibility may be determined after bid opening. Judgment, skill, promptness, faithfulness, skillful workmen, honesty of the contractor, financial standing, reputation, experience, resources, facilities, past history of adherence to plans and specifications, capacity and ability to do the work according to the plans and specifications and availability and efficiency are elements of responsibility.[38]

"Where a full investigation discloses a substantial reason which appeals to the sound discretion of the municipal authorities, they may award a contract to one not in dollars the lowest bidder. The sound discretion, which is upheld, must be based upon knowledge of the real situation gained by careful investigation." "The discretion, however, is in the determination of who is the lowest responsible bidder; when that is settled, discretion ends and the contract must be awarded, if at all, to him. . . ."[39]

A decision to reject a bid based upon bidder responsibility must be made pursuant to a thorough investigation.[40] Public bodies may determine responsibility in advance by pre qualifying bidders and then accepting bids only from the pre qualified bidders.[41]

Responsibility may be determined by the municipality's previous experience with a bidder without the requirement of a further investigation.[42]

Withdrawal of Bids

Withdrawal of a bid for certain work after opening is governed by 73 P.S. § 1602, which provides as follows:

> "A bidder to any construction contract for the construction, reconstruction, demolition, alteration or repair of any public building or other public improvement or for the provision of services to or lease of real or personal property whether by lease or concession from such contracting body, excepting highway work, may withdraw his bid from consideration after the bid opening without forfeiture of the certified check, bank cashier's check, surety bid bond or other security filed with the bid if the price bid was submitted in good faith, and the bidder submits credible evidence that the reason for the price bid being substantially lower was a clerical mistake as opposed to a judgment mistake, and was actually due to an unintentional and substantial arithmetical error or an unintentional omission of a substantial quantity of work, labor, material or services made directly in the compilation of the bid; provided, (i) notice of a claim of the right to withdraw such bid is made in writing with the contracting body within two business days after the opening of bids; and (ii) the withdrawal of the bid would not result in the awarding of the contract on another bid of the same bidder, his partner, or to a corporation or business venture owned by or in which he has a substantial interest. No bidder who is permitted to withdraw a bid shall supply any material or labor to, or perform any subcontract or other work agreement for any person to whom a contract or subcontract is awarded in the performance of the contract for which the withdrawn bid was submitted, without the written approval of the contracting body. The contracting body may prepare regulations to carry out the intent and purposes of the act."[43]

The statute is mandatory on both bidders and public bodies at all levels. The statute provides the only method by which a bid may be withdrawn after bid opening without forfeiture of the bid bond.[44] A bidder may always withdraw a bid *after* bid opening and forfeit the bid bond. In Pennsylvania, a bidder may always withdraw its bid *before* bid opening without penalty, and if it has ample time, may resubmit a new bid prior to bid opening. If the contracting body resubmits the project for bids, the withdrawing bidder must pay certain expenses of that process if the contracting authority finds that the expenses would not have been incurred but for the withdrawal.[45] Even a blatant mistake in the bid does not excuse the bidder unless the bidder complies with the statute.

The statute at 73 P.S. § 1604 sets forth the procedure by which a bidder may disagree with or contest his right to withdraw a bid. A bidder's failure to comply with the timely notice requirement, requiring that notice of a claim of right to withdraw a bid be made within two (2) business days after opening the bid precluded the bidder from demanding arbitration under the act.[46]

Non-Receipt of Bids

When a municipal entity advertises for bid, but no bids are received, 73 P.S. § 1641 provides as follows:

> "When a political subdivision, municipality authority or transportation authority advertises for bids on an item and no bids are received, the political subdivision, municipality authority or transportation authority shall rebid the item. If again such bids are not received, the political subdivision, municipality authority or transportation authority may purchase or enter into contracts for the purchase of any item where no bids are received from suppliers for the item within 45 days of the date of second advertisement therefor."[47]

The statute requires that there be a non receipt of bids twice for a particular bid, i.e. one rebid. The statute further allows a contract to be entered by the parties within 45 days of the date of the second advertisement.

When entering into a contract after no bids are received, the public body may not change the substantive specifications in contracting for the item for the reason that if the public body changes the specifications and then rebids the item, the public body may receive bids on the revised specifications.

Rejection of All Bids

Generally, absent fraud or collusion, a governmental body has the right to reject all bids if it is in its best interest to do so.[48] The right to reject all bids is not absolute. Bids may be rejected in the absence of fraud, collusion, bad faith or arbitrary claim.[49]

Some examples of acceptable reasons to reject all bids are as follows: 1) loss of funding; 2) the bids are in excess of project budget; 3) cancellation of the project; 4) ambiguity in the bid specifications; and 5) need for a major change in the project.

When a governmental entity rejects all bids and announces that it will rebid a project a bid protest becomes moot.[50]

Change Orders – When They must be Bid

A municipality, without bidding, may authorize work by change orders. It is permissible to authorize work by change orders where the work is "incidental" to that covered by the original contract. The key concept is that the change cannot be so great or of such importance (in money or type) as to constitute a new undertaking. Where a consideration is a change in the amount of money involved, both the percentage of the original contract and the actual dollar amount are relevant. For instance, a 5% change may be too great if the amount of money involved is substantial.

A public body may, by change order, provide for minor changes and additions to the contract as may be reasonably necessary to complete the work within the scope of the original contract, provided that the changes do not (i) significantly vary from the original scope of the work and (ii) are not of such importance (in monetary value or scope of work) so as to amount to a new undertaking. The following are examples of cases involving change orders:

1) The contract involved the erection of a guardrail and excavation for retaining walls. A change order was issued to do excavation to eliminate dangerous curves at the contract price. The court held that the change order must be bid because it constituted a new undertaking.[51]
2) The contract involved the completion of a paving project for a price not to exceed $500,000. When $500,000 was spent, the project was not complete. Change orders were issued for an additional $550,000 of work. Although the scope of work is the same, the court held that the change order must be bid due to the sheer size of the change order.[52]
3) The city had only $50,000 available for a paving project and stated in the specifications that a second contract will be given when the city has additional money. A second contract for the same work is let at $150,000. The court held that the second contract must be bid because it is a new contract.[53]
4) A municipal body changed the type of brick specified in a construction contract to a more expensive brick. The court held that the change to a slightly more expensive brick was merely incidental to the original contract and therefore a valid change order.[54]
5) A municipal body let a solid waste and recycling collection contract for five years with two one-year extensions. At the end of the five-year contract, instead of bidding for a new contract or electing to extend the contract at the prices originally bid, it renegotiated the price for the two one-year extensions to a lower amount. The court held that the extension was a new contract and not an amendment of the previous contract and thus was required to be competitively bid.[55]

Pennsylvania Separation Act

The Separation Act requires that there be separate contracts for plumbing, HVAC and electrical work when the cost of the work exceeds $4,000.00. The Separation Act provides as follows:

> "Hereafter in the preparation of specifications for the erection, construction, and alteration of any public building, when the entire cost of such work shall exceed four thousand dollars, it shall be the duty of the architect engineer, or other person preparing such specifications, to prepare separate specifications for the plumbing, heating, ventilating, and electrical work; and it shall be the duty of the person or persons authorized to enter into contracts for the erection, construction, or alteration of such public buildings to receive separate bids upon each of the said branches of work, and to award the contract for the same to the lowest responsible bidder for each of said branches."[56]

A single contract let by a transit authority for plumbing, heating and electrical systems violated the act. It was not enough for the transit authority to require a single contractor to use low bidding subcontractors.[57] Separate contracts are necessary to comply with the law's purpose of "keeping the expenditure of public funds open and clear of any possible manipulations."[58] A solicitation for a joint plumbing and HVAC contract violates the Separation Act.[59]

Award and Execution of Public Contracts

In general, a governing body of a municipality must vote to award a contract in order for the contract to be valid.[60] The award of public works contracts are governed by 62 Pa. C.S. § 3901, *et seq.*

The statute applies to all political subdivisions and contracts for construction in excess of $50,000.[61] Contract must be awarded within 60 days after bid opening, unless there is an extension by mutual written consent. All contracting bodies of the Commonwealth or any State aided institution must provide a list of the bidders and their bid amounts on each public contract within 10 working days of the bid opening to interested parties for a fee (the requirement does not apply to "the contracting bodies of any political subdivision or local authority which has the authority to enter into a public contract.").6[2] The governmental body must sign the contract within 60 days of the award.[63]

If the time limits are not met, the successful bidder is released from liability, unless the bidder waives noncompliance by written notice to the government agency.[64]

Performance by a contractor under the terms of a public contract entitles the contractor to payment by the contracting body. Performance by a subcontractor entitles the subcontractor to payment from the contractor.[65] The contracting body must pay the contractor or design professional strictly in accordance with the public contract.[66] If the public contract does not contain a term governing the time for payment, the contractor or design professional shall be entitled to make application for payment from the contracting body for progress payments and the contracting body shall make payment less the applicable retainage amount as authorized in Section 3921 to the contractor or design professional within 45 calendar days of the date the application for payment is received.[67] If any progress payment less retainage is not made to a contractor or design professional by the due date established in the contract or in subsection (b), the contracting body shall pay to the contractor or design professional, in addition to the amount due, interest computed as provided in Sections 806 and 806.1 of the Fiscal Code.[68] If the public contract does not contain a grace period and if the contractor or design professional is not paid by the payment date required by subsection (b), no interest penalty payment required under this section shall be paid if payment is made on or before the 15th calendar day after the payment date required under the act.[69]

Performance by a subcontractor of the terms of the public contract entitles the subcontractor to payment from the party with whom the subcontractor has contracted.[70] The contractor or subcontractor shall disclose to a subcontractor, before a subcontract is executed, the due date of receipt of progress payments from the contracting body.[71] When a subcontractor has performed the provisions of the contract, the contractor shall pay the subcontractor, and each subcontractor shall in turn pay his subcontractor, the full or proportional amount received for each such subcontractor's work and material 14 days after receipt of a progress payment, unless payment is

being withheld under the provisions of the statute.[72] A contractor must pay interest to a subcontractor if any progress payment is not made by the due date established in the contract or in Section 3932(c).[73] If the contract does not contain a grace period and if a subcontractor is not paid by the payment date required by subsection (c), no interest penalty payment is required if payment is made on or before the 15th calendar day after the payment date.[74]

The contracting body may withhold payment for deficiency items.[75] Reasonable attorneys' fees, expenses and penalty damages may be awarded for withholding payment in bad faith.[76]

A provision in a public contract making it subject to the laws of another state or requiring litigation on the contract in another state is unenforceable.[77] Disputes between a contractor and a government agency shall be arbitrated.[78]

The contracting body shall have no obligation to any third parties for any claim. Also, once a contractor has made payment to the subcontractor according to the provisions of the act, future claims for payment against the contractor or its surety by parties owed payment from the subcontractor which has been paid shall be barred.[79]

Bond Requirements

Specific requirements for bid bonds and performance and payment bonds are set forth in the public body's enabling statute. For example, Section 3102(g) of the Second Class Township Code requires a successful bidder on a contract to furnish a bond guaranteeing performance of the contract in an amount determined by the supervisors at the time of advertising for bids, which shall not be less than 10% nor more than 100% of the amount of the contract within twenty (20) days after the contract is awarded.[80]

The Public Works Contractors' Bond Law of 1967, which requires both performance and payment bonds equal to 100% of the contract amount, applies to all contracts for the construction, reconstruction, alteration or repair of any public work or betterment exceeding $10,000 made by any "contracting body," which is defined as follows:

> "'Contracting body' means any officer, employe, authority, board, bureau, commission, department, agency or institution of the Commonwealth of Pennsylvania or any State aided institution, or any county, city, district, municipal corporation, municipality, municipal authority, political subdivision, school district, educational institution, borough, incorporated town, township, poor district, county institution district, or other incorporated district or other public instrumentality, which has authority to contract for the construction, reconstruction, alteration or repair of any public building or other public work or public improvement, including highway work."[81]

In addition, federal regulations may impose additional bonding requirements on public contracts involving the use of federal funds for construction and/or acquisition.

Bid Protests

In the event that a taxpayer believes that a municipality has failed in some way to comply with the mandatory bidding requirements, a proper action is to move for preliminary injunction to enjoin award of a contract.[82] The elements for a preliminary injunction are as follows:

1) Relief is necessary to prevent immediate and irreparable harm, which cannot be compensated by damages;
2) Greater injury will occur from refusing the injunction than from granting it;
3) The injunction will restore the parties to the status quo as it existed immediately before the alleged wrongful conduct;
4) The alleged wrong is manifest and the injunction is reasonably suited to abate it; and
5) The plaintiff's right to relief is clear.[83]

Immediate and irreparable harm occurs and judicial intervention is proper where a municipality fails to comply with the law, i.e. mandatory bidding requirements.[84] "The argument that a violation of law can be a benefit to the public is without merit. When the Legislature declares certain conduct to be unlawful it is tantamount in law to calling it injurious to the public. For one to continue such unlawful conduct constitutes irreparable injury. . . ."[85]

The immediate and irreparable harm is to the taxpayer, not to the disappointed bidder. Disappointed bidders have no standing to sue in Pennsylvania.[86]

A disappointed bidder on a public contract has no injury, which entitles him to redress in court, even if the public official who refuses to award him the contract has a statutory obligation to award it to the lowest bidder.[87] However, a prospective bidder who was precluded from bidding because the bid document did not provide for separate bids for plumbing, heating, ventilation and electrical work, and who is not a taxpayer had standing to challenge a municipality's violation of the Separation Act in letting a bid.[88]

A taxpayer has standing to enjoin the award of a public contract to anyone other than the lowest responsible bidder and it does not matter that the taxpayer is also a disappointed bidder who seeks to have the contract awarded to itself.[89]

A taxpayer is not deprived of standing where the project, which is the subject of a public contract, is funded through bonds rather than directly through taxes.[90]

Taxpayers of the commonwealth who are not taxpayers of a local municipality awarding a municipal contract have no standing to challenge the award of that contract by the municipality regardless of the degree of involvement of commonwealth funds in relation to the degree of purely municipal funds.[91] The court in *Nunemacher*, however, acknowledged the continued existence of a narrow exception to local taxpayer requirement, which requires the commonwealth taxpayer to prove the following in order to have standing: (1) the government action would otherwise go unchallenged; (2) those directly and immediately affected by the complained of expenditures are beneficially affected and not inclined to challenge the actions; (3) judicial relief is appropriate; (4) redress through other channels is unavailable; and (5) no other persons are better situated to assert the claim. An employee of a disappointed bidder, however, does not have a substantial, direct and immediate interest in the award of a contract to his employer even though his livelihood is affected.[92]

A commonwealth taxpayer had standing to challenge award of contract by the Pennsylvania Turnpike Commission because he was also a toll payer and, therefore, much like a local taxpayer.[93]

Neither a taxpayer nor a disappointed bidder is entitled to the judicial award of a public contract to a disappointed bidder.[94]

A taxpayer has standing to challenge the award of a bid even though he does not understand the complaint, conducted no investigation, had no personal knowledge of the events, and was not paying the attorney who brought the challenge.[95]

A disappointed bidder has standing to challenge a bid award on the basis that it did not comply with the Separation Act.[96]

A party to a contract with a public body is an indispensable party to an action brought by a taxpayer to enjoin the performance of a public contract.[97]

Procurement without Competitive Bidding

Competitive negotiation is an optional process to procure professional services or contracts for proprietary items. The process begins with the publication of a Request for Proposal (RFP) by the procuring body. "Public contracts for professional services which involve quality as the paramount concern and require a recognized professional and special expertise are exempt from the normal statutory competitive bidding process."[98] Guaranteed energy savings contracts may be let under the RFP process in accordance with 62 Pa.C.S. § 3752, *et seq.*

The RFP typically advises prospective competitors of the criteria, which will be used in the evaluation of the proposals, and that the award need not be made to the lowest bidder.[99] RFPs are not subject to competitive bidding requirements unless the contracting body chooses to make them subject to these requirements and so indicates in the RFP.[100]

Competitive negotiations requires a process that will accomplish the purpose of protecting against favoritism, fraud, etc. by encouraging competition while ensuring that the competitor selected is qualified and has the capacity to perform the work. Because of the need to measure professional skill and ability as well as price, the contracting body must develop a procedure for soliciting and evaluating proposals which will, to the greatest extent possible, enable the contracting body to obtain the best service at the best price. In addition, a competitive negotiations process, unlike competitive bidding, the municipal entity is permitted to negotiate with those who submit proposals.

Sole source procurement is permitted for any purchases under $10,500.00 (for 2015). In addition, regardless of the amount of the purchase, such purchases are permitted only in limited circumstances if public bidding is otherwise required. These exceptions are typically stated in the municipal entity's enabling statute and usually consist of things such as the purchases of patented and manufactured products; purchases of insurance policies; purchases of public utility service; purchases made from other municipal entities and Federal and State government; and purchases involving personal and professional services. The enabling legislation for a particular municipal entity should be reviewed prior to making such a purchase.

Written and telephonic price quotations from at least three (3) qualified and responsible contractors shall be requested for all contracts in excess of the base amount of $10,500.00 (for 2015), but are less than the amount requiring advertisement and competitive bidding ($19,400.00 for 2105). In lieu of three (3) price quotations, a memorandum must be kept on file showing that fewer than three (3) qualified contractors exist in the market area within which it is practicable to obtain quotations. A written record of telephonic price quotations must be made and shall contain at least the date of the quotation, the name of the contractor and the contractor's representative, the construction, reconstruction, repair, maintenance or work which was the subject of the quotation and the price.

Emergency purchases may also be made without competitive bidding or written or telephonic price quotations under certain circumstances. The contracting body may dispense with otherwise required competitive bidding only when there is danger to the public health, safety and welfare and immediate procurement of the service, materials or supplies is necessary. Typically, emergency purchases are authorized as a part of a declaration of a state of emergency. The public body's own action or failure to act cannot be the cause of the emergency. An economic emergency is not sufficient. The potential for an emergency is not sufficient.[101]

Special Statutory Provisions

In addition to the contracting provisions in the enabling legislation for each municipal entity, there are also a number of stand-alone acts, as interpreted by the courts, which also regulate the municipal procurement process. A sampling of these acts is briefly discussed below.

Pennsylvania Prevailing Wage Act - The Prevailing Wage Act (1) requires certain items regarding prevailing wage to be included in specifications, notice and contracts to which the act applies; and (2) applies to contracts for "public work," which the act defines as follows:

"'Public Work' means construction, reconstruction, demolition, alteration and/or repair work other than maintenance work, done under contract and paid for in whole or in part out of the funds of a public body where the estimated cost of the total project is in excess of twenty five thousand dollars ($25,000), but shall not include work performed under a rehabilitation or manpower training program."[102]

To constitute a "public work," all of the following four elements must be satisfied: (1) there must be certain work; (2) such work must be under contract; (3) such work must be paid for in whole or in part with public funds; and (4) the estimated cost of the total project must be in excess of $25,000.[103]

Installation of equipment or materials should be considered a "public work" if it amounts to an alteration of the building. Even where installation appears to be merely ancillary to the purchase of equipment or material, the act may apply.[104]

Testing, adjusting and balancing of HVAC system on a public works job is a "public work" and the workmen performing the testing, adjusting and balancing are entitled to be paid prevailing wage.[105]

Maintenance is specifically excluded from the definition of "public work." "Maintenance work" is defined by the act as the repair of existing facilities when the size, type or extent of such facilities is not thereby changed or increased. "Facilities" refers not only to a change in the size, type or extent of the entire structure, but to its component parts as well.[106] Re-roofing of eight public buildings was repair work, thus a public work and not maintenance because the entire roof of each building was replaced, rather than being overhauled or patched.[107]

Installation of new telephone system using existing telephone poles and tunnels, but installing new cable and conduit in a state building was a public work and not maintenance work.[108]

Replacement of existing curb and sidewalk with new curb and sidewalk was reconstruction as opposed to maintenance, and, therefore subject to prevailing wage.[109]

Milling and resurfacing public streets is construction, reconstruction, demolition, alteration and/or repair and not minor repairs constituting maintenance work, and thus was subject to prevailing wage.[110] In addition, the court held that a borough could not rely on a publication from PennDOT, which included a memorandum of understanding between PennDOT and the Department of Labor & Industry, which incorporated PennDOT's interpretation that resurfacing was maintenance work not subject to prevailing wage. (As a result of the enactment of 75 Pa.C.S. § 9023, which became effective on January 1, 2014, "locally funded highway and bridge projects" are not public works projects subject to the requirements of the Act unless the estimated total project cost is in excess of $100,000.00 as opposed to $25,000.00).

A manhole project involving rehabilitation and/or maintenance work upon over 75% of a borough's manholes, with an estimated cost of over $250,000, was subject to the Prevailing Wage Act.[111] The combined extent of the project and projected costs rendered the work subject to prevailing wage.

The definition of "public work" for purposes of the Prevailing Wage Act does not require that a public body be directly involved with the project, but, rather, requires only that the project be paid for in whole or in part with public funds.[112 & 113]

The threshold of $25,000 applies to total project cost and the Prevailing Wage Act applies if the total project is in excess of the threshold amount, including all subcontracts even if the subcontracts individually are less than $25,000.[114]

The use of tax increment financing to finance a private project pursuant to the Tax Increment Financing Act, 53 P.S. § 1661, *et seq.*, makes the project a public work for purposes of the Prevailing Wage Act.[115]

The Prevailing Wage Act also imposes duties upon public bodies:

a. To determine from Secretary of Labor the prevailing minimum wage rates which shall be paid by the contractor to the workmen.

b. To include reference to prevailing wage rates in the published notice for securing bids.

c. To incorporate wage rates into the terms of the contract.

d. To receive statements from the contractor concerning the payment of wages before making final payment to the contractor.

e. The Secretary of Labor may order the contracting body to withhold payment to a contractor if a workman files a protest objecting to payment to a contractor because of payment due a workman.

Steel Products Procurement Act - The Steel Products Procurement Act mandates inclusion of a contract provision requiring the use of only "steel products" as defined in the Steel Products Procurement Act in every contract for construction, reconstruction, alteration, repair, improvement or maintenance of "public works" as defined by the Steel Products Procurement Act.[116]

Trade Practices Act - The Trade Practices Act prohibits "public agencies, " as defined by the act, from specifying, purchasing or permitting to be furnished or used in any public work, aluminum or steel products made in a foreign country which has been determined to have engaged in discriminatory actions.117

The Trade Practices Act requires public agencies to include a list of foreign countries, which have been found to discriminate, in all invitations for bid, schedules, forms of proposal or purchase orders for "public works" as defined by the Trade Practices Act. Such a listing is kept by the Prothonotary of the Commonwealth Court in a Foreign Registry Docket.

Motor Vehicle Procurement Act - The Motor Vehicle Procurement Act requires public agencies to purchase, lease or rent only vehicles, which are manufactured in North America (including the United States and Canada, not including Mexico).[118]

Antibid-Rigging Act - The Antibid-Rigging Act makes it unlawful for any person to conspire, collude or combine with another in order to commit or attempt to commit "bid-rigging" involving a contract for the purchase of equipment, goods, services or materials or for construction or repair let or to be let by a government agency.[119]

"Bid-rigging" is defined as: "The concerted activity of two or more persons to determine in advance the winning bidder of a contract let or to be let for competitive bidding by a government agency. The term includes, but is not limited to any one or more of the following: (1) agreeing to sell items or services at the same price; (2) agreeing to submit identical bids; (3) agreeing to rotate bids; (4) agreeing to share profits with a contractor who does not submit the low bid; (5) submitting prearranged bids, agreed-upon higher or lower bids or other complementary bids; (6) agreeing to set up territories to restrict competition; (7) agreeing not to submit bids."[120]

Any person who violates the Antibid-Rigging Act commits a felony of the third degree and is subject to fines and imprisonment. In lieu of criminal prosecution, the Attorney General may bring an action for a civil penalty. In addition, the government agency entering into a contract which was subject to bid-rigging has a cause of action against those who participated in the prohibited activities.[121]

Any government agency may require as a part of an invitation to bid that each bidder submit a non-collusion affidavit in a form as prescribed by the Antibid-Rigging Act.[122]

Davis Bacon, Copeland and Contract Work Hours and Safety Standards Acts
These acts require the inclusion of specified contract terms in contracts utilizing federal funds. Although the acts apply to construction contracts, they also may apply to some non-construction contracts involving some construction aspects (e.g. purchase and install contracts).

Federal Acquisition Regulations ("FARs") set forth conditions under which the acts will or will not apply with respect to non-construction contracts involving some construction work:

> (b) *Non-construction contracts involving some construction* work. (1) The requirements of this subpart apply to construction work to be performed as part of non-construction contracts (supply, service, research and development, etc.) if --
>
> (i) The construction work is to be performed on a public building or public work
>
> (ii) The contract contains specific requirements for a substantial amount of construction work exceeding the monetary threshold for application of the Davis-Bacon Act (the word *substantial* relates to the type and quantity of construction work to be performed and not merely to the total value of construction work as compared to the total value of the contract); and

(iii) The construction work is physically or functionally separate from, and is capable of being performed on a segregated basis from, the other work required by the contract.

(2) The requirements of this subpart do not apply if:

(i) The construction work is incidental to the furnishing of supplies, equipment, or services (for example, the requirements do not apply to simple installation or alteration at a public building or public work that is incidental to furnishing supplies or equipment under a supply contract; however, if a substantial and segregable amount of construction, alteration, or repair is required, such as for installation of heavy generators or large refrigerator systems or for plant modification or rearrangement, the requirements of this subpart apply); or (ii) the construction work is so merged with non-construction work or so fragmented in terms of the locations or time spans in which it is to be performed, that it is not capable of being segregated as a separate contractual requirement.[123]

Conclusion

The procurement process for municipal entities in Pennsylvania is anything but uniform. It is a maze of enabling statutes for each type of municipal entity, each of which may differ slightly from the others. The process is then compounded by stand-alone statutes and a body of case law from the courts. As stated at the outset, in order to successfully navigate the procurement process, a three step process should be used: determine the nature of the procuring body; consult the proper enabling statute to determine the extent of the body's power to procure and the manner in which that power must be exercised; and investigate special statutory provisions to determine their applicability.

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38. *See Kratz v. City of Allentown,* 304 Pa. 51, 155 A. 116 (1931); *Wilson v. City of New Castle,* 301 Pa. 358, 152 A. 102 (1930); *Hibbs v. Armstrong,* 276 Pa. 24, 119 A. 727 (1923).
39. *Kratz, supra.*
40. *Pearlman v. City of Pittsburgh,* 304 Pa. 24, 155 A. 118 (1931).
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42. *Kierski v. Township of Robinson,* 810 A.2d 196 (Pa.Cmwlth. 2002); *but compare Moscatiello v. Whitehall Borough,* 848 A.2d 1071 (Pa.Cmwlth. 2004) (court found that the borough council could not rely on the bidder's performance of a previous contract in the borough to determine that the bidder was not responsible since none of the borough council members were in office during the previous contract; thus, the borough council members lacked personal knowledge that would alleviate their responsibility to investigate).
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XII. Municipal Borrowing

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State Law

In 1968, Pennsylvania, which previously had quite restrictive provisions regulating municipal borrowing, became one of the more liberal states by the adoption of an amendment to the Pennsylvania Constitution.[1] Under this provision, the amount of debt permitted without requiring a voter referendum was liberalized by the use of a formula based upon average income of the municipality or other unit during a specified period of years.

This constitutional provision was followed by the enactment of the Local Government Unit Debt Act of 1972, which, as later amended, was codified by the Act of December 19, 1996 (LGUDA).[2] LGUDA implemented the liberal constitutional provisions, and also closed several loopholes under which borrowing had been permitted without any statutory limits. Previously a municipality or school district could lease a capital asset from a municipal authority and pay lease-rental equal to the debt service on the authority's bonds without any state regulation. Under LGUDA, this type of borrowing is defined as "lease-rental debt" and is regulated. On the other hand, borrowing by a municipal authority, so long as it is not guaranteed or backed by a lease to a municipality, is not covered by LGUDA and remains free of restriction. Now most types of local government entities other than authorities are covered by LGUDA. This includes counties, school districts, and all the various classes of municipalities.[3]

Borrowing limits under LGUDA are computed by use of the "borrowing base," which is the arithmetic average of the revenues of the municipality over the preceding three years.[4] There are two separate limits. The first covers debt which is directly supported by the taxing power of the municipality, called non-electoral debt.[5] For most types of municipalities, the ceiling on non-electoral debt is 250 percent of the borrowing base.[6] Under the second limit, each unit is permitted to incur a combined total of non-electoral and lease-rental debt up to 350 percent of the borrowing base for most types of municipalities.[7] The combined limit for school districts was reduced in 1998 to 225 percent of the school district's borrowing base.[8]

Two types of borrowing by municipalities are excluded from these limits. One which is rarely used is debt approved by the voters, called electoral debt. The other exception, frequently used, is tax anticipation borrowing.[9] Tax anticipation borrowing is separately regulated by limiting its size to a proportion of the expected taxes for the current year. Tax anticipation debt also must be repaid by the end of the fiscal year in which it is incurred. Prior to issuing tax anticipation notes, a municipality must file certain papers with DCED, but no approval is required.

For all other types of borrowings to be legal, the issuer of the debt must file certain papers with DCED and obtain its approval of the proceedings prior to issuing the debt. Three main documents must be filed with DCED. The first is a certified copy of the bond or note ordinance enacted by the unit to authorize the issue (the "debt ordinance"), which must contain certain statutory provisions. The debt ordinance must be advertised one time at least three days prior to enactment, and another notice must also be published after enactment. LGUDA specifies the contents of these advertisements and provides that its requirements govern, notwithstanding any other statute.[10]

The second important document for DCED is the borrowing base certificate, which is a listing of revenue sources and amounts and certain exclusions for the preceding three years.

The third document is the debt statement consisting of a list of outstanding debt obligations, again with certain exclusions. Other required items include proofs of publication of the required advertisements.

Two types of borrowings may be excluded in computing the borrowing limits of a municipality for subsequent borrowings, even though, in order to incur this type of debt the municipality still must fulfill the filing requirements. The first type is "subsidized debt," meaning debt which is covered by a statutory subsidy or an agreement of subsidy by a state agency.[11] The state subsidies for debt incurred by school districts to finance school construction are covered by this provision, and subsidies on account of construction of sewage treatment plants may be eligible.

The second type of excludible debt is "self-liquidating debt," which is debt of a utility or other operation that imposes and collects charges for the use of its facilities or for providing a service. Self-liquidating debt may consist of non-electoral or lease rental debt.[12]

In both cases, exclusion is not automatic. It is accomplished by filing an application for exclusion and supporting documents. Upon approval by DCED, this debt may be excluded from the net debt of the municipality. Usually, exclusion proceedings are filed at the same time as the application for approval of the incurrence of debt.

If at any time a municipality's utility operation or subsidized facility ceases to become fully self-supporting or the subsidy is reduced, then the amount of debt which could not be serviced because the shortfall would become subject to the debt limitation. Thus, each time an application for approval of new debt is filed, the municipality must certify that all of its outstanding debt which had previously been excluded, is still entitled to full exclusion as self-supporting or subsidized.[13]

Because of certain appeal rights, a filing will never be approved by DCED until it has been on file for 15 days after the date of the original submission and 5 days after filing of any corrected papers.[14] If DCED does not approve a filing or take other action within 20 days after the filing, it is deemed approved.[15] Usually, DCED seems to take most of the 20 days. The entire process, therefore, may take a month or more from the time the first advertisement is sent to the newspaper until DCED approval is received.

A simplified procedure is available for small borrowings for capital purposes defined as less than under $150,000 or 30 percent of the non-electoral debt limit and maturing in five years or less.[16]

Federal Tax Law

While the state law regulating borrowing is relatively straightforward, the federal government has produced an amazingly complex series of regulations under Section 103 and Section 148 of the Internal Revenue Code of 1986 (IRC) and prior laws. There are a number of requirements that must be met in order for local debt initially to be tax-exempt. In addition, a number of continuing requirements must be met after the issue, in order for the issuer to avoid losing the tax exemption. The complexity of these regulations results from the continuing battle between the Internal Revenue Service (IRS) and ingenious advisors to issuers who developed schemes for profiting from the issuance of tax-exempt debt. The original scheme was to borrow money at a tax-exempt rate and then invest the proceeds, for an unlimited time, in taxable obligations of the U.S. Government, which produce income at a higher yield to the issuer than it paid on its tax-exempt bonds. This is "arbitrage," and the debt is considered an "arbitrage bond," the interest of which is not exempt from Federal taxes.

In general, bonds may receive a tax-exempt status if they are issued for a recognized governmental purpose, are not issued earlier than needed for use toward the intended purpose, are not issued in excessive amounts, and 85 percent of the proceeds are expected to be spent within 3 years after the date of issuance. At the closing, the issuer must execute an "arbitrage certificate" about the issue, making various representations and agreeing to various requirements. This is a complicated document, prepared by bond counsel, but the solicitor should review it to make certain that the recited facts agree with his information.

Promptly after the closing, an information return on IRS Form 8038-G must be filed with the IRS. There are also restrictions on the size of reserve funds and limits of various kinds on refunding bonds, which are beyond the scope of this discussion.

The IRC gives an additional tax advantage to financial institutions which purchase bonds of a qualified small issuer.[17]

These bonds, limited to $10,000,000 or less, are called "bank qualified," and they can be sold with a slightly lower interest rate than regular tax-exempt bonds. In designating bonds for this category, the issuer must agree that it will not designate an aggregate of more than $10,000,000 of such bonds in the same calendar year as the issue.

Even though arbitrage profits may be earned on bond proceeds pending expenditure and on certain reserve funds, without loss of tax exemption, the IRC requires that any arbitrage profits be returned to the U.S. Treasury every 5 years. These so-called arbitrage rebate provisions are complicated, but there are various exemptions which may apply. One of the most important of these exemptions relates to issuers that meet certain structural requirements and also agree to issue less than an aggregate of $5,000,000 of bonds in the calendar year of the issue which is to be exempted.[18] There are several other exceptions that may apply or limit the need to rebate arbitrage to the IRS.

This field is so complicated that it requires a specialized attorney to provide complete and accurate advice.

Federal Securities Law

Another set of Federal laws regulates local borrowing, although to a lesser extent, namely, the Federal securities laws. Bonds of local government entities, being exempt from taxation, are also exempted from the securities registration requirements of the Securities Act of 1933. However, the "anti-fraud" Section 10(b)(5) of the Securities and Exchange Act of 1934 (Exchange Act) and Rule 10(b)(5) of the SEC does apply to municipal bonds. The term "fraud" has been broadly defined. Basically, the omission of a fact needed in order to make the disclosure document (the "official statement") a fair presentation, or the misrepresentation of any fact in the official statement, constitutes fraud if is "material" in nature.

The SEC has established certain regulations for municipal bond dealers, which indirectly impose obligations on municipal issuers. These apply directly only to underwriters, because the SEC is unable to directly regulate issuers of municipal bonds. Under one of these regulations, the underwriter must receive at the bond sale and deliver to its purchasers, a preliminary official statement approved by the issuer as being "substantially final."[19] Later, within a specified period after the sale the underwriter must send a final Official Statement to the purchasers and file a copy thereof in Electronic Municipal Market Access System (EMMA), which serves as the official, centralized electronic repository for all municipal securities disclosure documents. EMMA, operated by the Municipal Securities Rulemaking Board (MSRB), collects municipal securities offering documents, continuing disclosure documents, real-time trade data, and interest rate information for auction rate securities and variable rate demand obligations, and makes them available for free on www.emma.msrb.org.

Because of these disclosure standards, the solicitor must remember to inquire from the issuer if there are any material adverse economic factors surrounding the community, or relating to the municipal government itself or the project being financed. "Material" items must be disclosed in the official statement. These include major litigation, major environmental problems, underfunded pensions, major employee or union problems or other factors which could affect the ability of the issuer to repay the debt.

Rule 15c2-12 also prohibits underwriters from underwriting a new issue of bonds unless they have received a continuing disclosure agreement from the issuer prior to the date of issue. When bonds are guaranteed by a municipal entity, that entity becomes an "obligated person" and must also sign continuing disclosure agreement. In such agreements, the "obligated persons" all agree to provide certain periodic reports annually as long as the bonds are outstanding. Two types of information must be provided, financial information and operating data. This must be furnished within a specified period of time after the end of the issuer's fiscal year. It must be filed with EMMA. The obligation is modified if all "obligated parties" on an issue have less than $10 million in bonds outstanding on a combined basis. In that case, the annual information need not be filed, but only be made available to any person who requests it. The obligated parties must also agree to notify promptly EMMA if any one of certain specified types of events of defaults or other major transactions occur. Rule 15c2-12 originally required a material event notice of an adverse tax opinion or event affecting the tax-exempt status of the bond, if material. However, Rule 15c2-12 was amended for bonds issued after December 1, 2010, requiring a material event notice for events affecting the tax-exempt status of the security, whether or not material.

Issuers should be mindful of the need to timely file the financial and operating data set forth in their continuing disclosure agreements and implement procedures to ensure such disclosure. Rule 15c2-12 generally requires that any final official statement prepared in connection with a primary offering of municipal securities contain a description of any instances in the previous five years in which the issuer failed to comply, in all material respects, with any previous commitment to provide such continuing disclosure. The SEC may file enforcement actions under either Section 17(a) of the Securities Act of 1933 (Securities Act), and/or Section 10(b) of the Exchange Act against municipal issuers for inaccurately stating in final official statements that they have substantially complied with their prior continuing disclosure obligations. In such instances, underwriters for these bond offerings may also have violated the anti-fraud provisions to the extent they failed to exercise adequate due diligence in determining whether issuers have complied with such obligations, and as a result, failed to form a reasonable basis for believing the truthfulness of a key representation in the issuer's official statement.

Under the SEC's Municipalities Continuing Disclosure Cooperation Initiative (MCDC Initiative), the SEC encouraged municipal issuers who may have made materially inaccurate statements in a final official statement regarding their prior compliance with their continuing obligations as described in Rule 15c2-12 to consider self-reporting to the SEC. Those issuers who did so by December 2014 may be afforded with favorable settlement terms by the SEC. As of this time, the SEC has not indicated its intention to renew or extend the MCDC Initiative.

Solicitors should help to educate their clients on the importance of the continuing disclosure requirement, for various reasons. Failure to comply will not create an event of default under the bond issue, but will subject the issuer to various other penalties, including a requirement that in subsequent issues the official statement must disclose the situation if the issuer has not been complying with its continuing disclosure obligations in connection with prior issues.

General Advice

The solicitor should consider himself or herself a full partner in the borrowing procedures, and therefore should review all draft documents as well as participate in all meetings relating to the financing. In some instances he or she will be asked for a written opinion at the closing. Sometimes, particularly in tax anticipation borrowings, a bank or other note purchaser may present the solicitor with a series of document forms, including a form of his or her opinion.

Solicitors should not give an opinion on a municipal borrowing unless they are certain that they understand the nature of the obligation created by a bond opinion, as well as the requirements of State and Federal law for the issue. In most issues, of course, the underwriter will suggest, or the solicitor may recommend, the retention of a specialized law firm as "bond counsel." Underwriters will usually require that bond counsel be retained to give the bond opinion and that it be a firm that is listed in "The Bond Buyer's Municipal Marketplace," the "red book."

Additional information concerning municipal borrowing may be obtained by reviewing Fundamentals of Municipal Borrowing, from the Pennsylvania Bar Institute, 1992.

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2. 53 Pa.C.S. §§ 8001-8271.
3. 53 Pa.C.S. § 8002(c) (see definition of "local government unit").
4. 53 Pa.C.S. § 8002(c).
5. 53 Pa.C.S. § 8002(a).
6. 53 Pa.C.S. § 8022(a).
7. 53 Pa.C.S. § 8022(b).
8. 53 Pa.C.S. § 8022(f), added by Act 50 of 1998.
9. 53 Pa.C.S. §§ 8121-8128.
10. 53 Pa.C.S. § 8003.
11. 53 Pa.C.S. § 8024.
12. 53 Pa.C.S. §§ 8025, 8026.
13. 53 Pa.C.S. § 8110(b).

14. 53 Pa.C.S. § 8211(b).
15. 53 Pa.C.S. § 8206.
16. 53 Pa.C.S. § 8109.
17. Internal Revenue Code, § 265(b)(3).
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XIII. Eminent Domain

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The Power

The power of eminent domain, which refers to the government's power to take private property for public use, is statutory and is strictly construed. This governmental power is constrained by the United States Constitution (Fifth Amendment) and is applicable to the states (Fourteenth Amendment). The Pennsylvania Constitution has its own takings clause (Article I, Section 10). To the extent not constrained by constitutional requirements, the power of the Commonwealth to exercise eminent domain is an inherent attribute of sovereignty, but to be called into operation there must legislative authority.[1] Similarly, any entity other than the commonwealth must have express statutory authority to condemn. Once the right of eminent domain is vested in a municipality, however, the municipality has broad discretion and only actions that are in bad faith, arbitrary, contrary to statute, or contrary to the constitution may be successfully challenged.[2] Furthermore, "a taking does not lose its public character merely because there may exist in the operation some feature of private gain, for if the public good is enhanced it is immaterial that a private interest may be benefited," but to qualify as a public taking the public must be "the primary paramount beneficiary."[3] Other than the commonwealth, statutory power of eminent domain is given to: counties,[4] cities,[5] boroughs,[6] townships,[7] municipal authorities,[8] housing authorities,[9] redevelopment authorities,[10] school districts[11] and parking authorities.[12]

Land may be taken for present needs as well as for needs projected in the "foreseeable future."[13] Other than municipal authorities,[14] the empowered entity usually cannot exercise eminent domain outside of its boundaries. However, any two or more municipalities may cooperate and jointly condemn land, using a blend of their respective powers.[15]

As a basic rule, private and public property, except commonwealth property, may be taken by an entity that enjoys the statutory authority to condemn. There are many statutory exceptions, however, and the pertinent statutes should be consulted carefully in every case. Typically the exception is limited to certain types of condemnors. For example, a school board may not take the property of a religious association, institution of learning, burial ground or hospital association. Cemeteries are largely exempt. The listed exemptions seem to be limited to various types of property owned and used for public services by government or quasi-government (i.e., rate controlled) entities. Although land that is already public is not per se unavailable, still an impediment may be raised. There is in general a balancing test for attempts to condemn for public use property that already has a public use.[16] The Historical Preservation Act should also be consulted for its potentially damaging effect on any taking.[17]

The condemning entity does not enjoy any statutory waiver of local zoning restrictions.[18] However, with the right of condemnation comes the right to enter property not yet condemned "in order to make studies, surveys, tests, soundings and appraisals."[19] All that is required is: a) the property is land or an improvement that could potentially be condemned; b) 10 days prior notice is given; and c) any actual damages caused to the property are paid for by the potential condemnor.

Public vs. Private

An important recurring issue is how to determine when private benefit outweighs public benefit such that the taking is no longer a "public use" taking and so is prohibited by the constitution. This arises primarily in one of two contexts: public involvement in economic development and/or blight removal, and private invocation of Pennsylvania's Private Road Act (PRA).[20] Amendments to the Eminent Domain Code adopted in 2006 have

significantly resolved many facets of the issue. These amendments, sometimes referred to as the "Chapter Two" amendments, were collectively entitled the "Property Rights Protection Act," and they passed both Senate and House unanimously.

The Property Rights Protection Act (PRPA) was a direct response to the controversial United States Supreme Court decision in *Kelo v. City of New London,* which affirmed New London's proposed exercise of eminent domain for the purpose of revitalizing ninety acres of waterfront properties.[21] The decision established a broad concept of "public purpose" to include redevelopmental takings of non-blighted properties.[22] Under *Kelo*, governments under the guise of economic development or redevelopment could legitimately force private property to be turned over to others, "preferred" private owners, and could force owners of unblighted properties to sell and move away merely because they were in the vicinity of blighted property. The *Kelo* court affirmed such actions because economic development was considered a legitimate aim of local and state government,[23] and the use of private ownership and private gain merely a byproduct. *Kelo* caused the Pennsylvania General Assembly to consider what unwanted consequences its citizens might endure in the name of redevelopment or other "public" aims. Pennsylvania in 2005 already had a fairly broad legislative definition of blight and blight removal procedures, under its Urban Redevelopment Law[24] and the PRPA repealed that law to the extent it was inconsistent with PRPA's new, more restrictive provisions and definitions. The PRPA prohibits the taking of property "for private enterprise," except in the case of carefully defined exceptions.[25]

As of the date of this writing, the Pennsylvania appellate courts are struggling with how to apply eminent domain principles and restrictions to takings under the PRA. This should not pertain to municipal solicitor work, but it is curious and the Eminent Domain Code is apparently involved. The PRA essentially allows the owner of a private, practically landlocked property to "condemn" an access easement up to 25 feet wide across other private property in order to connect to a public road. It can only be invoked by a private party, but the procedures are similar to those in the Eminent Domain Code (payment of just compensation, use of a Board of View, etc.). The struggle began when in 2010 the Pennsylvania Supreme Court in a 4-3 decision remanded a PRA case to the Commonwealth Court to ascertain if the use of the PRA in that particular case did have the public, not the benefited landowner, as the "primary and paramount beneficiary.[26] The majority suggested, e.g., that if the land-locking was caused by a public condemnation such as creation of a new road dividing the property, and if relief through the PRA was considered then and was close in time, then it might quality as a sufficiently public purpose taking. The majority expressly rejected the traditional arguments about the public benefit of not having inaccessible tracts within the municipality. The *O'Reilly* case began, however, prior to the PRPA amendments to the Eminent Domain Code. While defining "eminent domain as the power of the commonwealth to take private property, for public use," the PRPA also included in the definition of "condemnor" "a private entity…authorized by law to exercise the power of eminent domain," and it specifically adopted as Pennsylvania's position that it was a "public use" to condemn property for private ownership if it was to be "used for any road," or "to be acquired to provide access to a public thoroughfare for a property which would be otherwise inaccessible as the result of the use of eminent domain."[27] The Commonwealth Court has consolidated several post-*O'Reilly* cases and heard arguments en banc but as of this writing has not ruled on them. One member of that court suggested they were "stuck with" the *O'Reilly II* analysis from the Supreme Court, which equated private condemnation under the PRA with governmental condemnation under the Eminent Domain Code. Certainly, individuals have constitutional safeguards against the powers and disproportionate strength of government that do not pertain to a neighbor to neighbor conflict, but that distinction was nowhere addressed in *O'Reilly II.*

Establishing the Taking

Once a project is identified and a site selected (typically with the help of pre-condemnation inspections), the issues are largely procedural rather than substantive. The Eminent Domain Code proceeds through various procedural milestones. The two exceptions are: 1) proceedings to determine if a taking has validity occurred (either an alleged "de facto" condemnee or a named condemnee may call for this determination) and 2) the issue of "just compensation" to the condemnee, along with the value of the various ancillary damages available which the Eminent Domain Code defines in detail.

The decision to condemn can be made by ordinance or by resolution; if by resolution, no prior notice or advertising is require.[28] Filing a "Declaration of Taking" begins the condemnation. The Eminent Domain Code details where to

file,[29] the contents required,[30] what notice and service of notice is required,[31] and what involvement other interest holders, such as mortgagees, should have.[32]

The date the declaration of taking is filed establishes the price,[33] but the actual payment of "just compensation" is postponed until either: 1) the condemnor decides to begin actual possession, or 2) the condemnee offers possession. The condemnee cannot offer possession (and thereby demand payment of at least the condemnor's estimated just compensation) until sixty days has passed from the date of the declaration of taking being filed, without the condemnor making payment or otherwise asserting possession rights. In some circumstances, the condemnor may be "deemed" to have taken possession even if this was not yet intended.[34]

Section 522 of the Eminent Domain Code provides for payment of the estimated just compensation into court in certain circumstances. If the security posted is found to be insufficient, or if the estimated compensation paid to the condemnee or into court is found to have been insufficient, then delay damages will accrue. The Eminent Domain Code at Section 713 provides for delay damages at a defined prime rate, plus one percent.[35]

As noted above, there are really just two substantive issues to be litigated under the Eminent Domain Code. The first is whether the taking is within the condemning entity's statutory and/or constitutional authority, and the second is how much "just compensation," or other damage enhancements, is due to the condemnee. The Eminent Domain Code attempts to ensure a prompt process for the first issue. All objections to the legal authority for the taking must be raised by the condemnee within the first thirty days after service of notice of condemnation or they are too late (unless the court extends the time for filing). The process is to state the objections as formal "preliminary objections," and notice of the process is a required part of the statutory "Notice of Condemnation."[31]

"Just Compensation" and Ancillary Damages

The Eminent Domain Code includes a chapter (Chapter 7) on "Just Compensation and Measure of Damages." While various qualifications and ancillary damages are addressed throughout the chapter, the definition of "just compensation" as found in Section 702(a) is as follows: "Just compensation shall consist of the difference between the fair market value of the condemnee's entire property interest immediately before the condemnation and as unaffected thereby and the fair market value of his property interest remaining immediately after the condemnation and as affected by the condemnation."

The just condemnation definition is built on the concept of "fair market value." Section 703 defines fair market value, but is essentially open-ended in describing what factors may be taken into consideration when determining it. Essentially it is "the price which would be agreed to by a willing and informed seller and buyer." Typically determination of fair market value is arrived at after consideration of one or more of the following appraisal approaches: market approach, income approach ("capitalization basis"), and replacement cost approach. These three approaches are in fact mentioned in Section 1105, a section addressing expert testimony.

There is significant appellate case law on fair market value. Fair market value depends significantly on what the condemned tract has as its "highest and best use" for valuation purposes. Much case law originates with a condemnee's effort to prove that the condemned tract has a "highest and best use" other than its present use.[36] Basically, the condemnee is required to prove that the nonexistent but potential use is: 1) physically possible; 2) legally permissible; 3) maximally productive; and 4) financially feasible. Mere speculation is insufficient to prove these elements.[37]

There are certain ancillary damages mentioned in the Eminent Domain Code, which provides protection for the economic position of a condemnee by providing for repayment of the costs of business relocation and removal of machinery, equipment and fixtures. The courts have created the "assembled economic unit doctrine" to further that legislatively-intended protection where the machinery, equipment, and/or tools cannot practically be removed and relocated by the owner; this doctrine supplements the real estate value by including in that sum the fair market value of these items.[38] The Eminent Domain Code also covers relocation expenses, transfer taxes and other closing costs, limited reimbursement of the condemnee's professional fees, increased mortgage costs and delay damages.[39] Reimbursement by the condemnor of the condemnee's professional fees are as follows: 1) all reasonable appraisal, attorney and engineering fees "and other costs and expenses" if preliminary objections

terminate the condemnation (Section 306(g)); 2) the same full reimbursements if the condemnor "relinquishes," or declines to pursue possession of, condemned property (Section 308(d)); 3) the same full reimbursements if the condemnee succeeds in a "de facto taking" claim (the condemnee files for just compensation where the condemnor had not filed a condemnation, Section 709); and 4) in any other case where there has been a taking, up to $4,000.00 total per property for costs and expenses, regardless of right, title or interest, except where the taking is for an easement for underground piping for water or sewer infrastructure, in which case the total is limited to $1,000 (Section 710, as amended in 2014). There is also a section entitled "consequential damages," but this section really only provides for damages to the owner of property abutting an improvement area in three very specific circumstances: 1) when damage results from a change in the grade of a road or highway; 2) when damage occurs from a permanent interference with access; and 3) when there is injury to surface support.[40] Note that only permanent interference with access is included; while temporary interference that causes a property owner to go out of business altogether may be compensable, in general the Eminent Domain Code and the courts continue to find temporary access difficulties to be noncompensable.[41]

Not all takings generate damages. Some generate benefits. Section 706 addresses the sometimes perplexing mandate found in Section 702 that the value of the subject property "immediately after such condemnation and as unaffected thereby" be compared to the value immediately before "and as unaffected thereby." Section 706 distinguishes between general community benefits and special, property-specific benefits. The intent is to be realistic about the effects of the condemnation that actually occurs, but not to incorporate the temporary, more speculative effect on value of imminence of a project, such as the temporary plunge in values that may occur as a result of fear and uncertainty over a planned, perhaps unpopular, project.

Resolving Dispute over Compensation

At or before gaining possession, the condemnor will have paid to the condemnee, or, if necessary, to the court an amount representing "just compensation." Disputes over damages are not supposed to hold up the condemnor's use of the land. The Eminent Domain Code is an exclusive remedy, and so once preliminary objections to the taking itself are waived or resolved in favor of the condemnor, the condemnor should be able to proceed. The statute of limitations for calling for a Board of View appears to be the statutory six-year "catch-all."[42]

The Board of View

The first step is for an aggrieved party to file a petition for the appointment of viewers.[43] Either the condemnor or condemnee can file. This includes a landowner claiming to be the victim of de facto condemnation. The parties, by filed agreement, may waive the Board of View altogether, and proceed directly to court.[44] The court shall "promptly" appoint three viewers, one of whom shall be an attorney and chairman of the board. The Eminent Domain Code provides various specifics on notice, required viewing of the premises, etc., all found in the Eminent Domain Code, Chapter 5. Any objection to the petition must be filed within twenty days, and, again, is to be "promptly" resolved by the court.[45] The viewers may hear claims for removal expenses, business dislocation damages and moving expenses either separately or together with the just compensation issue.[46] There is a right to subpoena.[47] The Eminent Domain Code provides for appointment of a trustee ad litem or a guardian ad litem if appropriate.[48] In "de facto" condemnations the burden of proof is clearly on the landowner; in filed condemnations the burden is not as clear.[49] The board is not bound by formal rules of evidence.[50] According to the Eminent Domain Code, the condemnor "shall" present expert testimony on damages; the condemnee has no such requirements.[51]

The board must issue a concise report, the requirements of which are found in Section 512. The report is to be filed within 30 days of the final hearing according to Section 514, and some prior notice to the parties or attorneys, intended to facilitate pre-filing corrections, is also required by the Eminent Domain Code.

Appeal to Court

The Eminent Domain Code addresses the procedure and substantive rules applied to an appeal from the Board of View. By legislative fiat, the Board of View's report, and its award, are not admissible at court trial.[52] Evidence of a property's tax assessment value is also precluded.[53] The court is to resolve preliminarily all issues raised other than

the amount of damages due, and this resolution may include confirming, modifying or changing the report, remanding it back to the same viewers, or remanding it to new viewers.[54] The issue of "amount of the award," i.e., the damages due, is of course the most common topic of appeal, and for this the appellant (who may be either a condemnor or condemnee) may elect either jury or non-jury determination.

The Eminent Domain Code provides that the condemnee shall be the plaintiff and the condemnor the defendant, regardless of which filed the appeal.[55] Either party may compel a viewing of the property by the fact finder.[56] Where the court has viewed the property, it may disregard expert testimony in reaching a valuation figure.[57] New experts are allowed, so long as notice of the expert's name, highest and best use opinion, and valuation opinion are disclosed to the other party at least ten days prior to hearing. Even if a condemnor had failed to produce an expert at the Board of View hearing, that condemnor may appeal to court and, with the requisite ten-day notice, present expert valuation evidence at the court trial.[58] The court's determination of damages may be valid even if it surpasses the Board of View's determination and the opinions of all the experts who testified.[59]

The court's disposition of objections to the Board of View's determinations, other than the amount of the award, by confirming, modifying or changing the report as part of its statutory duty to preliminarily determine such objections, constitutes "a final order."[60] The court's determination of damages made after a jury or non-jury trial, likewise constitutes a final order, and may be appealed to the Commonwealth Court.

Post-trial motions are required for jury trials held under the Eminent Domain Code, but not for non-jury trials.[61] The scope of review of the appellate court "is limited to a determination of whether the trial court abused its discretion, whether an error of law was committed, or whether the findings and conclusions are supported by substantial evidence."[62]

De Facto and Regulatory Takings

A "de facto" taking, or "inverse condemnation," is one where a governmental entity, although clothed with the power of eminent domain, has, without filing a taking, nevertheless engaged in conduct which deprives any property owner of the beneficial use of their property. The suggested condemnor must have the power to condemn; there must be exceptional circumstances; and the damage to the condemnee must be the immediate, necessary and unavoidable consequence of the condemnor's powers.[63] Pre-condemnation publicity is generally not enough to establish a taking, even if use of the property is affected, but complete failure of a business due to pre-condemnation publicity might be sufficient.[64] "De facto taking" should not be confused with negligence or other common-law trespasses, as they are mutually exclusive; only damage incidental to or the result of the eminent domain power is properly processed under the Eminent Domain Code.[65]

"Regulatory taking" is a concept that originates not in the statute but in the United States Constitution (" ...nor shall private property be taken for public use without just compensation"), made applicable to the states by the Fourteenth Amendment. This is a complex area of law. Generally speaking, there is no compensable taking "when interference arises from some public program, adjusting the benefits and burdens of economic life to promote the common good,"[66] and even regulatory deprivation of all economically valuable use of property is non-compensable if the challenged limitation was possible under the state's common law nuisance provisions.[67] If a regulation still allows some viable use of the property, and is substantially related to the proper public purpose it purports to serve, there should be no compensation due.[68]

Temporary regulatory takings are theoretically possible.[69] There was a bit of a scare in Pennsylvania when a county court, and then the Commonwealth Court, allowed the convening of a Board of View to determine damages occasioned by the inability to operate a quarry while the landowner successfully challenged the ordinance which precluded that use; the Pennsylvania Supreme Court, however, reversed and confirmed that is not the type of damage compensable as a government taking.[70] Compensable regulatory takings remain rare.

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33. 26 Pa.C.S. § 702.
34. *Hughes v. Commonwealth, Dept. of Transp.,* 523 A.2d 747, 514 Pa. 300 (1987) (holding that condemnor was deemed to have taken possession (i.e., deprived the landowner of his use) where the land was farmed and the condemnor, by not giving a time frame for when condemnor would take possession, had thereby "forced the condemnees to cease all farming operations on the condemned portions of their farms for fear that they would lose the invested planting once PennDOT assumed possession").
35. *Ridley Tp. v. Forde,* 459 A.2d 449, 73 Pa.Cmwlth. 611 (1983); *Hughes v. Commonwealth, Dept. of Transp.,* 523 A.2d 747, 514 Pa. 300 (1987). The former 6% was suggested to be unconstitutional, and so the prime rate formula was added in 2006.
36. See e.g. 16 A.L.R.2d 1113, 26 A.L.R.3d 780, and 7 A.L.R.2d 364.
37. For case law on "highest and best use" disputes, s*ee Snyder v. Commonwealth,* 192 A.2d 650, 412 Pa. 15 (1963); *Gwynedd Properties, Inc. v. Lower Gwynedd Tp.,* 635 A.2d 714, 160 Pa.Cmwlth. 598 (1993), *appeal denied,* 646 A.2d 1182, 538 Pa. 628 (1994); *Stoner v. Metropolitan Edison Co.,* 266 A.2d 718, 439 Pa. 333 (1970); *Atherholt v. Interstate Energy Co.,* 386 A.2d 167, 35 Pa.Cmwlth. 289 (1978); *Hughesville-Wolf Tp. Joint Mun. Authority v. Fry,* 669 A.2d 481 (Pa.Cmwlth. 1995); *Felix v. Baldwin-Whitehall School Dist.,* 289 A.2d 788, 5 Pa.Cmwlth. 183 (1972); *Rothman v. Commonwealth,* 178 A.2d 605, 406 Pa.Cmwlth. 376 (1962).
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41. *Friedman v. City of Philadelphia,* 503 A.2d 1110, 94 Pa.Cmwlth. 572 (1986); *Truck Terminal Realty Co. v. Commonwealth, Dept. of Transp.,* 403 A.2d 986, 486 Pa. 16 (1979).
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44. 26 Pa.C.S. § 520(a).
45. 26 Pa.C.S. § 504.
46. 26 Pa.C.S. § 507.
47. 26 Pa.C.S. § 510.
48. 26 Pa.C.S. § 508.
49. *Morrissey v. Commonwealth, Dept. of Highways,* 225 A.2d 895, 424 Pa. 87 (1961); *Redevelopment Authority of City of Philadelphia v. United Novelty & Premium Co., Inc.,* 314 A.2d 553, 11 Pa.Cmwlth. 216 (1973); *Kuhn v. Authority,* 18 D&C.3d 118 (1981).
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51. 26 Pa.C.S. § 1102; *Hoffman v. Commonwealth,* 221 A.2d 315, 442 Pa. 144 (1996); *Cohen v. Redevelopment Authority of City of Philadelphia,* 315 A.2d 372, 12 Pa.Cmwlth. 125 (1974).
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54. 26 Pa.C.S. § 518.
55. 26 Pa.C.S. § 518(4).
56. 26 Pa.C.S. § 1103.
57. *Hughesville-Wolf Tp. Joint Municipal Authority v. Fry,* 669 A.2d 481 (Pa.Cmwlth. 1995); *Croop v. Commonwealth, Dept. of Transp.,* 393 A.2d 41, 38 Pa.Cmwlth. 305 (1978).
58. *Goddard v. Commonwealth, Dept. of Transp.,* 358 A.2d 436, 25 Pa.Cmwlth. 112 (1976).
59. *Croop v. Commonwealth, Dept. of Transp.* 393 A.2d 842, 38 Pa.Cmwlth. 305 (1978).
60. 26 Pa.C.S. § 518(2).
61. *Bucks County Water and Sewer Authority v. Rawlings,* 556 A.2d 357, 129 Pa.Cmwlth 511 (1989); *Borough of Jefferson v. Bracco,* 536 A.2d 868, 133 Pa.Cmwlth. 223 (1988).
62. *Hughesville-Wolf Tp. Joint Mun. Authority v. Fry,* 669 A.2d 481 (Pa.Cmwlth. 1995); *Waite Appeal,* 641 A.2d 25, 63 Pa.Cmwlth. 283 (1994), *appeal denied,* 651 A.2d 543, 539 Pa. 657.
63. *Reidel v. County of Allegheny,* 633 A.2d 1325, 159 Pa.Cmwlth. 583 (1993) (flights of aircraft overhead; held, no prima facie case); *Stein v. City of Philadelphia,* 557 A.2d 1137, 125 Pa.Cmwlth. 225 (1989) (de facto taking occurred where demolition of neighboring row house weakened the foundation and common support wall of the complaining de facto condemnee); *see also Commonwealth, Dept. of Transp. v. Myers,* 522 A.2d 112, 104 Pa.Cmwlth. 356 (1987) (de facto taking has occurred where widening of public road results in adjoining property's basement flooding); *Visco v. Commonwealth, Dept. of Transp.,* 498 A.2d 984, 92 Pa.Cmwlth. 102 (1985), *citing Miller Appeal,* 423 A.2d 1354, 55 Pa.Cmwlth. 612 (1980) (authority advised landlord/owner not to repair roof, as condemnation was imminent; held, no de facto taking, as roof problem, not authority, caused the lack of tenants after authority's advice).
64. *In re Petition of 1301 Filbert Ltd. Partnership for Appointment of Viewers,* 441 A.2d 1345, 64 Pa.Cmwlth. 605 (1982) (four years of limited access to hotel, and loss of hotel's financing due to imminence of such circumstances held to be still insufficient to establish a de facto taking); *In re City of Allentown,* 557 A.2d 1147, 125 Pa.Cmwlth. 290 (1989); *Friedman v. City of Philadelphia,* 503 A.2d 1110, 94 Pa.Cmwlth. 572 (1986) (complete failure of the business use is more than a temporary inconvenience).
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66. *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419, 73 L.Ed.2d 868 (1982), *quoting Penn Central Transp. v. New York City,* 438 U.S. 104, 124 (1978).
67. *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 120 L.Ed.2d 798 (1992); *Keystone Bituminous Coal Ass'n v. Benedictus,* 480 U.S. 470, 94 L.Ed.2d 472 (1987); *Agins v. Tiburon,* 447 U.S. 255, 65 L.Ed.2d 106 (1980); *Jones v. Zoning Hearing Bd. of Town of McCandless,* 134 Pa.Cmwlth. 435 (1990).
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70. *Miller and Sons Paving, Inc. v. Plumstead Tp.,* 719 A.2d 19 (Pa.Cmwlth. 1998).

XIV. Municipal Investments

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The investment of monies by local governments is strictly governed by the municipal code under which they are organized. A review of the provisions set forth in the applicable code will provide each practitioner with a basic understanding of the limitations established by state law.

Invest using a sound business practice.
Each of the provisions governing the investment of monies contains similar goals for local governments and encourages sound business practices. The introductory paragraph to the investment provisions of the County Code (Third through Eighth Classes) is a perfect example. Section 1706 of the County Code, 16 P.S. § 1706(a), provides that "the county ... shall invest such moneys consistent with sound business practice, subject, however, to the exercise of that degree of judgment, skill and care under the circumstances then prevailing which persons of prudence, discretion and intelligence, who are familiar with such matters, exercise in the management of their own affairs not in regard to speculation, but in regard to the permanent disposition of the funds, considering the probable income to be derived therefrom as well as the probable safety of their capital."

Many of the investment statutes require that the governing body develop an investment program. Such a program can set forth general guidelines which the local government's finance officer should follow in making investments. A program that follows the basic guidance established in the County Code set forth above will provide a sound framework for the municipality. It is important for a local government's finance officer to understand each investment, including the expected return and the risks involved, and to select traditional investments that are geared toward the preservation and maintenance of capital.

Citations to applicable code provisions
The applicable code provisions for the investment of monies for each type of municipal entity are as follows:

Townships of the First Class – 53 P.S. § 56705.1

Townships of the Second Class – 53 P.S. § 68204

Boroughs – 8 Pa.C.S. § 1316

School Districts – 24 P.S. § 4-440.1

Municipality Authorities – 53 Pa.C.S. § 5611

Cities of the First and Second Class – 53 P.S. § 5410

Cities of the Third Class – 53 P.S. § 36804.1

Counties of the Second Class – 16 P.S. § 4964

Counties of the Third through Eighth Classes – 16 P.S. § 1706.

Investment of bond proceeds.
The investment of bond proceeds by local governments (except municipal authorities) is governed by the Local Government Unit Debt Act, 53 Pa.C.S. § 8224 (LGUDA). The investment of bond proceeds by a municipal authority, while not governed by LGUDA, may be limited by the investment provisions contained in the applicable financing documents pursuant to which the bonds or notes have been issued.

LGUDA provides that any moneys in sinking funds and other funds may be deposited in time accounts or certificates of deposit of any bank or bank and trust company, accounts with any savings bank or deposits in savings and loan associations. Moneys required for prompt expenditure shall be held in demand deposits. To the extent that the deposits or accounts are insured by the Federal Deposit Insurance Corporation (FDIC), they need not be secured; otherwise, the deposits must be secured as public deposits. LGUDA further provides that any moneys in funds or accounts not required for prompt expenditure may be invested in any securities in which the commonwealth may, at the time of investment, invest moneys of the commonwealth not required for prompt expenditure, subject to any stricter requirements in any contract with the holders of bonds or notes for which the particular fund or account was created or maintained.

The investment of bond proceeds may further be limited by the provisions of the Internal Revenue Code of 1986, as amended, and the regulations promulgated thereunder. Consultation with a qualified bond counsel firm is prudent before investing any bond proceeds.

Act 72 Collateralization
In 1971, Pennsylvania enacted Act 72 to enable financial institutions to pledge collateral on a pooled basis to secure public deposits in excess of insurance limits provided by the FDIC. Act 72 provides a standardized procedure for pledging assets to secure deposits of public funds and requires that the total amount of assets pledged must be at least equal to the total amount of such assets required to secure all of the public deposits of the depository. Typically the assets pledged consist of United States Treasury obligations, but can include municipal bonds and other securities. In lieu of pledged assets, Act 72 permits the financial institution to substitute an irrevocable letter of credit issued by a Federal Home Loan Bank.

A bank's compliance with Act 72 remains a mystery to many municipalities, but it important to note that, upon request of the appropriate municipal official, Act 72 requires that the financial institution provide a report to the municipality of the amount of the funds of such public body on deposit with it, the total amount of public funds on deposit with it and the total amount and valuation of assets pledged to secure such public deposits. Such reports must be provided to the municipality or the accountant or auditor designated by the municipality.

FDIC Insurance
In addition to collateralization requirements of Act 72, subject to the limitations described below, local government funds on deposit with an insured institution are further secured by the FDIC. The FDIC is an independent agency of the United States government created to protect depositors of insured banks located in the United States against the loss of their deposits if an insured bank fails.

The standard deposit insurance amount is $250,000 per depositor, per insured bank, for each account ownership category. The FDIC insures deposits that a municipality holds in one insured bank separately from any deposits of the municipality in another separately chartered insured bank. Funds deposited in separate branches of the same insured bank are not separately insured.

Insurance coverage for a municipality is unique in that the insurance coverage extends to the official custodian of the deposits belonging to the municipality rather than to the government unit itself. Accounts held by an official custodian of a government unit will be insured as follows: in-state accounts: (1) up to $250,000 for the combined amount of all time and savings accounts (including NOW accounts); and (2) up to $250,000 for the combined amount of all interest-bearing and noninterest-bearing demand deposit accounts, and out-of-state accounts: up to $250,000 for the combined amount of all deposit accounts.

The information provided in this section describing FDIC insurance was obtained from www.fdic.gov.
For additional information concerning the FDIC and its programs, please see the Federal Deposit Insurance Act (12 U.S.C. § 1811, *et seq.*).

XV. Audits and Surcharges

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Municipal governments, much like for-profit corporations, rely on independent auditors and, in some cases, controllers, to ensure that the fiscal affairs of the municipality are in order and taxpayers' money is being well spent.[1] Municipal solicitors can assist their clients by making sure that the auditing requirements in the various municipal codes are satisfied.

General

Requirements The municipal codes set forth the statutory qualifications that must be met by elected auditors. They must be registered voters within the municipality[2] and must have resided in the municipality for at least one year before their election[3]. Auditors serve six-year terms.[4]

Conflicts with Elective/Appointed Office and Municipal Employment In order to ensure the independence of elected auditors, they are prohibited from holding other elective or appointive office or working as an employee for the municipality that they audit.[5]

Meetings The board of auditors must meet at least annually on the day following the organizational meeting for the municipality's governing body.[6]

Responsibilities - The board of auditors is responsible for auditing, settling, and adjusting the accounts of the elected and appointed officials of the municipality and its boards and agencies. The board of auditors may also audit the records of magisterial district justices to determine the amount of fines and costs due to the municipality.[7] In addition, in townships of the second class, in which members of the board of supervisors are permitted to be employees of the township, the board of auditors is solely responsible for determining the compensation for supervisors employed by the township.[8] The board of auditors is required to keep official minutes of meetings and comply with the requirements of the Sunshine Act.

Compensation - Members of the board of auditors in townships of the second class and boroughs are entitled to receive $10 per hour, plus reimbursement for travel costs, for performing their official duties.[9] Members in townships of the first class shall receive $20 per day for performing the duties of their office.[10]

Authority to Issue Subpoenas - Boards of auditors have the authority to issue subpoenas to municipal officers and other necessary persons for testimony or production of records.[11]

Appointment of Attorney - Boards of auditors are permitted to petition the court of common pleas for the appointment of an attorney in the event of a disagreement between them and any official that they are required to audit. The compensation of the attorney must be set with the agreement of the municipality's governing body or, if necessary, the court.[12]

No Financial Interests in Municipality - Municipal auditors are prohibited from having any direct or indirect financial interest in a municipal transaction.[13]

Annual Audits

The board of auditors must complete its annual audit by March 1 of each year.[14] It must also file its annual audit report with the township secretary, county clerk of court or prothonotary, and DCED.[15] The report must be submitted on the Annual Audit and Financial Report form provided by DCED.

The annual report must include a statement of township receipts from all sources, including accounts receivable and a statement of the resources, liabilities, and indebtedness of the municipality at the end of the fiscal year, among other things.[16]

There are also statutory requirements that the board of auditors publish a concise statement of the municipality's financial status.[17]

Appeals from the annual audit must be filed within 45 days in townships and 40 days in boroughs.[18] There are various bonding requirements that must be satisfied to prosecute an appeal. Absent fraud and/or collusion, appeals are the exclusive means of challenging municipal expenditures.[19] In the event of fraud and/or collusion, the municipal solicitor and governing body should consult with the appropriate law enforcement authorities.

Municipal officers and municipalities are entitled to receive reasonable attorneys' fees depending on the outcome of the court's final determination on an appeal.[20]

Surcharges

The board of auditors has the statutory authority to surcharge elected or appointed officers if their acts or omissions contribute to financial loss of the township.[21] If there is no intent to violate the law or exceed the scope of the officer's authority, then the surcharge must be limited to the difference between the costs incurred and the costs that would have otherwise been incurred had the proper procedures been used.[22] A surcharge will not be sustained if restitution is made and the governing body does not suffer loss.[23]

Enforcement - Once a judgment is entered for a surcharge, any auditor, elector or taxpayer may enforce the collection of the judgment by filing a bond.[24]

Appointments of Certified Public Accountants and Controllers

Townships of the second class are permitted to adopt resolutions appointing CPAs to examine their financial records in lieu of the elected board of auditors.[25] They are required to advertise for the appointment. There, the board of auditors retains the authority to set the compensation for supervisor/employees, regardless of whether the township appoints a CPA.

In townships of the first class and boroughs, governing bodies may adopt ordinances providing for CPAs to audit their accounts, thereby abolishing the office of elected auditor. Those ordinances may be repealed and the office of elected auditor may be reinstated.[26] The CPAs have the same powers and duties as the elected auditors would have had.[27]

In addition, boroughs may adopt ordinances creating the office of elected controller. If they do so, the members of the board of auditors continue to serve until January 1 of the year following the election of the controller, after which date the office of borough auditor is abolished.[28] The borough council sets the salary of the controller, who is responsible for managing the fiscal affairs of the borough and making recommendations to the borough council regarding the management and improvement of the borough's finances.[29]

Other Resources

DCED also makes available the *Auditor's Guide*, which is a comprehensive compilation of information and statutory references to the offices of auditors and controllers in boroughs and townships. This is an excellent resource for municipal officials and solicitors and is available for download at DCED's website.

REFERENCES

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2. 53 P.S. § 55501; 53 P.S. § 65401.
3. 53 P.S. § 65404(a).
4. 53 P.S. § 55520; 53 P.S. § 65404(a).
5. 53 P.S. § 65404(b).
6. 8 Pa.C.S. § 1041(a); 53 P.S. § 56001; 53 P.S. § 65901(a).
7. 8 Pa.C.S. § 1041(b); 53 P.S. § 56001; 53 P.S. § 65901(a).
8. 53 P.S. § 65901(a).
9. 8 Pa.C.S. § 1053; 53 P.S. § 65902.
10. 53 P.S. § 56001.
11. 8 Pa.C.S. § 1055; 53 P.S. § 56002; 53 P.S. § 65903.
12. 8 Pa.C.S. § 1059.2; 53 P.S. § 56006; 53 P.S. § 65906.
13. 53 P.S. § 65916.
14. 8 Pa.C.S. § 1059.1; 53 P.S. § 65904(a).
15. 8 Pa.C.S. § 1059.1(b.1); 53 P.S. § 65904(b).
16. 8 Pa.C.S. § 1059.1(a); 53 P.S. § 65904(d).
17. 53 P.S. § 65904(e).
18. 8 Pa.C.S. § 1059.4; 53 P.S. § 56009; 53 P.S. § 65909.
19. *Bennett v. Mountain View School Bd.,* 693 A.2d 651 (Pa.Cmwlth. 1997); *Festa v. Derry Tp.,* 411 A.2d 904, 49 Pa.Cmwlth. 297 (1980).
20. 8 Pa.C.S. § 1059.8; 53 P.S. § 65915.
21. 8 Pa.C.S. § 1059.3; 53 P.S. § 56003; 53 P.S. § 65907(a).
22. 8 Pa.C.S. § 1059.3(a)(2)(i); 53 P.S. § 65907(a).
23. *Appeal of Auditors of Halfmoon Tp., Centre County,* 643 A.2d 754 (Pa.Cmwlth. 1994).
24. 53 P.S. § 56008; 53 P.S. § 65908.
25. 53 P.S. § 65917.
26. 8 Pa.C.S. § 1005(7); 53 P.S. § 55520.
27. 8 Pa.C.S. § 1059.11; 53 P.S. § 55520.
28. 8 Pa.C.S. § 1071.
29. 8 Pa.C.S. §§ 1062, 1068.

XVI. Collecting Municipal Accounts

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Like an archer selecting an arrow from his quiver, there are a variety of strategies that can be employed in collecting in rem municipal accounts, which include sewer and water fees, trash fees, abatement of nuisance fees and real estate taxes. Many factors need to be considered in choosing the best strategy, including the type of claim being collected, the obligor's ability to pay, the market value of the obligor's real property, and the municipality's willingness to sell or purchase the obligor's property in collection of the debt.

Reviewing Applicable Ordinances and Resolutions

The importance of a well-drafted ordinance or resolution is highlighted when collection litigation ensues. Combined with the rights provided in the applicable municipal code and state law, the ordinance or resolution will need to provide the legal authority to collect all sums that are being claimed as due. The municipality is bound by the terms of its own promulgated rules, and its failure to abide by the same will likely lead to an undesired result.[1]

The interplay between the local ordinance/resolution and state law also must be considered. A local resolution or ordinance may not conflict with state law.[2] Further, a penalty that comports with an ordinance can still be deemed excessive by the courts.[3]

The Municipal Claims and Tax Liens Act (MCTLA)[4] provides that the municipality's attorney fees incurred in the collection of the delinquent account may be added to the delinquent account, which shifts the burden of paying the municipality's attorney fees to the delinquent obligor; but only if the municipality "by ordinance, or by resolution if the municipality is of a class which does not have the power to enact an ordinance, shall adopt the schedule of attorney fees."[5] It is important to make sure that the schedule of fees included in the ordinance or resolution is all-inclusive.

Fee shifting enables the municipality to avoid the problem of determining whether the cost of collection obviates the benefit of the collection effort and provides an incentive to the property owner to pay municipal claims in a timely manner. Because the MCTLA applies to *in rem* claims, it is important that the local legislation imposing the charges state that the charges are assessed against the owner of the real estate (and not the resident).

On the subject of ordinances and resolutions, it is important to note that while some judges may demand a certified copy of an ordinance or resolution at hearing, the general rule is that the municipal ordinance should be judicially noticed.6 This rule also has been applied to resolutions.[7]

Choosing Your Method of Collection

With the ability to pass through costs of collection, including attorney fees, the MCTLA is frequently the statute of choice for collecting municipal accounts. County tax claim bureaus are required to follow the detailed procedures of the Real Estate Tax Sales Law (RETSL)[8] for the collection of delinquent real estate taxes. The RETSL creates tax claim bureaus in each county, other than counties of the first and second class, and affords taxing districts the opportunity to return delinquent taxes to the bureaus for collection.[9] The Commonwealth Court held that the alternative methods of collection under the MCTLA and the RETSL are not irreconcilable or mutually exclusive, but operate concurrently with one another.[10]

The MCTLA provides a comprehensive structure under which municipal claims and real estate taxes can be collected. Claims, also known as liens, for taxes or municipal claims are filed with the court of common pleas in which the property is situated.[11] The details concerning the required contents of the claim are set forth in 53 P.S. § 7144. Because the lien is a statutory proceeding, strict compliance with the statutory requirements is important.[12]

Because the claim constitutes a statutory lien under the MCTLA, no judgment need be obtained; perfection can be accomplished merely by filing the lien.[13] Technically, an enforceable lien is created when the tax or municipal claim is first assessed in accordance with 53 P.S. §§ 7102 and 7106. The lien is perfected by timely filing the claim before the last day of the third calendar year in which the taxes or claims are first payable.[14] If the lien is lost due to the failure to file, it can be revived by late filing pursuant to 53 P.S. § 7432, except that the revived lien cannot impair the rights of intervening purchasers or lien holders. Once filed, the municipal lien shall continue and remain as a lien for a period of twenty years, subject to revival.[15]

With the formal filing of the claim, the MCTLA provides that statutory interest may be charged by the municipality at a rate not higher than ten percent per annum.[16] The statute only establishes the maximum rate of interest that is permitted. The specific rate of interest that a municipality intends to charge must be clearly established in an ordinance or resolution.[17]

To proceed with the enforcement of a claim or lien, the next step is for the municipality to file a writ of *scire facias* with the court of common pleas. A writ of *scire facias* is a purely statutory action i*n rem*, and the term *scire facias* is used to designate both the writ and the proceeding.[18] The form of the writ of *scire facias* is detailed in 53 P.S. § 7185. The object of a writ of *scire facias* is to ascertain the sum due on a lien of record, and to give the defendant an opportunity to show cause why the municipality should not have execution.[19] In the event that the municipality does not file its writ of *scire facias*, the defendant has the ability to move the litigation forward by serving the municipality with a notice to issue a writ of *scire facias* within fifteen days of such notice.[20]

A defendant may respond to a writ of *scire facias* by filing an affidavit of defense.[21] The affidavit of defense must be filed within fifteen days after service of the writ.[22] In the affidavit, the defendant may raise all defenses that he has to the municipal claim.[23] Proper defenses to the writ include actual payment of taxes or claims, a defective claim or lien, fraud, or lack of process or notice.[24] The burden of proof is initially with the defendant, as tax and municipal claims are prima facie evidence of the facts averred therein.[25] Should the defendant fail to file an affidavit of defense, a default judgment should be entered. Judgment for the municipality also can be entered for "want of sufficient affidavit of defense."[26]

In addition to the remedies provided by law for the filing of liens for the collection of municipal claims, municipalities may proceed with the collection of claims against the owner of the property, at the time the obligation became due, through an action in assumpsit.[27] Municipalities are permitted to use both an *in rem scire facias* procedure and an *in personam* action in assumpsit to recover a municipal claim.[28] Unlike actions under the MCTLA, the burden of proof in an assumpsit action initially falls on the municipality to prove that the claim is due and owing. An action in assumpsit must be filed within six years after the completion of the improvement from which the claim arises or within six years after the water or sewer rates or the cost of abating a nuisance first became payable.[29]

The Local Tax Collection Law also provides that taxing districts shall have the power to collect unpaid taxes from the persons owing such taxes by suit in assumpsit or obtain other appropriate remedy.[30]

Executing on the Claim

A judgment on the claim is enforced by a sheriff's sale of the property under the provisions of the Pennsylvania Rules of Civil Procedure governing the enforcement of judgments in mortgage foreclosure.[31] The Commonwealth Court succinctly described the execution procedure under the MCTLA in *EMC Mortgage Corp. v. Lentz*.[32]

The MCTLA provides a two-step procedure for conducting judicial sales when executing upon a municipal lien. First, there is an initial upset sale and then, if the property is not sold at the upset sale, a judicial sale, free and clear of all liens and encumbrances is held. In the case of an upset sale, the upset price is the amount sufficient to pay all of the municipality's claims in full.[33] If the upset price is not obtained, the municipality may petition the trial court to issue a rule to show cause why the property should not be sold free and clear of all claims, mortgages, charges and estates. If the court agrees, an order will be issued that the property be sold free and clear of all liens, including mortgages. Thus, a prior-in-time mortgage will not be divested by an upset sale, but will be divested at a free and clear sale.34

An upset sale cannot be made unless the bid is sufficient to pay in full all accrued taxes and municipal claims owed on the property, or the municipality chooses to purchase the property subject to all other outstanding municipal and tax claims, and all other liens not otherwise discharged by sale under existing law.[35] In the event that a property is not sold for a sum sufficient to pay all taxes and municipal claims, together with accrued costs, the plaintiff may postpone the sale and petition the court to sell the property free and clear of liens. The petition must aver that: (i) one year has elapsed since the filing of the claim; (ii) that plaintiff exposed the property to sheriff's sale; and (iii) that plaintiff was unable to obtain a bid sufficient to pay the upset price in full. The proceeds from a judicial sale shall be distributed first to the oldest tax having priority, with municipal claims being paid next, with the oldest in point of lien having priority.[36] Any municipality, being a claimant, has the right to bid and become the purchaser of the property at sale. The former owner will be provided a right to redeem the property.[37]

In 2013, the General Assembly revised 53 P.S. § 7106 of the MCTLA to provide that in cases where delinquent property taxes have been reduced to judgment, that judgment will be enforceable as a lien against other real property of the defendant to the same extent as a judgment for money. This revision may enable a municipality to execute against more valuable real property to collect debt owed on less valuable property, thus increasing the chance that the delinquent taxes will be paid.

Terminating Utility Service

Terminating utility service is often an effective method to initiate payment of delinquent bills. Because of the drastic nature of this remedy, all procedures must be strictly followed.

Termination of service is discussed in the Water Services Act (WSA).[38] Under the WSA, water supply may not be shut off unless a written notice has been posted at a main entrance and mailed to the person liable for payment and the owner of the property or property manager at least ten days before termination of service.[39]

Tenants receive protection from utility service shutoff under the Utility Service Tenants Rights Act (USTRA).[40] Under the USTRA, the municipality must notify the landlord in writing at least thirty-seven days before termination of service, and must notify each residential unit in writing at least seven days after notice to the landlord and at least thirty days before shutoff.[41]

The Commonwealth Court reviewed the constitutional due process requirements surrounding utility shutoffs in *Ziegler v. City of Reading*:

> The Fourteenth Amendment of the United States Constitution "places procedural constraints on the actions of government that work a deprivation of interests enjoying the stature of 'property' within the meaning of the Due Process Clause." *Memphis Light, Gas and Water Division v. Craft*, 436 U.S. 1, 9 (1978). "[T]he expectation of utility service rises to the level … of a 'legitimate claim of entitlement' encompassed in the category of property interests protected by the Due Process Clause." *Ransom v. Marrazzo*, 848 F.2d 398, 409 (3d Cir. 1988) (quoting *Memphis Light,* 436 U.S. at 9). However, because the expectation of utility service falls within the protections of due process a judicial hearing is not automatically required before such service may be discontinued. In *Memphis Light*, the United States Supreme Court held that, before utility service may be discontinued by a municipal utility, due process requires only that a customer receive notice of a proposed termination that advises "the customer of the availability of a procedure for protesting a proposed termination of utility service as unjustified," and "the provision of an opportunity for the presentation to a designated employee of a customer's complaint that he is being overcharged or charged for services not rendered." *Memphis Light*, 436 U.S. at 15-16.[42]

Complying with Consumer Protection Statutes

It is important to be cognizant of and comply with all relevant consumer protection statutes. The federal Fair Debt Collection Practices Act (FDCPA)[43] was enacted to "eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses."[44] Pursuant to the FDCPA, "[a] debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt."[45] Under the FDCPA, the term "debt collector" includes any person "who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another."[46] The term "debt" is defined as "any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment."[47] The FDCPA does not apply to the collection of taxes.[48] The Court of Appeals for the Third Circuit held that a homeowner's water and sewer obligations fall under the definition of "debt" under the FDCPA.[49] The United States District Court for the Middle District of Pennsylvania held that the City of Scranton's refuse fee was not a "debt" under the FDCPA.[50]

The FDCPA describes in detail how a debt collector may communicate with the consumer and third parties, as well as what actions constitute harassment or abuse.[51] The list of actions that constitute false or misleading representations is lengthy, as is the list of unfair practices.[52] Within five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall, unless the following information is contained in the initial communication or the consumer has paid the debt, send the consumer a written notice containing: (1) the amount of the debt; (2) the name of the creditor to whom the debt is owed; (3) a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector; (4) a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; and (5) a statement that, upon the consumer's written request within the thirty-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor.[53]

Pennsylvania enacted the Fair Credit Extension Uniformity Act (FCEUA),[54] which establishes what shall be considered "unfair methods of competition and unfair or deceptive acts or practices with regard to the collection of debts."[55] The FCEUA is essentially Pennsylvania's state law version of the FDCPA, but pursuant to the FCEUA, remedies available for violations of the FCEUA and the FDCPA shall not be cumulative.[56] Unlike the FDCPA, the FCEUA prohibits unfair or deceptive collection practices by both debt collectors and creditors.[57] The FCEUA provides that if a debt collector or creditor engages in an unfair or deceptive debt collection act or practice under the FCEUA, it also shall constitute a violation of the Pennsylvania Unfair Trade Practices and Consumer Protection Law.[58] Unlike the FDCPA, the FCEUA applies to the collection of taxes.[59]

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3. *Commonwealth v. Heggenstaller,* 699 A.2d 767, 769 (Pa.Super. 1997).
4. 53 P.S. § 7101, *et seq.*
5. 53 P.S. § 7106(a.1).
6. 42 P.S. § 6107(a); *Providence Builders, Inc. v. Commonwealth,* 492 A.2d 488, 489-90 (Pa.Cmwlth. 1985).
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20. 53 P.S. § 7184.
21. 53 P.S. § 7182.
22. 53 P.S. § 7185.
23. *Shapiro*, 632 A.2d at 997.
24. *Pentlong,* 820 A.2d at 1247.
25. 53 P.S. § 7187.
26. 53 P.S. § 7271.
27. 53 P.S. §§ 7251, 39601.
28. *City of Harrisburg v. Laukemann,* 471 A.2d 132, 133 (Pa.Cmwlth. 1984).
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31. Pa.R.Civ.P. 3190, 3191.
32. *EMC Mortg. Corp. v. Lentz,* 972 A.2d 112, 116 (Pa.Cmwlth. 2009).
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38. 53 P.S. §§ 3102.101-3102.507.
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40. 68 P.S. § 399.1, *et seq.*
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42. *Ziegler v. City of Reading,* No. 1060 C.D. 2013, 2014 WL 273804, at *3 (Pa.Cmwlth. Jan. 24, 2014).
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47. 15 U.S.C. § 1692a(5).
48. *Staub v. Harris,* 616 F.2d 275, 278 (3d Cir. 1980) ("the statutory language does not appear to support the construction of a tax as a debt under the FDCPA").
49. *Pollice v. National Tax Funding,* L.P., 225 F.3d 379, 400 (3d Cir. 2000) ("homeowners ('consumers' of water and sewer services) had an 'obligation…to pay money' to the government entities which arose out of a 'transaction' (requesting water and sewer services) the subject of which was 'services…primarily for personal, family, or household purposes.'").
50. *Reilly v. Northeast Revenue Servs., LLC,* No. 3:12-CV-02312, 2013 WL 3974181, at *5 (M.D.Pa. Aug. 1, 2013) ("The City of Scranton refuse fee, for purposes of analysis of the definition of a 'debt' under the FDCPA, is more akin to a tax than a bargained for good.").
51. 15 U.S.C. §§ 1692b, 1692c, 1692d.
52. 15 U.S.C. §§ 1692e, 1692f, 1692j.
53. 15 U.S.C. § 1692g.
54. 73 P.S. § 2270.1, *et seq.*
55. 73 P.S. § 2270.2.
56. 73 P.S. § 2270.5(c).
57. 73 P.S. § 2270.4.
58. 73 P.S. § 201-1, et seq.; 73 P.S. § 2270.5(a).
59. 73 P.S. § 2270.3 (the definition of "debt" includes "any amount owed as a tax to any political subdivision of this Commonwealth").

XVII. Collecting Municipal Accounts in Bankruptcy

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Given that municipalities are seeing an increasing number of their property owners file for bankruptcy, it is important for municipalities and their solicitors to have a working knowledge of the bankruptcy process. There are many misconceptions as to how municipal claims are treated in a bankruptcy case. On one end of the spectrum, there are municipalities that believe they can completely ignore the bankruptcy case and their municipal claims will remain intact. On the other end of the spectrum, the mere mention of the word "bankruptcy" causes municipalities to permanently take the obligation off the collection rolls. Most municipal claims constitute secured debt that survives discharge; however, the failure to properly monitor the treatment of such claims through the bankruptcy process can, at a minimum, unnecessarily delay payment that could have been made to the municipality through the bankruptcy case. In a worst case scenario, the failure to monitor the claim could result in the reduction or loss of the municipality's claim. For this reason, bankruptcy filings cannot be ignored.

Bankruptcy Chapters

Municipalities are most likely to see bankruptcy cases filed under Chapters 7, 11 and 13. Depending upon your location, you may see cases filed under Chapter 12, which is available only to family farmers or fishermen.[1] If you see anything concerning Chapter 9, you may need to find another client, as this is the chapter used by municipalities to file for bankruptcy protection.[2]

Chapter 7 bankruptcies generally provide for the liquidation of the debtor's non-exempt assets for the benefit of the debtor's creditors. Chapter 7 is available to all individuals and most business entities.[3] There are two types of Chapter 7 cases: no-asset cases and asset cases. No-asset cases generally have a short life span, lasting approximately four to seven months. Asset cases can take considerably longer, as the trustee may have to liquidate the debtor's non-exempt assets to pay off creditors. The goals behind Chapter 7 are to provide honest debtors with a fresh start by relieving them of most of their debts, while at the same time providing for the equitable distribution of the debtor's non-exempt assets to creditors through liquidation.[4]

Chapter 11 bankruptcies generally provide for the reorganization and restructuring of a debtor's finances. This chapter is primarily employed by business entities, but can be used by individuals.[5] Chapter 11 bankruptcies are the most complex bankruptcy cases and can proceed for many years. Creditors will be provided with an opportunity to vote to accept or reject the debtor's plan of reorganization.[6] The policy behind Chapter 11 is to allow the debtor to continue to operate and reorganize its business as an alternative to the quick liquidation required under Chapter 7. The theory is that the assets of the business will be maximized as a "going concern."[7] Chapter 11 allows business debtors to stay in control of their assets and continue to provide jobs to their employees.

Chapter 13 bankruptcies provide for the reorganization and adjustment of an individual's debts. This chapter is only available to individuals who have a regular source of income; corporations and partnerships are not eligible to file under Chapter 13. There are debt limits for individuals filing under this chapter.[8] Chapter 13 cases encourage repayment of obligations by providing the debtor with more options to deal with their debt. Successful cases filed under this chapter generally last between three and five years.[9]

The Automatic Stay

The automatic stay is the reason why most debtors file for bankruptcy protection. The automatic stay prevents creditors from taking action against property of the debtor's bankruptcy estate after the bankruptcy filing.[10] The stay is automatically created at the time the bankruptcy case is filed, and the stay is self-executing without the debtor taking any additional action.[11] The purpose of the stay is to provide the debtor with breathing room at the beginning of the case, and to prevent rogue creditors from unilaterally continuing with pre-bankruptcy collection efforts while the case is open.[12] The scope of the automatic stay is very broad, prohibiting all collection activity and actions against the debtor, including phone calls, letters, messages, lawsuits and monthly statements.[13] Actions taken in violation of the automatic stay are prohibited, and will be deemed void or voidable regardless of whether the creditor had knowledge of the bankruptcy filing.[14] Bankruptcy judges take automatic stay violations very seriously and creditors who take action in violation of the automatic stay are subject to monetary sanctions, including attorney's fees and costs, and in appropriate circumstances, punitive damages.[15] In fact, courts have held that sanctions are mandatory against creditors who knowingly violate the automatic stay, with the bankruptcy court having no discretion to withhold an award of compensatory damages due to the phrase "shall recover actual damages" used in 11 U.S.C. § 362(k).[16] For this reason, it is very important for a municipality to stop all collection activity when it learns of a bankruptcy filing.

Post-Petition Obligations

It is important for municipalities to understand the difference between pre-petition claims and post-petition claims. A snapshot is taken of all the debtor's obligations at the time the bankruptcy petition is filed with the court. Any obligation that first became due before the bankruptcy was filed constitutes a pre-petition claim, and any attempt to collect such claim outside of the bankruptcy court without prior court approval will be considered a violation of the automatic stay.[17] Debtor obligations that first became due *after* the bankruptcy filing constitute post-petition obligations, and creditors are permitted to pursue collection of post-petition claims during the bankruptcy case without violating the automatic stay.[18] The key date is the date that the obligation was first incurred by the debtor; not the date that the obligation was first billed or the date that the debtor was required to make payment. This date is determined pursuant to state law.[19]

Municipalities should continue to collect on post-petition claims during the bankruptcy case. Failure to do so may not only result in a loss of money coming in, but in some cases, the failure to collect may place the debtor in an artificial comfort zone where the debtor believes that all obligations are being paid current through the bankruptcy plan. After surfacing from a 3-5 year bankruptcy case and believing that they now have a fresh start, it will be a rude awakening to find out that delinquent post-petition municipal bills have remained unpaid for the last 2-4 years. The failure to collect on post-petition claims may end up forcing the debtor right back into bankruptcy. One important exception to note is that while pursuit of a post-petition claim is not barred by the automatic stay, creditors are prohibited from taking action against property of the debtor's bankruptcy estate, and thus the execution or attachment of a judgment on a post-petition claim would be barred under the automatic stay.[20] To proceed against the debtor's property on a post-petition claim, the creditor must first seek leave of court by way of a motion for relief from the automatic stay.[21]

Filing Claims

Filing a proof of claim with the bankruptcy court will significantly increase the likelihood that the municipality's claim will be paid through the bankruptcy case. A proof of claim is a formal document filed by a creditor who wishes to receive payment.[22] The proof of claim is a written, signed statement that describes the total debt owed by the debtor at the time the bankruptcy case was filed.[23] A proof of claim shall conform substantially to the Official Form (B10), which can be found on most bankruptcy court websites.[24] The deadline set by the bankruptcy court to file a proof of claim is an important date because if a creditor misses the deadline, it may be precluded from sharing in the distribution of proceeds paid through the bankruptcy case. Although in most cases this will not result in the loss of a pre-petition claim, it could mean that a creditor may have to wait up to five years in a Chapter 13 case before seeking collection of the claim. A proof of claim filed by a governmental unit is timely filed in a Chapter 7, Chapter 12 or Chapter 13 case if it is filed not later than 180 days after the bankruptcy filing.[25] The deadline for filing claims in a Chapter 11 case is set by the bankruptcy court.[26] It is prudent to file your claim as early as possible, as this will assist the debtor in properly including your claim in the bankruptcy plan.

Proofs of claim are filed directly with the bankruptcy court and documentation supporting the claim should be attached to the form, including an itemized statement of any interest, fees, expenses or other charges added to the claim.[27] The only real downside that can be attributed to filing a proof of claim is that the filing of the claim will submit the creditor to the jurisdiction of the bankruptcy court. This will allow the bankruptcy court to preside over any disputes involving the creditor and the debtor, including, potentially, ongoing litigation. To the extent that your municipality has any ongoing litigation with the debtor, you should consult with your solicitor prior to filing a proof of claim.

Creditor claims are paid through the bankruptcy case in their order of priority. Generally, the order of priority is: (i) secured claims; (ii) priority claims; (iii) unsecured claims; and (iv) equity claims (e.g., stock). Under the absolute priority rule, a junior class of claims cannot be paid until the senior class is paid in full, unless otherwise agreed to by the senior claim holders.[28] Most municipal claims that can be collected under the Municipal Claims and Tax Liens Act, 53 P.S. § 7101, *et seq*., constitute secured claims. Bankruptcy Code Section 506 describes the determination of secured status: "[a]n allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under Section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property."[29] Debtors can seek to cram down a municipality's claim based on the value of the property upon which the lien is held, as the debt is considered "secured" only up to the value of the property that is securing the debt. To the extent that the amount of the municipality's claim exceeds the value of the debtor's property, that portion of the debt that exceeds the property value can be deemed "unsecured" and discharged under bankruptcy law.

Monitoring Pleadings

Debtors frequently take action in their bankruptcy case, intentionally or unintentionally, that can delay, reduce or eliminate a municipality's claim. For this reason, it is important to monitor the debtor's bankruptcy pleadings and plan to ensure that action is not taken that can adversely affect the municipality. Debtors often will file a bankruptcy plan that does not include any mention of the municipal claim. While this plan ultimately should not reduce or limit the municipality's secured claim, it may force the municipality to wait a significant amount of time before it can seek payment, as a standard Chapter 13 plan can take up to five years to complete. Once a debtor's plan has been confirmed by the court, all creditors are bound by it. A more troubling scenario is when the debtor lists the wrong amount of the municipal claim in the plan, as the confirmed plan could bind the municipality to the reduced amount set forth in the plan.[30] The only way to prevent these situations from occurring is to monitor the debtor's plan and file an objection with the court if the plan does not include, or improperly lists the amount of, the municipality's claim.

Debtors and trustees also can take action to sell the debtor's real property through the bankruptcy case free and clear of all liens. This is generally accomplished through a motion filed by the debtor or the trustee. When there is an attempt to sell property through the bankruptcy case, it is very important to review the proposed order attached to the sale motion to ensure that your municipality's secured liens against the property will be paid in full from the sale proceeds. To the extent that the order does not propose payment in full of your municipality's secured claims, an objection to the motion should be filed with the bankruptcy court.

In order to help ensure that your municipality is receiving copies of all pleadings and notices in a particular bankruptcy case, the municipality can file a request for notices with the bankruptcy court, asking that all notices required under Rule 2002 of the Federal Rules of Bankruptcy Procedure and all pleadings or other papers served in the bankruptcy case be provided to the municipality. This request should be served on the debtor, the trustee and all creditors. Be warned that in large or contentious bankruptcy cases, this could result in a significant amount of documentation being served on the municipality.

Utility Shutoffs

The Bankruptcy Code specifically includes a section for municipal creditors pertaining to utility shutoffs - 11 U.S.C. § 366. By enacting Bankruptcy Code Section 366 titled "Utility service," Congress struck a balance between a debtor's need to have utility service, while respecting the utility's right to refuse providing services for which it may never be paid.[31]

Bankruptcy Code Section 366 is broken into three subparts. The first subpart, Section 366(a), provides: "Except as provided in subsections (b) and (c) of this section, a utility may not alter, refuse, or discontinue service to, or discriminate against, the trustee or the debtor solely on the basis of the commencement of a case under this title or that a debt owed by the debtor to such utility for service rendered before the order for relief was not paid when due."[32] Thus, Bankruptcy Code Section 366(a) provides the general rule that a utility may not alter, refuse or discontinue service to the debtor solely on the basis of the bankruptcy filing or an unpaid, pre-petition debt. A utility may not use the fact of the bankruptcy filing and the existence of a pre-petition delinquency as a basis to conclude that the debtor presents such a bad credit risk that the utility should terminate service.[33] Bankruptcy Code Section 366(a) not only requires the continuation of utility service post-bankruptcy, but also requires the initiation of service to a debtor whose utility service was shut off pre-bankruptcy, or who did not have service prior to the bankruptcy.[34] Essentially, the utility may not treat the debtor differently from other customers solely because of the bankruptcy filing or the debtor's pre-petition default.

Bankruptcy Code Section 366(b) provides some pro-utility language: "Such utility may alter, refuse, or discontinue service if neither the trustee nor the debtor, within 20 days after the date of the order for relief, furnishes adequate assurance of payment, in the form of a deposit or other security, for service after such date. On request of a party in interest and after notice and a hearing, the court may order reasonable modification of the amount of the deposit or other security necessary to provide adequate assurance of payment."[35] By combining Bankruptcy Code Sections 366(a) and (b), a utility is prohibited from terminating service during the first 20 days of a bankruptcy case, but after the expiration of the initial 20-day period, the utility is permitted to terminate service unless the debtor has timely furnished adequate assurance of payment for post-bankruptcy service. While the Bankruptcy Code does not provide guidance as to the proper assessment of an "adequate assurance of payment," courts have often deferred to state public utility regulations to determine the amount.[36] Even when a debtor meets the adequate assurance requirements of Bankruptcy Code Section 366(b), a utility may still terminate service if post-petition payments are not made.[37]

The third subpart, Bankruptcy Code Section 366(c), deals exclusively with Chapter 11 cases. Under this section, the initial 20-day adequate assurance period is increased to 30 days, but in a pro-utility light, the adequate assurance must be deemed "satisfactory to the utility."[38] Unless the bankruptcy court orders otherwise, this means that in a Chapter 11 case, the debtor must pay what the utility demands. Bankruptcy Code Section 366(c)(4) also permits a utility, in a Chapter 11 case, to set off a debtor's pre-petition deposit against a pre-petition claim without notice or court order.[39] This type of set off generally is not available to a creditor in other bankruptcy chapters.

The case of *In re Weisel*[40] provides some practical insight into how bankruptcy courts look at Bankruptcy Code Section 366 with regard to post-petition defaults. In that case, the debtors had an account with Dominion Peoples Gas Company prior to filing for bankruptcy. As a result of the bankruptcy, Dominion closed its pre-petition account for the debtors (this is a smart thing to do, as it will help prevent automatic stay violations). Dominion then opened a post-petition account for the debtors with $0 opening balance. Dominion requested a small, adequate assurance deposit of $217 from the debtors that was paid. The debtors subsequently accumulated a large post-petition delinquency. After providing the debtors with proper notice pursuant to state law, Dominion terminated the debtors' utility service. The debtors then filed a complaint against Dominion, alleging that Dominion violated the automatic stay by terminating the debtors' gas service without first obtaining stay relief from the court. Essentially, the debtors claimed that Dominion should have first sought court approval before shutting off service. The court held that Dominion was permitted to unilaterally terminate service to the debtors based on the post-petition default, without first seeking leave of court. To summarize, other than the initial ban for shutting off service during the first 20 days of a Chapter 7 or Chapter 13 case, or the first 30 days of a Chapter 11 case, nothing prohibits a utility from shutting off service due to a post-petition default, so long as the procedures employed by the utility comply with the utility's standard shutoff procedures following state law. This applies to cases even where the debtor previously provided security or an adequate assurance deposit to the utility.

Creditor's Checklist

It is important to develop internal procedures that can be employed by your municipality upon receipt of a bankruptcy notice. Taking the following ten steps can increase the likelihood of collecting your claim and keeping your municipality away from legal sanctions:

(1) Create internal recording procedures to prevent inadvertent stay violations caused by sending demand letters, bills or notices to property owners on pre-petition claims after a bankruptcy is filed.

(2) Separate any billings that precede the bankruptcy filing date and discontinue billing for those charges. Remember that continued billing on pre-petition claims constitutes an automatic stay violation and subjects your municipality to sanctions.

(3) Establish a new billing record for post-petition obligations. These bills can be sent to the debtor in the usual course of business.

(4) File a proof of claim in the debtor's bankruptcy case. The only reason to possibly refrain from this action is when there is ongoing litigation between the municipality and the debtor outside of bankruptcy court.

(5) Shut off utility service if adequate assurance of payment is not furnished within twenty days of the filing of a Chapter 7 or Chapter 13 case, or within thirty days of the filing of a Chapter 11 case.

(6) In a Chapter 11 case, set off against the debtor's pre-bankruptcy security deposit and apply it against the outstanding delinquency.

(7) Shut off utility service if the debtor defaults on post-petition obligations, using normal shutoff procedures in compliance with state law.

(8) File a request for notices with the bankruptcy court and serve it on all parties.

(9) If the municipality desires more information about the bankruptcy case, attend the first meeting of creditors, known as the "341 meeting," referencing the Bankruptcy Code section that requires such meeting. The 341 meeting is the first formal meeting of the debtor's creditors, and is usually scheduled by the U.S. Trustee's Office approximately 20-50 days after the bankruptcy case is filed. The purpose of the meeting is to obtain information about the debtor's bankruptcy case, assets, liabilities and financial affairs. Creditors generally are permitted to ask a few questions of the debtor at the end of the meeting.

(10) Monitor the debtor's bankruptcy plan and pleadings and file objection when appropriate.

REFERENCES

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5. 11 U.S.C. § 109(d).
6. 11 U.S.C. § 1126.
7. *In re PWS Holding Corp.,* 228 F.3d 224, 238 (3d Cir. 2000).
8. 11 U.S.C. § 109(e).
9. 11 U.S.C. § 1322(d) (bankruptcy plan may not provide for payments for a period longer than five years).
10. 11 U.S.C. § 362.
11. *In re Perl,* 513 B.R. 566, 572 (B.A.P. 9th Cir. 2014).
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XVIII. Municipal Authorities

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Nature of Authorities

According to the Municipality Authorities Act of 1945, a municipal authority is a "body corporate and politic" engaged in the proprietary fields of government. An authority is designed to provide an alternate means of accomplishing the public purposes of counties, municipalities, and school districts. An authority, however, is a separate legal entity with the power to incur debt, own property, and finance its activities through user charges and lease rentals. An authority may also be an operating entity, a financing agent for capital projects, or both.

Authorities are "special purpose" government corporations, with no general police powers, and no taxing powers. An authority is not a creature, agent, or representative of the municipality, but is a separate and independent agency of the Commonwealth. The courts have held that authorities are entities of the state, and not of the incorporating municipality.[1]

An authority may be formed by a municipality, school district, or county. Additionally, more than one of the aforementioned entities may join together to form a joint authority. The Municipality Authorities Act of 1945 is the most commonly used enabling statute in forming authorities and was amended and codified as Chapter 56 of the Pennsylvania Consolidated Statutes by Act 22 of 2001 (Authorities Act).

The Authorities Act provides a measure of independence for authorities from the incorporating municipality. A major aspect of independence arises from the way authority board members are appointed. The Authorities Act provides that board members are appointed for five-year terms on a staggered basis. To provide an additional layer of independence, board members may not be removed except by judicial proceedings.[2] Under Article VI of the Pennsylvania Constitution, removal would require evidence of substantial misconduct.[3] The incorporating municipality may limit, by ordinance or through the articles of incorporation, the projects that an authority may undertake, but it may not interfere in the daily operations of the authority.[4]

Although authorities are independent from the incorporating municipality, this fact should not be overemphasized. If conflict arises between an authority and its incorporating municipality, the municipality may direct by legislative action that the authority turn over all of its assets to the incorporating municipality. It is important to note that the incorporating municipality must also assume the indebtedness and other obligations of the authority prior to assuming the assets of the authority.[5] This provision has been upheld in cases where an authority contested the hostile takeover attempt of an incorporating municipality.[6] It has also been held that a municipality may require an authority which it has created to pay off its debts from funds on hand prior to conveying the project to the municipality.[7] Upon taking over the authority functions, the acquiring municipality must segregate the funds received and use them only for the same purposes as those of the authority.[8]

Formation of Authorities

The formation of an authority pursuant to the Authorities Act begins with the incorporating municipality holding a public hearing to consider formation of an authority. Public notice of the hearing must be provided thirty days prior to the hearing.[9] After the hearing, the municipality may approve the articles of incorporation and appointment of

the first board members of the authority by enactment of an appropriate ordinance.[10] Following a second published public notice, the articles of incorporation are filed with the Department of State. The articles of incorporation filed with the Secretary include the following:

1. Name of the authority, name of the incorporating entity(s);
2. Names, addresses and terms of office of the first members of the board of the authority;
3. A listing of authorities already organized by the incorporating entity;
4. In the case of a business district authority, a statement that the municipal governing body retains the right to approve any authority plan for providing improvements or administrative services;
5. Authorized projects the authority may undertake;
6. Term of existence of the authority; and
7. Designation of the service area of the authority.

The Department of State issues a certificate of incorporation stating the term of corporate existence. Under the Authorities Act, an authority exists for a fixed term of 50 years, which may be extended by amendment of the articles of incorporation.[11]

The Authorities Act allows the incorporating municipality to specify authorized projects or purposes in the incorporating ordinance. Unless expressly limited, an authority is free to engage in any of the projects permitted under the Authorities Act, subject to later action of the municipality expanding or limiting the projects by filing amended articles of incorporation.[12] When forming an authority, it is imperative that the incorporating ordinance be carefully crafted to only include those authorized projects or purposes the municipality intends to delegate to the authority unless the intention is to form a general authority.

A joint authority may be formed by two or more municipalities. The Authorities Act requires that at least one board member must be appointed from each municipality. The total for each municipality, however, need not be equal. Additional member municipalities may be added by amendment to the articles of incorporation after approval by all of the existing municipal members.[13]

An authority should write and adopt bylaws describing the management of its affairs and the appointment of officers, agents, and employees. The bylaws should also prescribe the duties of the appointed officers, agents, and employees. It is also important that the authority adopt, by resolution, a set of rules, rates, and regulations governing the manner of service to its customer. The purpose of the rules, rates, and regulations is to provide a document that outlines and governs nearly all questions or challenges that the authority staff may be confronted with in the daily operation of its affairs. The rules, rates, and regulations must conform to the Authorities Act and should be sufficiently specific. The bylaws should authorize indemnification of board members, to the extent permitted by law, for expenses and liabilities incurred in the ordinary course of fulfilling their responsibilities.

Authority Board and Meetings

An authority board consists of at least five members, but the board may be larger as set forth in the articles of incorporation. The Authorities Act requires that each board member be a taxpayer, business operator, or citizen of the appointing municipality, or of a municipality into which the authority's projects extend. A majority of the board members must be residents of the incorporating municipality or municipalities of the authority.[14] It is permissible for a member of a municipal governing board to also serve on an authority board.[15]

Terms of board members expire the first Monday in January, to coincide with the organization of municipal governing bodies, following the municipal elections.[16] Appointments made prior to the existence of a vacancy are void.[17] Vacancies on the board of an authority are filled by appointment by the municipality that appointed the board member who created the vacancy.[18] The Authorities Act is silent as to the time in which a vacancy must be filled.

Authority board members (except for school authorities) *may* be paid compensation for services, but such compensation must be approved by the incorporating municipality and may not be changed during a term of office.[19] The incorporating municipality, however, is not required to approve compensation of an officer or employees.

A majority of the board constitutes a quorum.[20] Where there are vacancies, the quorum probably should be a majority of those then in office rather than of the full board.[21]

The Authorities Act prohibits an authority board member from being a party to, or having an interest in, any contract of the authority.[22] This restriction is broader than the restriction on this subject that is found in the Ethics Act.[23]

The appointing municipality may remove a board member who fails to attend three consecutive meetings of the board, unless excused by the board.[24]

Officers and Employees

Among the powers of authority boards is the power to appoint officers and employees and fix their compensation.[25] These powers are limited, however, by general law, as well as by provisions of the Pennsylvania Constitution.

The board has the power to appoint one of its members as an officer and as an employee.[26] The Ethics Act prohibits a board member from voting on his own employment. Moreover, if reciprocal arrangements were to be arranged by board members for the approval of each other's compensation as officers, the arrangements would be invalid.

Employment agreements for authority employees extending over a period of time (even less than one year) have been held to be invalid.[27]

It is good practice to obtain bonding for all authority employees who handle money despite the Authorities Act's requirement that only treasurers of school authorities be bonded.[28]

Projects

Economic Development Authorities - This is the smallest category of authority, both in terms of numbers of projects, total revenues, and outstanding debt. These authorities are involved in tourist promotion, development promotion, industrial parks, and small business incubator projects.

Airport Authorities - Airports are recognized as a critical economic development asset for their communities. Areas without ready access to air travel are at a disadvantage. Airport authorities are operating authorities, either by using their own staff or by contracting with a private airport management company. Grants from federal, state, and sometimes local governments provide most of the capital to construct and expand airports. Operating expenses are lowered because the federal government assumes the cost of air traffic control and services such as weather information. Current revenues come from user charges levied on aircraft using the facilities, rental of space for retail outlets, ticket booths, offices, and hangars.

Parking Authorities - Parking authorities are concentrated in the central cities of metropolitan areas and in urban boroughs. Many of the operating parking authorities are double leasebacks, or at least have a contract with the municipality or private enterprise to ensure adequate revenue. This close relationship with the municipal government is necessary if bonds are to be sold because, unlike water and sewer systems, parking is not a natural monopoly. User charges are too unpredictable to provide security for a bond issue. This close relationship also reflects recognition of the effect of parking on public concerns such as traffic control and the economic health of the community. Because of the necessity of a close relationship between the incorporating municipality and authority, communication and cooperation are key.

Transit Authorities - The two largest transit systems in the state, those in Philadelphia and Pittsburgh, are operated by authorities formed under special legislation and not under the Municipality Authorities Act. The Southeastern Pennsylvania Transportation Authority (SEPTA) services Philadelphia and the Port Authority of Allegheny County

(PAT) provides service to Pittsburgh. Mass transit systems can be fixed route bus systems or demand response bus/van systems, or a combination of both. Generally, the more urban the area, the higher percentage of activity is found on fixed routes. Only SEPTA and PAT operate subway and rail systems.

Sewer Authorities - These include multi-purpose authorities with sewer projects. Sewer authorities sell bonds to finance acquisition of existing systems or for construction, extension, or improvement of a system. For sewer operating authorities, current revenues come from charges on the users of the system. The charge frequently is based on the amount of water used and payment is enforced by the ability to direct the water utility to terminate water service, as well as the right to lien against real estate. In areas with no public water supply, flat rate charges are calculated on average use per dwelling unit.

Stormwater Authorities - In passing Act 68 in July 2013, the General Assembly recognized that municipalities throughout Pennsylvania were facing increasing cost and pressure to effectively manage stormwater. Act 68 authorizes municipalities to create stormwater authorities or add stormwater responsibilities to existing authorities serving the municipality's residents. Stormwater is a problem that does not recognize jurisdictional or municipal boundaries and, as such, is a perfect candidate for a joint authority. A joint authority would allow and facilitate cooperation across municipal boundaries.

Forming a stormwater authority offers numerous benefits to the incorporating municipality and its citizens. The incorporating municipality would be relieved of a significant burden both economically and operationally. Most municipalities fund stormwater management with money from the general fund. Creation of a stormwater authority would allow collection of a stormwater fee to fund stormwater management and would also allow collection from tax exempt properties. The costs of stormwater management would be equitably allocated among all properties contributing to the problem, not just those that are owned by taxable entities.

Water Authorities - These include multi-purpose authorities with water projects, many of which operate both water and sewer systems. In addition, financing water systems for lease back to the municipality is one of the principal activities of the local government facilities financing authorities.

An operating water authority issues bonds to purchase existing facilities or to construct, extend, or improve a system. The primary source of revenues is user charges based on metered usage. The cost of constructing or extending water supply lines can be funded, completely or partially, by special assessments against abutting property owners. Tapping fees also help fund water system capital costs.

Water utilities are also operated directly by municipal governments and by privately owned public utilities under PUC regulation. Because of the costs of complying with federal safe drinking water standards, DEP has a program to assist with consolidating small water systems to make upgrading cost effective.

Recreation Authorities - Recreation authorities are formed to fund and/or operate parks, recreation centers, auditoriums, civic centers, stadiums, convention centers, swimming pools, and golf courses.

Solid Waste Authorities - Solid waste authorities fund and operate sanitary landfills, incinerators, transfer stations, resource recovery projects, and solid waste collection systems. Municipal governments and the private sector are also very active in solid waste collection and disposal.

Flood Control Authorities - Flood control authorities fund and operate flood control protection systems. For many years, the Sunbury Municipal Authority operated the only authority of this type. It funded its operations through a graduated fee structure on residential, commercial, and industrial properties within the city.

As a result of the levee-raising project in the Wyoming Valley and problems managing and maintaining an extensive flood protection system, an authority was formed to manage operations and maintenance of this much larger system. The Luzerne County Flood Protection Authority assumed responsibilities previously managed by individual municipalities within the river watershed. This authority is funded through existing governmental revenues without any direct charge to the protected properties.

Business District Authorities - These are generally small authorities that operate within designated business improvement districts within commercial areas, develop a plan for improvements and administrative services and, with the approval of the municipal governing body, levy assessments to pay their costs.

Administrative costs improve the ability of commercial establishments to serve consumers. They include free or reduced fee parking, transportation subsidies, public relations programs, group advertising, and district maintenance and security services. Business improvements are capital improvements designed to make the district more commercially attractive and functional, including sidewalks, street paving, street lighting, parking facilities, trees and plantings, pedestrian walks, sewers, waterlines, rest areas and rehabilitation, or clearance of blighted structures.

Transportation improvement authorities operate under the Transportation Partnership Act, 53 P.S. § 1621, as well as the Authorities Act. Transportation improvement authorities build transportation improvements and fund them through property assessments, with the prior approval of the elected municipal officials. This allows creation of public-private sector partnerships to fund projects where benefits are restricted to a small area.

Community Facilities Authorities - These authorities operate the following community facilities: ambulance services, flood control projects, community centers, libraries, markets, and museums.

School Financing Authorities - These authorities are formed by school districts to finance construction or repair of public school buildings. The Authorities Act limits the powers of authorities formed by school districts to finance public school projects. School authority debt is completely offset by bond fund assets and lease rentals receivable from school districts, resulting in zero net debt. In the 1950s and 1960s, school authorities were the largest type of authority in terms of outstanding debt. However, over the past 30 years, the amount of school debt issued by authorities has decreased precipitously as school districts have switched to funding their capital needs through their own direct obligations.

All school authority projects are leased back to the district. The Department of Education must approve the lease and construction plans. The school district pays its lease rentals out of current revenues of the school district. Their sources are local taxes and state school subsidies, since there are no user fees for school buildings.

Local Government Facility Financing Authorities - This debt is completely offset by bond fund assets and lease rentals receivable from municipalities, resulting in zero net debt. These authorities borrow funds for the construction of various types of projects that are leased back to municipal governments to operate. This group also includes several authorities operating bond pools that loan funds to outside local governments and an Allegheny County authority financing municipal community development projects within the county. The vast majority of these authorities finance water and sewer projects. Municipalities operate the projects and make lease rental payments from the user fees charged to customers. Other projects include municipal buildings, parking structures, and equipment leasing.

Nonprofit Institution Financing Authorities - The debt of these authorities is almost completely offset by bond fund assets and lease rentals receivable from nonprofit institutions. As more financing authorities have been adopting Governmental Accounting Standards Board Statement No. 14 (GASB 14), this category of authority debt is declining. GASB 14 removes the liability for debt repaid directly by the nonprofit institution from the authority's balance sheet. In addition, changes to federal income tax laws have now restricted borrowing for nonprofits to some extent.

Nonprofit institution financing authorities issue debt to finance construction projects of nonprofit institutions. They finance hospitals and nursing homes, community colleges and private nonprofit colleges and universities, and miscellaneous nonprofit institutions.

Multipurpose Authorities - Multipurpose authorities operate and/or finance more than a single category of project. The majority operates two project types, several operate and/or finance three project types, and one operates four project types. The Sunbury City Municipal Authority operates water, sewer, solid waste, and flood control projects. Operation of both water and sewer systems is the most common combination for multipurpose authorities.

Operations

Although authorities are essentially independent from the incorporating municipalities, communication and cooperation between the incorporating municipality and the authority is absolutely necessary. For instance, wastewater authorities are tasked with actual implementation of the sewage facilities planning that municipalities are required to undertake by the Sewage Facilities Act.[29] The authority is, therefore, essentially bound by the plan and should install sewage facilities only as provided therein. Cooperation between the incorporating municipality and the authority in both the planning and implementation phases would ensure that both parties are on the same page.

Occasionally, authorities enter into management contracts, either with a private company or with a municipality, to provide management services over an extended period. In the case of a contract with a private company, such contracts have been considered valid, even though they extend beyond the terms of the elected officials who approved the contract or the authority board members. Such a contract is permissible because the operations constitute proprietary functions, which may be delegated, as distinguished from governmental functions, which may not.[30]

Area of Operation; Eminent Domain

An authority is prohibited from acquiring facilities outside the boundaries of a municipality that incorporated the authority "solely for revenue producing purposes" without the approval of the municipality where the property is located.[31] The word "solely" was inserted because the amendment was intended to prohibit a type of business activity wholly unrelated to the municipal projects of the authority.

The Authorities Act also contains a provision prohibiting an authority from engaging in any new activities which "shall duplicate or compete with existing enterprises serving the same purposes."[32] The section contains exceptions for certain types of activities where competition may be permitted subject to complying with certain conditions. This section has been held to apply to preventing competition between adjoining authorities.[33] The noncompetition clause has been held inapplicable, however, where an authority which had been purchasing water form one authority, in bulk, without a long-term agreement, determined to change its supplier and buy from a different authority.[34] In a subsequent related case, it was held that where a territorial conflict did not violate the non-competition provision, the authority also was immune from attack by the neighboring authority based upon tortious interference with a contract.[35]

The Authorities Act grants authorities the power of eminent domain, which is not restricted to the boundaries of the incorporating municipality.[36]

Mandatory Connection

A key aspect of an authority's financial security is municipal action requiring that properties that can be served by the authority's system be connected to, and use, the system. Authorities do not have the power to establish such a requirement. This power can be exercised only by the applicable municipality enacting an ordinance requiring property owners to connect and use the authority system. The so-called "mandatory connection ordinance" is an important form of assistance rendered by a municipality to an authority. All of the municipal codes authorize enactment of this type of ordinance. To enforce such an ordinance, it is not necessary to prove that each individual property has a malfunctioning on-site system. Property owners usually have not been successful in preventing enforcement of the mandatory connection ordinance.[37] However, a municipality may not enact a mandatory connection ordinance that excludes properties in a part of the community.[38]

Governmental Regulation

An operating authority is not subject to the jurisdiction of the PUC regardless of whether its service extends beyond the boundaries of the incorporating municipality.[39] However, a different result arises where a system is owned by an authority and leased to a municipality. In that situation the rates are established by the lessee municipality. If the system serves users in another municipality, the rates established by the lessee municipality for users located in another municipality are subject to regulation by the PUC.[40] The PUC in such a case also has jurisdiction over service, and may order an extension of lines by a municipality, upon application by a potential user.[41]

If an authority intends to acquire a system which is already subject to regulation by the PUC, the acquisition may not be completed without approval by the municipality where the system is located.[42] Also, approval by the PUC is required, indirectly, through its issuance of a certificate of abandonment to the prior owner of the system.[43]

Authorities are subject to zoning, subdivision, and other regulations of each municipality in which they operate.[44] Authorities must also obtain all state and federal permits.

Tapping Fees; Rates and Charges

Authorities are permitted to charge reasonable and uniform rates for the services they render.[45] Authorities are also permitted to impost initial charges for the right to connect to the system, including tapping fees, connection fees, and customer facilities fees.[46] Act 203 of 1990 established a detailed procedure for setting the initial fees and a formula for the maximum amount. The Commonwealth Court has held that the determination of an equivalent dwelling unit (EDU) could not be based on the well-known planning figure of 350 gallons per day, but must be based on the records of actual water use by apartment units in the municipality.[47] Since sewer systems must necessarily treat not only sewage but also infiltration, the allocated portion of which should also be included if the authority is to be fully compensated. Act 203 also requires that when a developer or property owner pays for an extension to the authority's lines, the authority must repay him a portion of the tapping fee revenue received when others connect their properties directly to the line.[48]

In practice, authorities have a great deal of discretion in setting rates. Although the Authorities Act specifies that rates are to be "uniform,"[49] this has been interpreted as not prohibiting the establishment of rate districts, based upon the differing costs of service in various geographic areas. Also, multiple user classifications related to differing costs of service for different types of properties are also permitted. The Commonwealth Court has also held that rate structures may be established to reflect the *value* of service available in addition to the amount used.[50]

If customers disagree, they can challenge the rates in the courts of common pleas. However, the courts have reviewed authorities' rates with a great deal of deference, and customers will find it quite difficult to challenge water or sewer rates by asserting they are not reasonable or uniform. Nonetheless, all service providers, including authorities, are well served to ensure that rates reflect true costs. Historically, municipal entities sometimes looked to excess revenues from their authorities to supplement municipal budgets. In 2012, the Authorities Act was amended to prohibit the use of authority funds for any purpose other than a service or project directly related to the purpose of the authority. The amended section also added a clause providing ratepayers with a cause of action in the court of common pleas where the authority is located to seek return of money expended in violation of the statute directly from the ratepayers.[51]

Investor-owned water and sewer utilities generally may collect rates only with approval of the PUC. The PUC scrutinizes rates closely – the exact opposite of the courts that review authorities' rates. Those who make rate applications to the PUC know the expense, difficulties, and complexities of that procedure. Because PUC rate setting is so much more onerous than rate setting under the more general guidance of a statute, most entities avoid PUC jurisdiction wherever possible.

Two scenarios can land otherwise exempt municipal rates in the PUC thicket: (1) extraterritorial service by a municipality; and (2) extraterritorial rates set by an authority that is not a *bona fide* authority, but rather is controlled by the municipality itself. These are the danger areas that require close scrutiny by the system's solicitor.

Bulk Service Contracts

The requirement for rates to be "reasonable and uniform" does not apply, however, to charges established pursuant to an agreement.[52] Authorities have the power to make contracts under Sections 5607(d)(13 and (14) of the Authorities Act. The reasonableness of such contracts is not subject to review. Arguments based upon the assertion that rates established by agreement are "unconscionable" have not been successful.[53]

The power to enter into contracts applies also to contracts between authorities and privately-owned public utilities.[54] Such contracts must be filed by the public utility with the PUC.[55] However, that does not give the PUC jurisdiction over subsequent conflicts about the agreement.[56]

The Authorities Act includes a limitation upon the power of a sewer authority to contract for the initial charges to be received by it pursuant to an intermunicipal agreement. This provides that an authority wishing to sell a portion of its excess sewage treatment capacity to another authority or municipality may not charge a higher cost for the capacity than the selling authority charges its own customers for that capacity in its tapping fee. It also limits the capacity portion of the tapping fee that may be imposed by the purchasing authority upon users in its system.[57]

Financing

Authorities have power to borrow money, issue securities, and provide pledges of revenue, securing such obligations.[58] Like all other governmental entities, under the Pennsylvania Constitution, authorities do not have the power to mortgage their real property.[59] Borrowing by an authority is not subject to the Local Government Unit Debt Act.[60] To enhance the marketability of authority bonds, however, they are often secured by a guaranty, issued by one or more municipalities. Such guaranties are covered by the Local Government Unit Debt Act.

The primary security for an authority's bonds is a pledge of its revenues, and an authority may give such a pledge.[61] The pledge and related covenants are set forth in a trust indenture between the authority and a bank as trustee, for the benefit of the bondholders. It is wise to review the indenture restrictions before undertaking major projects or transactions.

The Authorities Act requires authorities to prepare annual financial reports that are audited by independent accountants.[62] To obtain an unqualified opinion from such accountants the authority must maintain its books and records in accordance with generally accepted accounting standards, which are more comprehensive than those applicable to municipalities under Pennsylvania law. These reports must be filed with DCED, and a summary must be published in a local newspaper. The Authorities Act also contains provisions regulating the types of investments that may be made with authority money.[63]

Other Statutes

The various municipal codes do not apply to authorities. However, several general statutes apply to authorities, sometimes regulating matters which are also covered in the municipal codes, but are not in the Authorities Act. For instance, the Separation Act applies to authorities and requires the use of separate contracts for general construction, electrical, plumbing, etc.[64]

Another general statute containing provisions applicable to authorities is the MPC. One provision in that statute requires authorities to give notice of extensions to the applicable planning agency.[65]

One of the most useful of the ancillary statutes for sewer authorities is the one which makes it mandatory for any water utility (defined to include a water company or municipally-owned system) to terminate water service to any property where a sewer system operator, including an authority, notifies the water utility of an unpaid, delinquent sewer bill for such property.[66] The termination of water service is becoming a more and more important tool for authorities to use in collecting delinquent rentals.

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41. *Borough of Phoenixville v. Pennsylvania Public Utility Com'n,* 280 A.2d 471, 3 Pa.Cmwlth. 56 (1971).
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43. *Borough of Media v. Pennsylvania Public Utility Com'n,* 456 A.2d 540, 500 Pa. 320 (1983).
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45. 53 Pa.C.S. § 5607(d)(9).
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50. *Patton-Ferguson Joint Authority v. Hawbaker,* 322 A.2d 783, 14 Pa.Cmwlth. 402 (1974).
51. 53 Pa.C.S. § 5612(a.1).
52. *Municipal Authority of City of Monongahela v. Carroll Tp. Authority,* 555 A.2d 264, 123 Pa.Cmwlth. 615 (1989).
53. *See White Rock Sewage Corp. v. Township of Monroe,* 465 A.2d 102, 77 Pa.Cmwlth. 119 (1983).
54. *Northampton, Bucks County Mun. Authority v. Bucks County Water and Sewer Authority,* 508 A.2d 605, 96 Pa.Cmwlth. 514 (1986).
55. 66 Pa.C.S. § 507.
56. *White Rock Sewage Co. v. Pennsylvania Public Utility Com'n,* 578 A.2d 984, 133 Pa.Cmwlth. 608 (1990).
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58. 53 Pa.C.S. § 5607(d)(12), (14); 53 Pa.C.S. § 5608.
59. Pa.Const. art. III, § 31; *see Beam v. Borough of Ephrata,* 149 A.2d 431, 395 Pa. 348 (1959).
60. 53 Pa.C.S. §§ 8001-8271.
61. 53 Pa.C.S. § 5607(d)(16).
62. 53 Pa.C.S. § 5612.
63. 53 Pa.C.S. § 5611.
64. 53 P.S. § 1003; 71 P.S. § 1618; see Mechanical Contractors Ass'n of Eastern Pennsylvania v. Southeastern Pennsylvania Transp. Authority, 654 A.2d 119 (Pa.Cmwlth. 1995).
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XIX. The Planning Commission and the Comprehensive Plan

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An important component of any municipality's responsibilities in reviewing land development and subdivision submissions is the review and advice provided by the planning commission. This article will discuss the establishment of a planning commission, examine its responsibilities, and conclude with an analysis of the planning commission's duties in preparing the municipality's comprehensive plan.

Establishment of a Planning Commission

The Pennsylvania Municipalities Planning Code (MPC)[1] permits a municipality to create a planning agency, which can take the form of a planning commission, a planning department, or a planning committee of the governing body.[2] Most local governments have created planning commissions. The creation of a planning commission is governed by MPC Sections 201 to 211. The planning commission must have between three and nine members.[3] Members may be compensated at a rate not to exceed that of the governing body, and may be reimbursed for necessary and reasonable expenses. The municipality's governing body appoints the members of the planning commission, each of whom serves a 4-year term. There are special provisions for the first members appointed in order to stagger terms of office. All members must be residents of the municipality. The governing body may fill vacancies in the planning commission by appointment for the unexpired term. Once appointed, a member of a planning commission may only be removed for malfeasance, misfeasance, or nonfeasance in office or for other just cause by a majority vote of the governing body taken after 15 days' advance notice and an opportunity to be heard.[4]

Powers and Duties of the Planning Commission

The powers and duties of the planning commission are set by the governing body. The MPC requires the planning commission, at the request of the governing body, to prepare the comprehensive plan for the development of the municipality and present it for the consideration of the governing body, and to maintain and keep on file records of its actions, which records and files must be in the possession of the governing body.[5] The governing body may also request the planning commission to perform numerous other activities, including the following:

- make recommendations concerning an official map;
- prepare and present for consideration by the governing body zoning, subdivision, land development, and planned residential development regulations, building and housing codes, and environmental studies;
- submit to the governing body a recommended capital improvements program;
- prepare and present to the governing body of the municipality a water survey;
- hold public hearings and meetings;
- present testimony before any other board; and
- enter upon land to make examinations and surveys with the consent of the owner.[6]

Conduct of Meetings and Functions of a Planning Commission

Typically, a governing body will empower the planning commission to review all subdivision and land development applications that are submitted to the municipality. The planning commission normally receives input from the municipality's professional engineer and other staff members concerning technical compliance with the municipality's codes and ordinances. The planning commission then considers each application at a public meeting.

Meetings of the planning commission are governed by the Sunshine Act.[7] Therefore, the planning commission must advertise the dates of its meetings, it must deliberate and vote in public, and it must allow public comment on proposed plans.[8] When considering an application for tentative approval of a planned residential development pursuant to Article VII of the MPC, the governing body, or the planning commission if designated, must hold a public hearing pursuant to public notice.[9] As stated previously, the planning commission must maintain public records of its activities.

The governing body usually directs the planning commission to make recommendations to the governing body on subdivision and land development applications. However, the governing body may delegate actual approval authority to the planning commission,[10] although in practice this delegation is rare. The governing body often requires applicants seeking special exceptions from the municipality's zoning hearing board to appear before the planning commission, and requires the planning commission to make a recommendation to the zoning hearing board. The planning commission recommendations are only advisory and are not binding on the governing body[11] or the zoning hearing board.[12]

In addition to acting on subdivision and land development applications, the planning commission is required to review the municipality's official sewage facilities plan required by the Pennsylvania Sewage Facilities Act, commonly referred to as Act 537.[13] The planning commission must review the Act 537 plan and any official plan revisions to ensure consistency with the municipality's programs of planning for the area. This review must be transmitted to the Department of Environmental Protection (DEP).[14] DEP will not act on an official plan or an official plan revision without evidence of planning commission review.[15]

Advisors to the Planning Commission

The planning commission may not hire consultants on its own initiative, as it is not authorized to expend public funds. However, the governing body of the municipality may employ administrative and technical services to assist the planning commission in carrying out its responsibilities. This assistance may include receiving services from the county planning agency, with the consent of the governing body.[16] The planning commission may accept and utilize funds, personnel, and other assistance from the county, the commonwealth, or the federal government, or from private sources, again with the consent of the governing body.[17] The planning commission may have a solicitor, if the governing body chooses to employ one for it. In practice, the township solicitor is generally tasked to render assistance to the planning commission when necessary. Although one solicitor cannot represent both a municipality and its zoning hearing board,[18] there is no similar prohibition related to a municipal solicitor advising a planning commission.

The Comprehensive Plan

As suggested by its name, a comprehensive plan is an exhaustive evaluation of the past, present and future land use and development needs and desires of a municipality. The MPC is clear that the planning commission is required to prepare the comprehensive plan.[19] The planning commission should be guided in its task by Article III of the MPC, which sets forth the procedure that the planning commission and the governing body must follow in creating and enacting the comprehensive plan.

The comprehensive plan may include textual matter, maps, and charts, and must include, but need not be limited to, several basic elements set forth in the MPC.[20] These elements include:

- a statement of objectives of the municipality concerning its future development;
- a plan for future land use;
- a plan to meet the housing needs of present residents and those persons anticipated to reside in the municipality;
- a plan for the movement of people and goods;
- a plan for community facilities and utilities;
- a statement of the interrelationships among the various plan components;
- a discussion of short-and long-range plan implementation strategies;
- a statement indicating the compatibility of the plan to contiguous municipalities, or a statement indicating how the municipality intends to buffer or transition its uses with disparate uses, and that the plan is generally consistent with the county comprehensive plan; and
- a plan for the protection of natural and historic resources to the extent not preempted by Federal or State law, including but not limited to wetlands and aquifer recharge zones, woodlands, steep slopes, prime agricultural land, flood plains, unique natural areas, and historic sites.

The comprehensive plan must also include a plan for the reliable supply of water, considering current and future water resources availability, uses, and limitations. Any such water plan must be consistent with the State Water Plan and any plan adopted by a river basin commission.[21] The comprehensive plan may also include a plan for energy conservation.[22] In carrying out its task of preparing the comprehensive plan, a planning commission must make surveys, studies and analyses of trends in housing, demographics and economics; land use; transportation and community facilities; natural features affecting development; natural, historic and cultural resources; and the prospects for future growth in the municipality.[23]

Once the plan is completed, but before it is adopted by the governing body, the municipality must forward a copy of the plan to the county planning agency, all contiguous municipalities and the local school district, for review and comment.[24] The planning commission is required to hold at least one public hearing pursuant to public notice before forwarding the proposed comprehensive plan to the governing body. The governing body must then hold another public hearing, pursuant to public notice, before proceeding to vote on the plan.[25] If, after the public hearing, the proposed plan is substantially revised, the governing body must hold another public hearing, pursuant to public notice, before proceeding to vote on the plan.

Typically, the completed comprehensive plan becomes the basis for adjustments to the zoning and subdivision ordinances and the zoning map. Other ordinances may need to be enacted or revised to effectuate the goals of the comprehensive plan. After a comprehensive plan is adopted, the governing body must submit plans for new or altered streets, public grounds, public structures, water lines and sewer facilities and amendments to the zoning or subdivision ordinances to the planning commission for an advisory report whether the proposed action is in accordance with the comprehensive plan.[26] The comprehensive plan is not positive law of the municipality. Thus, no action of the governing body is invalid or subject to appeal on the basis that it is inconsistent with, or fails to comply with, a provision of the comprehensive plan.[27] However, Act 68 of 2000 amended the MPC to provide that zoning, subdivision, and land development regulations and capital improvement programs must "generally implement the municipal . . . comprehensive plan."[28] Act 68 also required that, if a change to a zoning ordinance was not generally consistent with its comprehensive plan, the municipality must concurrently amend its comprehensive plan.[29] Act 68 allowed a municipality to amend its comprehensive plan at any time, provided that it remains generally consistent with the county comprehensive plan and compatible with the comprehensive plans of abutting municipalities.[30]

Act 68 also permitted municipalities to join together to form a multi-municipal planning agency and then to jointly prepare a comprehensive plan. This allows municipalities to consider issues of common interest, including matters

such as agricultural and open space preservation, natural and historic resources, transportation, housing, and economic development.[31] The zoning ordinances of each municipality must then be consistent with the multi-municipal comprehensive plan.[32]

Obviously, preparing a comprehensive plan is a massive undertaking. There are huge demands placed on the municipality's professional staff in gathering all of the requisite information. Because most municipal staffs are busy with the day-to-day functions of government, many municipalities retain the services of a consultant to guide the planning commission and the municipality through the comprehensive plan process. Most municipalities prepare a comprehensive plan about once a decade, and the MPC requires that the comprehensive plan be "reviewed" at least once every 10 years.[33] With improvements in technology and information available to municipalities, some municipalities revise and update their plans on a more frequent basis. More frequent updates can also reduce reliance on consultants.

This author served as chairman of his township's planning commission when it was preparing a comprehensive plan. In order to foster public involvement in and support of the process, the governing body created a large comprehensive plan committee consisting of the planning commission and representatives of many of the township's community associations. All meetings were held pursuant to public notice in order to comply fully with the Sunshine Act. The community representatives continually informed their respective constituencies about the planning process, and provided feedback to the committee. Many issues of community concern were debated at length during the committee meetings. The committee delivered a final working draft to the planning commission, which considered additional revisions before it held a public hearing. The planning commission then forwarded the completed draft to the governing body for consideration and adoption. The net result was that the public was involved in the process from its inception and the completed plan received little public criticism.

Additional Resources

Further information may be obtained from DCED, particularly the following publications:

- *The Planning Commission* (Planning Series #2), available for download at dced.pa.gov/publications
- *The Comprehensive Plan* (Planning Series #3), available for download at dced.pa.gov/publications

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3. 53 P.S. § 10202.
4. 53 P.S. § 10206.
5. 53 P.S. § 10209.1(a).
6. 53 P.S. § 10209.1(b).
7. 65 Pa.C.S. § 701, *et seq.*
8. *See Moore v. Township of Raccoon,* 155 Pa.Cmwlth. 529, 625 A.2d 737 (1993) (planning commission violated Sunshine Act by holding closed meeting concerning proposed changes to a junkyard ordinance; violation cured by holding a later open meeting where citizens could comment).
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11. *Todrin v. Board of Sup'rs of Charlestown Tp.,* 27 Pa.Cmwlth. 583, 367 A.2d 332 (1976).
12. *Heck v. Zoning Hearing Bd. for Harvey's Lake Borough,* 39 Pa.Cmwlth. 570, 397 A.2d 15 (1979).
13. 35 P.S. § 750.1, *et seq.*
14. 35 P.S. § 750.5(d)(8).
15. 25 Pa. Code § 71.32.
16. 53 P.S. § 10210.
17. 53 P.S. § 10211.
18. 53 P.S. § 10617.3(c).

19. 53 P.S. § 10209.1(a)(1).
20. 53 P.S. § 10301(a).
21. 53 P.S. § 10301(b).
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23. 53 P.S. § 10301.2.
24. 53 P.S. § 10301.3.
25. 53 P.S. § 10302.
26. 53 P.S. § 10303.
27. 53 P.S. § 10303(c); *see Briar Meadows Development, Inc. v. South Centre Tp. Bd. of Sup'rs,* 2 A.3d 1303, 1307 (Pa.Cmwlth. 2010).
28. 53 P.S. § 10303(d).
29. 53 P.S. § 10603(j).
30. 53 P.S. § 10603(k).
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XX. Zoning

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Zoning ordinances are created by municipalities in accordance with the Municipalities Planning Code (MPC),[1] which provides enabling legislation for cities, incorporated towns, townships, boroughs and counties with the exception of Philadelphia and Pittsburgh.[2] The necessary and implicit police power of local governments to promote public health, safety, morals and welfare provides the constitutional foundation underlying all zoning laws. Hence, where a zoning restriction does not unreasonably restrict property rights and there is a rational relationship between a zoning restriction and the public health, safety, morals or general welfare, the restriction will be upheld.[3]

The ability of municipalities to exercise their police power through the use of zoning ordinances is no longer disputed. Zoning enabling acts are therefore liberally construed to provide municipalities with wide latitude to enact such legislation.[4] Once enacted, however, where ambiguity exists, zoning ordinance provisions will be construed in favor of property owners to allow the broadest possible use of their property.[5]

The responsibility for enacting, or refusing to enact zoning ordinances, lies exclusively with the municipal governing body.[6] Zoning and rezoning is a purely legislative function with which the courts lack the authority to interfere, except where a zoning classification clearly has no substantial relation to public health, safety, morals or general welfare.[7] Likewise, county zoning ordinances are inapplicable to local municipalities which have enacted their own zoning ordinances, and the county in which a municipality is situated lacks the authority to direct the municipality to alter its zoning ordinances.[8]

Zoning ordinances usually create districts and impose restrictions on the types of uses permitted within each district, as well as the size, construction and location of buildings and other improvements. Such ordinances may regulate the population density and intensity of uses, as well as preserve natural resources, historic areas and open spaces.[9] The various zoning districts within the municipality must be described on a map made part of the zoning ordinance.[10]

Purpose

As described in the MPC, there are a multitude of specific purposes which zoning ordinances may serve to fulfill within the general mantle of promoting the public health, safety, morals and welfare. For example, ordinances may be designed to promote, protect and facilitate emergency management preparedness and operations, national defense facilities, adequate light and air, police protection, vehicle parking and transportation, sewage, water supply, schools, forests, recreational facilities, wetlands, aquifers, forests and flood plains. Zoning ordinances may be used to prevent overcrowding, loss of health, life or property from fire, flood, panic or other dangers.[11] Another important purpose of zoning, and one which is constitutionally required, is providing for all basic forms of housing within each municipality.[12]

Procedure

The initial studies, surveys and related work necessary for the creation of the text and map of a proposed zoning ordinance are to be conducted for the municipal governing body by its advisory planning agency. This preliminary work must be discussed in at least one public meeting pursuant to public notice. Before voting on the enactment, the governing body of the municipality must hold a public hearing following public notice. Additionally, the pertinent county planning agency must have been given at least 45 days to review and make recommendations

regarding the proposed ordinance prior to the public hearing.[13] The vote must be taken within 90 days after the last public hearing and within 30 days after enactment, a copy of the zoning ordinance must be forwarded to the county planning agency.[14] The procedures for the enactment of amendments to zoning ordinances are similar to those pertaining to original zoning ordinances, requiring both a public hearing and county planning commission review prior to ordinance adoption.[15] In contrast to original zoning ordinances, however, amendments are not required to be prepared initially by the planning agency. Amendments not prepared by the planning agency, however, must be submitted to the planning agency for review and recommendation at least 30 days prior to the public hearing.[16]

Challenges to Zoning Ordinances

Procedural The amendments to the MPC enacted pursuant to Act 39 of 2008 changed the rules for challenging the validity of a zoning ordinance on procedural grounds. Whereas procedural validity challenges were permitted to be filed with the zoning hearing board prior to Act 39, they may now be filed only with the court of common pleas in accordance with Section 5571.1 of the Judicial Code (relating to appeals from ordinances, resolutions, maps, etc.).[17] Appeals must be taken within 30 days from the intended effective date of the challenged ordinance.[18] Act 39 of 2008 also added a provision allowing the governing body or any resident or landowner of the municipality to publish optional notice that municipal action has been taken to adopt an ordinance, whether or not such action was taken prior to or subsequent to the enactment of Act 39.[19] Under Section 108 of the MPC, so long as optional notice is published in accordance with the requirements set forth therein, any appeal not filed within 30 days of the second publication of notice shall be dismissed, with prejudice, as untimely.[20]

Substantive A landowner seeking to challenge the validity of a zoning ordinance or map on substantive grounds may submit a written request for a curative amendment, presenting the matters at issue and plans describing the proposed development, to the governing body of the municipality. Public hearings on the requested amendment must commence within 60 days of the submittal. Following the presentation of evidence, the governing body may accept the curative amendment, adopt an alternative amendment or reject the request altogether.[21] A validity challenge may also be made to the municipal zoning hearing board by a landowner[22] or any person who is aggrieved by a use or development permitted on the land of another by such ordinance or map[23]. Although the court on appeal may not order the enactment of the curative amendment,[24] it has broad power to provide relief,[25] including the power to order the municipality to issue building and related permits necessary for the completion of the planned development.[26]

Confiscatory Zoning

All zoning involves governmental diminution of some private property rights without compensation,[27] but a zoning ordinance that is "clearly arbitrary and unreasonable and without substantial relation to public health, safety, morals, or general welfare" may be declared constitutionally invalid,[28] and a landowner whose property rights are unreasonably restricted by such an ordinance is entitled to relief. The question of when zoning restrictions become so onerous as to constitute a taking and therefore require compensation is a difficult one. Since this issue is derived from the Fifth Amendment of the United States Constitution, the United States Supreme Court has rendered several decisions identifying circumstances relevant to this question.[29] Generally, an uncompensated taking will be easier to establish the closer the interference comes to physical seizure of the property. The economic impact of the zoning ordinance on the property owner and the remaining uses to which the property can be utilized are important considerations.

Providing a "Fair Share" of Uses

Just as unduly restrictive zoning ordinances are deemed unconstitutional, so too are those zoning ordinances that serve to unjustly exclude categories of people who may desire to live within the municipality.[30] Although the right of the community to exclude uses from selected zoning districts was firmly established when land use regulation was first created, the ability to ban legitimate uses from the entire municipality is prohibited as a violation of the "fair share" principle.[31] Municipalities may be held in violation of the "fair share" principle even if they only partially exclude a use, if such partial exclusion constitutes selective admission.[32]

For a zoning ordinance to be declared unconstitutional on this basis, either a de jure or de facto exclusion must be found to exist. A de jure exclusion occurs where the ordinance, on its face, totally prohibits the use.[33] A de facto exclusion is created where the ordinance states that the use is permitted, but when applied, the ordinance serves to prohibit it.[34] In resolving the issue of a de facto exclusion, the percentage of land available under the zoning ordinance for the alleged excluded use must be evaluated in light of regional and municipal population growth, the total amount of undeveloped land within the municipality, as well as the current extent of the use within the municipality.[35] Although challenges to zoning ordinances are usually based upon excluded residential uses, legitimate commercial and industrial uses are also protected.[36] Municipalities, however, need not make provision for every possible planning variation or combination of commercial uses.[37]

Zoning ordinances, like other legislative enactments, are presumed valid and constitutional, and the burden of proving otherwise is on the challenger.[38] However, once a challenge to the presumption of the validity of an ordinance demonstrates that the ordinance excludes a legitimate use, the burden shifts to the municipality to show that the exclusion bears a substantial relationship to the public health, safety and welfare.[39]

Relief from Zoning

A property owner can secure relief from zoning restrictions by applying for or establishing a special exception, conditional use, variance, nonconforming use or vested right. A special exception will be granted by the zoning hearing board if the applicant demonstrates that the proposed use meets the specific and objective requirements for a special exception under the applicable zoning ordinance, unless it can be shown by any party objecting to such use that it will create an unusual burden on the public health, safety or welfare.[40] A conditional use is established in the same manner as a special exception except that the applicant applies to the governing body for relief rather than the zoning hearing board.[41]

Relief in the nature of a variance requires the applicant to demonstrate to the zoning hearing board that the unique characteristics of the subject property would create an unnecessary hardship were the zoning restrictions applied to it. The applicant must also show that the hardship was not self-imposed, that the relief requested is the minimum necessary to avoid the hardship and that it will neither alter the essential character of the neighborhood nor unduly burden the public welfare.[42] These traditional requirements for a variance, however, may be avoided where the relief sought is so minor as to be de minimus.[43]

Relief from zoning restrictions can also be obtained by establishing that the subject use, lot or structure is validly nonconforming. In order to qualify for this status, the use must have been lawfully in existence at the time of enactment of a zoning ordinance prohibiting such use.[44] Where a legal nonconforming use exists, the property owner has a constitutional right to continue such use until such time as the use is abandoned.[45]

A vested right to violate a zoning ordinance may result from the issuance by the municipality of a permit to proceed, notwithstanding the zoning prohibition. Generally, such a right can be established where the applicant exercised due diligence and good faith in attempting to comply with the ordinance, and expended substantial unrecoverable funds in reliance on the permit.[46] Other relevant factors include the expiration without appeal of the period during which an appeal could have been taken from the issuance of the permit,[47] as well as the insufficiency of evidence to demonstrate that the public health, safety or welfare would be adversely affected by the use of the permit.[48] Although considered a rare remedy, a property owner may also be granted a variance by estoppel, with or without the issuance of a permit, where there has been active municipal acquiescence in the creation and continuance of a prohibited use and where the property owner has made substantial expenditures toward the property in good faith reliance on the validity of the use.[49]

Zoning Enforcement

A municipality may initiate enforcement proceedings for violations of its zoning ordinance by sending an enforcement notice to the landowner which details the violations, including citations to applicable sections of the zoning ordinance and a description of how the zoning provision has been violated, sets forth the date by which compliance must be commenced and completed, and gives notice of the right to an appeal to the zoning hearing

board.[50] Failure of a landowner to appeal an enforcement notice setting forth all required information results in a conclusive determination that the landowner violated the zoning ordinance.[51] Upon a failure of the landowner to appeal, or a denial of the appeal by the zoning hearing board, the municipality may file a civil complaint with the magisterial district court and, upon a finding of liability, recover a civil penalty up to $500, plus court costs and reasonable attorney fees,[52] or file an action in equity to enjoin the landowner from committing further violations.[53]

Additional Information

Further information regarding Pennsylvania zoning law may be found in the following treatises: R. Anderson, *Law of Zoning in Pennsylvania*, 1982 and Supp., 1992; and R. Ryan, *Pennsylvania Zoning Law and Practice*, 2nd Edition, 1981 and Supp., 2014.

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3. *C & M Developers, Inc. v. Bedminster Tp. Zoning Hearing Bd.,* 820 A.2d 143, 573 Pa. 2 (2002).
4. *Exton Quarries, Inc. v. Zoning Bd. of Adjustment of West Whiteland Tp.,* 228 A.2d 169 (Pa. 1967); *Forks Tp. Bd. of Sup'rs v. George Calantoni & Sons, Inc.,* 297 A.2d 164, 6 Pa.Cmwlth. 521 (1972).
5. 53 P.S. § 10603.1; U*pper Salford Tp. v. Collins,* 669 A.2d 335 (Pa. 1995).
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7. *Gratton v. Conte,* 73 A.2d 381, 364 Pa. 578 (1950), *Clover Hill Farms, Inc. v. Lehigh Tp. Bd. of Sup'rs,* 289 A.2d 778, 5 Pa.Cmwlth. 239 (1972).
8. 53 P.S. § 10602; *Commonwealth v. Bucks County,* 302 A.2d 897, 8 Pa.Cmwlth. 295 (1973).
9. 53 P.S. § 10603.
10. 53 P.S. § 10605.
11. 53 P.S. § 10604.
12. 53 P.S. § 10604(4); *Appeal of Girsh,* 263 A.2d 395, 437 Pa. 237 (1970); *H & R Builders, Inc. v. Borough Council of Borough of Norwood,* 555 A.2d 948, 124 Pa.Cmwlth. 88 (1989).
13. 53 P.S. § 10607.
14. 53 P.S. § 10608.
15. 53 P.S. § 10609.
16. 53 P.S. § 10609(c).
17. 53 P.S. § 11002-A(b).
18. 42 Pa.C.S. § 5571.1(b)(1) and (c) ("[a]n appeal shall be exempt from the time limitation in subsection (b) if the party bringing the appeal establishes that, because of the particular nature of the alleged defect in statutory procedure, the application of the time limitation under subsection (b) would result in an impermissible deprivation of constitutional rights).
19. 53 P.S. § 10108.
20. 53 P.S. § 10108(d); 53 P.S. § 10108(g) (note that the 30-day deadline under § 108 contains the same caveat as referenced in the previous footnote).
21. 53 P.S. §§ 10916.1(a)(2), 10609.1.
22. 53 P.S. § 10916.1(a)(1).
23. 53 P.S. § 10916.1(b).
24. *Board of Com'rs of Ross Tp. v. Harsch,* 467 A.2d 1183, 78 Pa.Cmwlth. 395 (1983).
25. 53 P.S. § 11006-A(c).
26, *Application of Friday,* 381 A.2d 504, 33 Pa.Cmwlth. 256 (1978).
27. *Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365, 47 S.Ct. 114 (1926).
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29. *Dolan v. City of Tigard,* 512 U.S. 374, 114 S.Ct. 2309 (1994); *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 112 S.Ct. 2886 (1992).
30. *Surrick v. Zoning Hearing Bd. of Upper Providence Tp.,* 382 A.2d 105, 476 Pa. 182 (1977).
31. *BAC, Inc. v. Board of Sup'rs of Millcreek Tp.,* 633 A.2d 144, 534 Pa. 381 (1993); *Fernley v. Board of Sup'rs of Schuylkill Tp.,* 502 A.2d 585, 509 Pa. 413 (1985).

32. *Williston Tp. v. Chesterdale Farms, Inc.,* 341 A.2d 466, 462 Pa. 445 (1975).
33. *Fernley v. Board of Sup'rs of Schuylkill Tp., supra.*
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XXI. Zoning Hearing Boards

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What follows is a summary of the procedural rules and issues that municipal solicitors and zoning hearing board solicitors regularly encounter in the course of zoning hearing board proceedings and appeals therefrom. This summary reflects recent amendments to the Municipalities Planning Code (MPC). It is not intended as a comprehensive treatment of zoning hearing board practice. Rather, it is an effort to set forth areas of that practice which seem most likely to be of interest to municipal solicitors. And, it highlights some of the areas where the province of zoning hearing boards, on the one hand, and municipal solicitors and their local official clients, on the other hand, interface.

Though independent decision makers, zoning hearing boards are completely dependent for their sustenance upon the municipality in which they serve. The governing body appoints zoning board members, provides them with quarters, assigns office staff to provide administrative assistance, finances their operations and presents them with the ordinance that guides their actions and often their operating forms and procedures. A solicitor can on occasion provide insights and advice to the officials he counsels that will enhance the operation of the zoning hearing board and, in turn, the administration of the zoning ordinance.

Organizational Matters

Formation The statutory framework for the organization and practice of municipal zoning hearing boards is found in the MPC. Each municipality that has enacted a zoning ordinance must create a zoning hearing board.[1] Zoning hearing boards are quasi-judicial, administrative bodies.[2] As such, they must not only be unbiased, but also avoid even the appearance of bias.[3] Ex-parte contact with any party or its representative is forbidden.[4] Municipal solicitors will do well to caution the municipal officials they represent against meeting privately with board members in an effort to influence the outcome.

Members and Officers The board may consist of either three or five members, at the discretion of the governing body, with 3-year or 5-year terms of office staggered so that one term expires each year. Appointing authority is vested in the governing body. It may also appoint up to three alternate members.[5] The board chairman may designate alternate members to replace absent or disqualified members and shall designate alternate members to the extent necessary to reach a quorum. Alternates are to be seated in rotation on a case-by-case basis according to declining seniority.[6] Even when not seated, alternates may participate in all proceedings, except the vote.[7] The board shall elect officers from its membership, which officers shall serve annual terms.[8] Although not specified in the MPC, it is customary for a board to elect a chairman and vice-chairman and in some municipalities, a secretary.

Members and alternates must be residents of the municipality and hold no other elected or appointed office in the municipality nor be employed by the municipality.[9] The compensation of members and alternates may be fixed by the governing body at a rate not exceeding the permissible limit of their own compensation.[10] Board members must file the Statement of Financial Interest prescribed by the State Ethics Commission under the Public Official and Employees Ethics Act, Act 170 of 1978.[11]

Members of a zoning hearing board enjoy judicial immunity from suit.[12] Further, when they act in good faith and reasonably believe their decision is authorized by law, they are statutorily shielded from liability by governmental official immunity even if they reach a wrong legal conclusion.[13] Zoning hearing board members may be removed by the governing body, following 15 days' prior notice (and after a hearing, if requested), for malfeasance, misfeasance or nonfeasance in office or other just cause.[14]

Procedural Rules and Forms Procedural rules and forms consistent with applicable laws and ordinances may be adopted by the board.[15] Perhaps the most important aspect of this power is the establishment of application forms. It is the experience of some municipal and zoning hearing board solicitors that the application forms used by some municipalities are extremely outdated. Therefore, this author will reiterate the recommendation of the previous author of this chapter - that municipal solicitors encourage the governing bodies for which they serve to authorize and direct their zoning hearing boards to update their forms. Structuring the application form to elicit as much information about the relief requested and the facts support effective administration.

Joint Boards Though quite uncommon, joint zoning hearing boards may be created by two or more municipalities.[16] Municipalities adopting a joint zoning ordinance under Article VIII-A of the MPC shall either create a joint board to administer the entire joint ordinance, or provide for individual boards to administer the ordinance as to properties located within each participating municipality.[17]

Solicitor, Advisors & Other Assistance Legal counsel, support staff and consultants may be hired by the board, which is authorized to fix their compensation, though the expenditures are limited to the funds appropriated by the governing body.[18] Typically, other than the board solicitor, hired support consists only of the stenographer contracted to attend and transcribe hearings. Administrative functions, including the recording of the minutes, are often performed by municipal employees. The municipal zoning officer normally attends meetings and should be available to testify on behalf of the municipality if needed.

Avoidance of bias and/or the appearance of bias, essential to due process, have prompted the courts and the General Assembly to bar the municipal solicitor from also serving as the zoning board solicitor.[19] Further, the once common practice of the governing body dictating the choice of the board's solicitor has been held to be without basis.[20] The same sorts of considerations also require the zoning board solicitor to politely ward off requests from municipal officials for advice on matters about which he or she might be called upon to advise the board, or behind-the scene efforts to influence that advice.

Application Fees. Reasonable fees to be charged applicants may be prescribed by the governing body to defray board member compensation, notice costs and administrative overhead; however, fees of the board's solicitor, engineering, architectural, consulting or expert witness costs may not be recovered.[21] An application may be dismissed for failure to pay the required filing fee.[22] Special provisions address the distribution of the burden of the stenographer's fees. The appearance fee is to be shared equally by the applicant and the board. Oftentimes, the applicant's share of the stenographer's appearance fee is built into the application fee. With respect to the costs of preparing the original transcript, if an appeal is taken, the party appealing the decision must pay for the transcript. Otherwise, the party requesting the transcript bears the cost. Regardless of who is responsible to pay, the original transcript is part of the board's record and should be filed with the board. Additional copies are to be paid for by the requesting party.[23] The stenographer should be informed to make sure payment arrangements are in place with the party responsible for the cost of the transcript prior to preparation.

Records Each zoning hearing board must keep records of its business, which records are the property of the municipality.[24] Other than official transcripts of hearings, records ordinarily take the form of meeting minutes recorded and maintained by the board's secretary.

Board Functions

Exclusive Jurisdiction Zoning hearing boards are invested with "exclusive jurisdiction to hear and render final adjudications" in eight separate categories of matters arising under land use ordinances as set forth under Section 909.1(a) of the MPC.[25] The most frequently heard matters before zoning hearing boards are:

- Requests for special exceptions under the zoning ordinance.
- Applications for variances from the terms of the zoning ordinance.
- Appeals from determinations of the zoning officer. Among these and of much interest to the municipal solicitor are appeals from the zoning officer's issuance of an enforcement notice.
- Substantive challenges to the validity of a land use ordinance. An exception to the exclusivity rule, these challenges may also be brought as a request to the governing body for a curative amendment pursuant to Sections 609.1 and 916.1(a)(2) of the MPC.

The other matters over which zoning boards are given jurisdiction arise under ordinance provisions dealing with floodplain or flood hazard, the administration of transferable development rights, or sedimentation and erosion control and storm water management ordinance provisions not involving a subdivision, land development, or a planned residential development, and the zoning officer's preliminary opinion.[26]

Exclusive Procedures Being the exclusive procedures for pursuing these various types of matters, a failure to follow the prescribed method, if raised, will usually be fatal.[27] With respect to zoning enforcement proceedings, failure of the property owner to appeal an enforcement notice to the zoning hearing board results in a conclusive determination of a zoning violation, from which the property owner is precluded from contesting either at the magisterial district judge level or the court of common pleas in an action in equity.[28]

"Interpretations" Requests to "interpret" a zoning ordinance outside of the context of any of the types of matter that the General Assembly has entrusted to zoning hearing boards are occasionally received, sometimes based upon a purported authorization in the application form, or in the zoning ordinance. Zoning hearing boards lack jurisdiction to address such requests.[29]

Enforcement Zoning hearing boards, which exist solely as adjudicative bodies, have no enforcement powers, even as to their own previously issued decisions.[30] The power to enforce lies in the governing body or an agent to whom the governing body delegates that power – ordinarily the zoning officer.[31] Enforcement may take the form of refusal to issue permits, revocation of permits, or the issuance of an enforcement notice.

Reconsideration of Decisions Zoning hearing boards lack the power to reconsider their decisions.[32]

Appeal Period

Generally - Appeals to the zoning hearing board must generally be taken within 30 days after the action appealed from or challenged.[33] Substantive validity challenges by one desiring to prevent a use on land of another must await the approval of that use, which then triggers the 30-day appeal period.[34] The landowner, however, can move forward the commencement of the period for filing a challenge by utilizing the preliminary opinion provisions of Section 916.2 of the MPC.[35]

Party Without Notice - In the case of a proceeding to reverse or limit an approval granted another where the appellant lacked notice, knowledge, or reason to believe that such approval had been given, the 30-day period begins when the party-appellant knew, or should have known, of the action complained of.[36] An objector filing an untimely appeal of zoning officer's issuance of a permit has burden of proof as to when he received notice.[37] An objector who failed to examine a permit which he knew had been issued and review contents for objectionable aspects of permit was not entitled to untimely appeal in which to raise these objections.[38]

Stay of Proceedings - The filing of various specified types of applications and appeals with the zoning hearing board will result in an automatic stay of the matter which is subject to the application or appeal during the pendency of the board's proceedings. Among these (and of particular interest to the municipal solicitor) is a landowner's appeal from an enforcement notice issued by the zoning officer, with its attending delay in that particular effort to compel compliance with the zoning ordinance. Relief from the stay is possible if imminent peril to life or property would result.[39] Once the stay is lifted by the completion of the proceedings before the board, it is not resurrected by an appeal to the court of common pleas; however, appellants to the court of common pleas may petition the court for a stay.[40]

Hearings

Public Notice - Hearings must be preceded by "public notice," which shall "state the time and place of the hearing and the particular nature of the matter to be considered" and be "published once each week for two successive weeks in a newspaper of general circulation in the municipality." The "first publication shall not be more than 30 days and the second publication shall not be less than 7 days from the date of the hearing."[41] Additionally, under the Statutory Construction Act, the first publication must precede the hearing date by at least 14 days and at least 5

days must elapse between the first and second publications.[42] Public notice, in the case of a validity challenge, must include notice that the ordinance is being challenged and state when and where relevant material may be examined.[43]

Written Notice/Posting - Written notice is to be given to the applicant, the zoning officer and any other persons designated by ordinance or who have made a timely request for notice. If the ordinance does not spell out the time and manner in which the written notice is to be given, the board's rules may do so. Posting of the written notice at a conspicuous place on the subject tract at least one week prior to the hearing is also required.[44]

Notice Mandatory As notice requirements are mandatory, a failure to comply may result in the board's decision being declared a nullity.[45]

Description of Relief Sought Application forms often mischaracterize the technical nature of the relief sought, which, if repeated in the notice, may cause it to be fatally defective. This can be avoided by including in the notice a "reasonably accurate description of the activity or structure which the applicant wishes to institute or erect." If mistakes are discovered in the application with respect to the relief required, the application should be amended at the hearing, and objectors, who might have been misled by the inaccurate characterization of the nature of relief, must be given a fair opportunity to present relevant evidence. If opponents are unprepared to present relevant evidence because of the mistake, a second hearing should be scheduled, with notice and opportunity to be heard provided to the opponents.[46]

Timing The first hearing must be held within 60 days of the receipt of the application, unless extended in writing by the applicant.[47] Section 916.1 of the MPC, which deals with substantive validity challenges, does not repeat the "in writing" requirement.[48]

Decisions must be rendered within 45 days of the last hearing, unless extended in writing by the applicant,[49] or in the case of substantive validity challenges, by mutual consent of the landowner and the municipality[50].

The applicant must complete the presentation of his case-in-chief within 100 days of the first hearing. Further, the board or hearing officer must assure that the applicant, upon request, receives at least 7 hours of hearing within that 100-day period. Opponents must complete the presentation of their opposition within 100 days of the first hearing held after the completion of the applicant's case-in-chief. An applicant may be granted additional hearings to complete his case in chief, if the objectors are granted an equal number. Objectors, with the consent, written or on the record, of the applicant and the municipality may be granted additional hearings to complete their opposition, if the applicant is granted an equal number in rebuttal.[51]

Deemed Approvals and Denials Except in the case of a substantive validity challenge, a "deemed approval" of the application will result where a zoning board fails to meet the 45 day decisional deadline, or fails "to commence, conduct or complete the required hearing" within the applicable time periods unless the applicant has agreed to an extension in writing or on the record.[52] In the case of a substantive validity challenge a "deemed denial" of the challenge will result where a board fails to commence the hearing in a timely fashion,[53] or fails to render a timely decision unless the time has been extended by mutual consent by the landowner and the municipality[54].

Parties

Appellants/Applicants[55]

- *Landowners.* Affected landowners may file validity challenges on substantive grounds or applications for variance and/or special exceptions, as well as appeal from adverse decisions of the zoning officer, municipal engineer, or the official administering transferable development rights.[56] The term "landowner" means the "legal or beneficial" owner of property and includes any party under an option or contract to purchase the subject property, a lessee of the property, if authorized by the owner, and any "other person having a proprietary interest" in the land.[57]

- *Municipal Officials.* An officer or agency of the municipality may make challenges to land use ordinances on substantive grounds as well as appeal various sorts of determinations by the zoning officer or municipal engineer, before the board.[58]

Others

- *Persons Affected.* Any person affected by the application who has made a timely appearance of record may become a party, as may any other person including civic or community organizations who are permitted to appear by the board.[59] Status as a party before a zoning hearing board commonly arises in connection with the issue of the standing to appeal from an adverse decision. The outcome may depend whether or not the person attempting to appeal has entered an appearance before the board. Unless the board requires that parties enter their appearance on written forms provided by the board (which it may do under Section 908(3)), the filing of a letter setting forth objections to the application constitutes an appearance by a nearby landowner, so as to qualify as a party appellant.[60] A person with an otherwise adequate interest in a matter may not be denied the right to become a party solely because of the location of his/her property outside of the boundary of the municipality in which the subject property is located.[61] It is recommended that the board or its solicitor explain the steps citizens must take to protect their rights.
- *The Municipality.* The municipality is a party to every hearing before the zoning hearing board in a proceeding initiated by another party regardless of whether it chooses to participate.[62] Status as a party sets the stage for a municipality to appeal to court from a decision with which it disagrees, as well as for intervention in an appeal to the court of common pleas taken by another.[63] Although the municipality is automatically a party to a board proceeding, municipal and board solicitors should take caution to avoid the appearance of municipal officials to state concerns about pending applications without presenting any evidence or legal authority to support their positions.

Conduct of the Hearing Oaths may be administered and subpoenas may be issued by the chairman. It is also common for oaths to be administered by a stenographer who is a notary public. Representation by counsel, as well as an opportunity to present evidence and argument and cross-examine adverse witnesses, is authorized. Hearings are much more casual than a trial in court. Formal rules of evidence do not apply, but irrelevant, immaterial or unduly repetitious evidence may be excluded.[64] Often, however, the informality is carried too far as, for example, when an applicant's counsel states the case in the form of a monologue, rather than examining witnesses who have been sworn. This is risky, as counsel's statements, without the presentation of sworn testimony, do not constitute evidence.[65]

The board must keep a stenographic record of the proceedings.[66] As this requirement is mandatory, a record kept by any other party or person present at said proceedings may properly be rejected by the court as an official stenographic record of the proceedings before a zoning hearing board.[67] The requirement may be waived by the applicant, however.[68] Although normally the stenographic record is transcribed only when an appeal is filed as a cost saving measure, there are other instances in which a transcript may be warranted. Some types of relief, such as special exceptions, are particularly fact sensitive and, thus, are premised on precisely what the applicant said he proposed to do. A future inability to recall the precise extent of the use which the applicant described to the board might allow an unwarranted expansion of the use for which permission was granted.

As a corollary to the need for impartiality, it is improper for the board to communicate with a party, or to inspect the site with a party, or take notice of communications, reports and memoranda (except those from the solicitor), unless all parties are afforded an opportunity to be involved.[69]

Quorum The quorum necessary for a hearing or board action is not less than a majority of all of the members of the board.[70] Where two members of a three-member board remained after the resignation of the third prior to the hearing then held the hearing and rendered the decision, the matter was heard and decided by a majority of a duly constituted board.[71] If alternates exist, the chairman must designate as many as are necessary to reach a quorum.[72]

Hearing Officer The board is authorized to designate one of its numbers or an "independent attorney" as a hearing officer to conduct any hearing.[73] Unless the parties have stipulated that his decision is final, the hearing officer's report and recommendations are to be made available to the parties within 45 days after the last hearing. The parties may then make written representations to the board prior to final decision or entry of findings, which, in turn, must follow the report and recommendations by no more than 30 days.[74]

Reality A zoning hearing board hearing has been characterized as "something of a cross between a town meeting and a judicial hearing."[75] The town meeting aspect is at least partly due to a common lack of understanding of zoning law, as well as a failure to appreciate that zoning hearing boards do not legislate, but rather are required to apply the law, as established by the governing body in the zoning ordinance, by the legislature in the MPC and by court decisions. Applicants and objectors alike are often completely unprepared to address the evidentiary and legal matters the board must decide. Although clearly worded application forms and concise and relevant evidentiary offerings are helpful, oftentimes the board and its solicitor struggle to keep the presentations within the bounds of relevance and to avoid repetitious or emotional presentations. As the previous author of this chapter advised, however, sometimes the best policy is to let everybody who wishes to speak have their say, so that they at least believe their positions were considered.

Decisions

Timing Unless the applicant has agreed to an extension of time, in writing or on the record, decisions must be rendered within 45 days after the last hearing. The consequence of a failure to comply with this requirement is the application being deemed to have been approved, except in the case of substantive validity challenges, in which case failure to meet the deadline results in a deemed denial.[76] Consideration should be given to the use of pre-printed extension forms for the applicant to sign to signify his agreement in every case where the applicant agrees to an extension, in order to avoid a later claim by the applicant that the spoken words which appear in the transcript of testimony do not accomplish that.

Form & Contents Zoning hearing board decisions must be in writing. Where the relief sought is denied or where the application is contested, findings of fact and conclusions based thereon must accompany the decision.[77] General conclusory statements are to be accompanied by findings of fact that support them.[78] However, the MPC does not call for a deemed approval of the application if the decision does not meet these formal requirements, so long as it is rendered in a timely fashion.[79] In fact, a decision communicated in writing, not supported by written facts and findings, is still a decision rendered within 45 days for purposes of Section 908(9), and an application is not deemed approved solely because written findings and conclusions are late or absent. However, a written decision must be specific enough to afford an aggrieved party a sufficient basis to form and articulate an appeal.[80] Therefore, it is recommended that the decision, including all written findings and conclusions, be issued within the 45-day period. Although uncontested applications which are approved do not require findings of fact or conclusions, the use which is the subject of the decision should be sufficiently described to avoid future disputes concerning the nature and extent of the permission granted. Where a substantive challenge is found to have merit, the decision must include recommended amendments to the ordinance.[81]

Delivery A copy of the decision must be mailed or delivered personally to the applicant not later than the day after the decision is made. All other persons who filed their names and addresses with the board must receive notice of the decision and where it may be examined.[82]

Sunshine Act

A zoning hearing board is an "agency" and subject to the Sunshine Act.[83] However, because it is performing a quasi-judicial function, deliberations may be conducted in private executive sessions, as confirmed by the Pennsylvania Supreme Court in 2003 in *Kennedy v. Upper Milford Tp. Zoning Hearing Bd.* In *Kennedy*, the Supreme Court upheld what it considered to be the express language of the Sunshine Act in permitting quasi-judicial deliberations of zoning hearing boards to occur in executive session.[84] Furthermore, the Sunshine Act requires only that formal action on an application be taken during a public meeting, and the written decision may be executed in private.[85]

After the Board's Decision

Appeals to the Court of Common Pleas - As the municipality is a party in every matter pending before the board, it may appeal from a decision to which it objects.[86] It may also intervene in an appeal to the court of common pleas taken by another. Within 30 days of the filing of the appeal, intervention is as of course.[87] Municipal solicitors should recognize that if the municipality does not intervene before the court of common pleas in another party's appeal, it will not be a proper party to appeal to the Commonwealth Court if it is dissatisfied with the former's decision.[88] This might result in the lack of a party able to appeal such a decision where the zoning hearing board was the only party which defended its decision, because such a board may not appeal a common pleas reversal of its decision. Thus, the municipality should consider intervening before the court of common pleas in any appeal in which it has a serious interest in the outcome.

Return of Writ of Certiorari Following an appeal of its decision to the court of common pleas, the board must respond to the writ of certiorari issued by the prothonotary by filing the record of its proceedings within 20 days from receipt of the writ.[89] Generally the board's solicitor, whose letter of transmittal should include an itemized list of the items that are included, handles this response.

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11. 65 Pa.C.S. § 1101, *et seq.*
12. *Urbano v. Maneses,* 431 A.2d 308, 288 Pa.Super. 103 (1981).
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15. 53 P.S. § 10906(c).
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21. 53 P.S. §§ 10617.3(e) and 10908(1.1).
22. *Golla v. Hopewell Tp. Zoning Hearing Bd.,* 452 A.2d 273, 69 Pa.Cmwlth. 377 (1982).
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24. 53 P.S. § 10906(c).
25. 53 P.S. § 10909.1(a). Act 39 of 2008 removed from the jurisdiction of zoning hearing boards challenges to the validity of land use ordinances based on procedural deficiencies in the enactment process. Pursuant to Act 39, procedural validity challenges must now be filed with the court of common pleas in accordance with 42 Pa.C.S. § 5571.1 (relating to appeals from ordinances, resolutions, maps, etc.); 53 P.S. § 1002-A(b).
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27. *Harris v. Oil Service, Inc.,* 467 A.2d 1376, 78 Pa.Cmwlth. 510 (1983); *Dunlap v. Larkin,* 493 A.2d 750, 342 Pa.Super. 594 (1985); *Reserve Tp. v. Zoning Hearing Bd. of Reserve Tp.,* 468 A.2d. 872, 78 Pa.Cmwlth. 496 (1983); *Visionquest Nat., Ltd. v. City of Franklin Zoning Bd. of Adjustment,* 459 A.2d 1327 (Pa.Cmwlth. 1983); *Baker v. Chartiers Tp.,* 641 A.2d 688, 163 Pa.Cmwlth. 574 (1994).

28. *Johnston v. Upper Macungie Tp.,* 638 A.2d 408, 162 Pa.Cmwlth. 170 (1994); *Borough of Latrobe v. Pohland,* 702 A.2d 1089 (Pa.Cmwlth. 1997).
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39. 53 P.S. § 10915.1.
40. 53 P.S. § 11003-A(d).
41. 53 P.S. §§ 10107, 10908(1).
42. 1 Pa.C.S. § 1909.
43. 53 P.S. § 10916.1(e).
44. 53 P.S. § 10908(1).
45. *Eaton v. Zoning Hearing Bd. of Borough of Wellsboro,* 471 A.2d. 919, 80 Pa.Cmwlth. 392 (1984); *In re Appeal of Connors,* 454 A.2d 233, 71 Pa.Cmwlth. 213 (1983).
46. *In re Appeal of Booz,* 533 A.2d 1096, 111 Pa.Cmwlth. 330 (1987), citing R. Ryan, *Pennsylvania Zoning Law and Practice* § 9.4.13 (1986 Supp.).
47. 53 P.S. § 10908(1.2).
48. 53 P.S. § 10916.1(d).
49. 53 P.S. § 10908(9).
50. 53 P.S. § 10916.1(f)(4).
51. 53 P.S. § 10908 (1.2).
52. 53 P.S. § 10908(9).
53. 53 P.S. § 10916.1(f)(1).
54. 53 P.S. § 10916.1(f)(4).
55. Although the MPC refers to "Parties Appellant Before the Board" in Section 913.3, typically parties applying for relief in the nature of a variance or special exception are referred to as "Applicants" in the zoning hearing board proceeding, which terminology is consistent with Section 909.1 setting forth the types of matters heard before zoning hearing boards.
56. 53 P.S. § 10913.3.
57. 53 P.S. § 10107.
58. 53 P.S. § 10913.3.
59. 53 P.S. § 10908(3).
60. *Orie v. Zoning Hearing Bd. of Borough of Beaver,* 767 A.2d 623 (Pa.Cmwlth. 2001).
61. *Miller v. Upper Allen Tp. Zoning Hearing Bd.,* 535 A.2d 1195, 112 Pa.Cmwlth. 274 (1987).
62. 53 P.S. § 10908(3); *Lower Paxton Tp. v. Fieseler Neon Signs,* 391 A.2d 720, 37 Pa.Cmwlth. 506 (1978).
63. *West Manchester Tp. v. Zoning Hearing Bd. of West Manchester Tp.,* 403 A.2d 234, 44 Pa.Cmwlth. 252 (1979); 53 P.S. § 11004-A.
64. 53 P.S. § 10908.
65. *SCRUB v. Zoning Bd. of Adjustment,* 713 A.2d 135 (Pa.Cmwlth. 1998); *Borough of Glenfield v. C. & E. Motors, Inc.,* 347 A.2d 732, 22 Pa.Cmwlth. 115 (1975).
66. 53 P.S. § 10908(7).
67. *Colarossi v. Clarks Green Zoning Bd. of Zoning Appeals,* 623 A.2d 424, 154 Pa.Cmwlth. 217 (1993).
68. *Shamah v. Hellam Tp. Zoning Hearing Bd.,* 648 A.2d 1299, 167 Pa.Cmwlth. 610 (1994).
69. 53 P.S. § 10908(8).
70. 53 P.S. § 10906(a).
71. *Dieterly v. Zoning Bd. of Cheltenham Tp.,* 646 A.2d 672, 166 Pa.Cmwlth. 370 (1994).
72. 53 P.S. § 10906(b).

73. 53 P.S. §§ 10906(a), 10908(2).
74. 53 P.S. § 10908(9).
75. *Ryan, Pennsylvania Zoning Law and Practice,* § 9.4.14.
76. 53 P.S. § 10909(9); 53 P.S. § 10916.1(f).
77. 53 P.S. § 10908(9).
78. *Zoning Hearing Bd. of Upper Darby Tp. v. Konyk,* 290 A.2d 715, 5 Pa.Cmwlth. 466 (1975).
79. *Piecknick v. South Strabane Tp. Zoning Hearing Bd.,* 607 A.2d 829, 147 Pa.Cmwlth. 308 (1992).
80. *Romesburg v. Fayette County Zoning Hearing Bd.,* 727 A.2d 150 (Pa.Cmwlth. 1999).
81. 53 P.S. § 10916.1(c)(5).
82. 53 P.S. § 10908(10).
83. 65 Pa.C.S. § 701, *et seq.; Piecknick v. South Strabane Tp. Zoning Hearing Bd.,* 607 A.2d 829, 147 Pa.Cmwlth. 308 (1992); *Glennon v. Zoning Hearing Bd. of Lower Milford Tp.,* 529 A.2d 1171, 108 Pa.Cmwlth. 371 (1987); *Pae v. Hilltown Tp. Zoning Hearing Bd.,* 385 A.2d 616, 35 Pa.Cmwlth. 229 (1978).
84. *Kennedy v. Upper Milford Tp. Zoning Hearing Bd.,* 834 A.2d 1104, 575 Pa. 105 (2003), *reversing* 779 A.2d 1257 (Pa.Cmwlth. 2001).
85. *Glennon, supra,* at 1175 (1987).
86. *West Manchester Tp. v. Zoning Hearing Bd. of West Manchester Tp.,* 403 A.2d 234, 44 Pa.Cmwlth. 252 (1979).
87. 53 P.S. § 11004-A.
88. *Brendel v. Zoning Enforcement Officer of Borough of Ridgeway,* 780 A.2d 750 (Pa.Cmwlth. 2001); *Zoning Hearing Bd. of City of Erie v. Burrows,* 584 A.2d 1072, 136 Pa.Cmwlth. 689 (1990).
89. 53 P.S. § 11003-A(b).

XXII. Subdivision and Land Development Ordinances

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Subdivision and land development ordinances are local governments' most effective tool in controlling municipal growth and development. The permitted scope of municipal regulation is set out in the Pennsylvania Municipalities Planning Code (MPC). This article will summarize the basic elements of a subdivision and land development ordinance pursuant to the MPC.

Authority to Regulate

Article V of the MPC authorizes a municipality to regulate subdivisions and land developments. In order to determine what can and should properly be regulated, initial reference must be made to the MPC definitions of "subdivision" and "land development."

Section 107(a) of the MPC defines "subdivision" as:

> The division or re-division of a lot, tract or parcel of land by any means into two or more lots, tracts, parcels or other divisions of land including changes in existing lot lines for the purpose, whether immediate or future, of lease, partition by the court for distribution to heirs or devisees, transfer of ownership or building or lot development: Provided, however, that the subdivision by lease of land for agricultural purposes into parcels of more than ten acres, not involving any new street or easement of access or any residential dwelling, shall be exempted.[1]

Section 107(a) of the MPC defines "land development" as any of the following activities:

1) The improvement of one lot or two or more contiguous lots, tracts or parcels of land for any purpose involving:

   (i) a group of two or more residential or nonresidential buildings, whether proposed initially or cumulatively, or a single nonresidential building on a lot or lots regardless of the number of occupants or tenure; or

   (ii) the division or allocation of land or space, whether initially or cumulatively, between or among two or more existing or prospective occupants by means of, or for the purpose of streets, common areas, leaseholds, condominiums, building groups or other features.

2) A subdivision of land.

3) Development in accordance with Section 503(1.1) [dealing with certain development which may be excluded from the definition of "land development"].

Provisions regulating mobile home parks must be set forth in separate and distinct articles of any subdivision and land development ordinance.[2]

Municipal Regulation

It is Section 501 of the MPC[3] that authorizes a municipality to regulate subdivisions and land developments; however, a municipality is not required to do so. Such regulation is accomplished through enactment of a subdivision and land development ordinance which thereafter controls the exercise of powers granted in Article V of the MPC.

The ordinance must require that all subdivision and land development plats be submitted to the municipality for approval.[4] The governing body may retain the authority to review and approve subdivision and land development proposals or it may delegate such authority to a planning agency.[5] The delegation of limited authority to a planning agency is no longer common practice because the preliminary approval granted by the planning commission creates vested rights.

As discussed above, a municipality may adopt the county's subdivision and land development ordinance and may designate the county planning agency as the body for review and approval of plats.[6] When granting approval of a subdivision or land development plan, the governing body or planning agency may not exercise powers that are within the exclusive jurisdiction of the zoning hearing board, such as the power to grant a lot area variance.

Ordinance Enactment Procedure

Prior to enacting a subdivision and land development ordinance, the governing body must hold a public hearing in accordance with the MPC.[7] Unless the proposed ordinance is prepared by the municipal planning agency, the governing body must submit the proposed ordinance to the planning agency at least 45 days prior to the hearing.[8] The proposed ordinance must also be submitted to the county planning agency for its recommendations at least 45 days prior to the public hearing. Within 30 days following adoption of the ordinance, the governing body must send a certified copy to the county planning agency, or if there is no county planning agency, to the county governing body.[9]

County Regulation

Section 502 of the MPC[10] provides that when a county has adopted a subdivision and land development ordinance, that ordinance applies until an individual municipality within the county enacts its own ordinance and files a certified copy of the ordinance with the county planning agency. If a municipality has enacted its own subdivision and land development ordinance, it must nonetheless submit all subdivision or land development applications to the county for review along with a fee to be paid by the applicant which covers the cost of the county review and report.[11] The MPC specifically provides that a municipality cannot approve an application until the county report is received or until 30 days after the application was forwarded to the county.[12] Failure to forward an application to the county for review will nullify a municipality's approval of the application. While municipal approval should suffice to allow development to go forward, as a practical matter, county approval may be a prerequisite to the recording of a plat.

If a municipality has not enacted its own subdivision and land development ordinance, then the municipality is not required to review subdivision and land development applications and the landowner is not required to seek municipal approval in addition to county approval. A municipality need not draft its own ordinance. It may adopt the county's subdivision and land development ordinance and may, by a separate ordinance, designate the county planning agency as the official administrative agency for review and approval of plats. The county planning agency must agree to this designation.[13]

Mediation

Section 502.1 offers a mediation option to a municipality and a contiguous municipality that believes its citizens will experience harm from a subdivision or development.[14] Article IX procedures apply and the cost of the mediation is to be shared equally by the municipalities. In addition, an applicant shall have the right to participate in the mediation. Furthermore, Section 502.1(b) allows a governing body to appear and comment before a contiguous municipality considering a proposed subdivision, change of land use or land development.[15]

Plan Submission

Section 503(1) of the MPC authorizes a municipality to establish procedures for the submission and review of subdivision or land development plans. A municipality may adopt procedures for both preliminary and final approval and for final approval by stages or sections of development.[16] Mandatory sketch plan submission prior to preliminary plan submission is permitted, but is generally not advisable because failure to faithfully follow due process procedures can result in a deemed approval conferring vested rights.[17]

Section 503(1) also authorizes the municipality to collect review fees, which may include reasonable and necessary charges by the municipal engineer or other professional consultants for review and report on subdivision and land development applications.[18] Such fees must be based on a schedule set by ordinance or resolution, must be reasonable and cannot exceed customary fees charged to the municipality.[19]

If an applicant disputes a review fee, the applicant must notify the municipality within 14 days of the applicant's receipt of the bill. The dispute resolution shall be handled by a professional of the same profession or discipline as the consultant whose fees are being disputed.[20]

Exclusion of Certain Land Development from the Definition

Section 503(1.1) provides that an ordinance may contain provisions for excluding certain types of lesser impact land development activities from the definition of land development contained in Section 107(a) only when such land development involves:

(i) the conversion of an existing single-family detached dwelling or single family semi-detached dwelling into not more than three residential units, unless such units are intended to be a condominium;

(ii) the addition of an accessory building, including farm buildings, on a lot or lots subordinate to an existing principal building; or

(iii) the addition or conversion of buildings or rides within the confines of an enterprise which would be considered an amusement park. For purposes of this sub-clause, an amusement park is defined as a tract (or area) used principally as a location for permanent amusement structures or rides. This exclusion shall not apply to newly acquired acreage by an amusement park until initial plans for the expanded area have been approved by proper authorities.

Plan Decision Procedures

Section 508(5) of the MPC authorizes an optional public hearing on any subdivision or land development plan. Lack of a public hearing does not invalidate a subdivision approval. However, if a public hearing is held, it must be preceded by proper public notice.

A municipality may grant modifications to the requirements of one or more provisions of the ordinance if the literal enforcement will exact undue hardship because of peculiar conditions pertaining to the land in question, provided that such modification will not be contrary to the public interest and that the purpose and intent of the ordinance is observed.[21] All requests for modifications shall be in writing and accompany the application for development.[22] Requests for modifications shall be referred to the municipal planning agency for its recommendation, if it is acting in an advisory capacity.[23]

Section 508 provides that a municipality may fix by ordinance a time limit within which the appropriate municipal body must act on a subdivision or land development application. However, if such a time limitation is greater than that set forth in the MPC, the MPC provision controls. A time limitation set forth in an ordinance which is more restrictive than the MPC provision will apply. Strict attention should be paid to the running of the time periods set forth in Section 508 (or in the ordinance if more restrictive) because failure to act within the specified time periods may result in the application being deemed approved as filed.[24]

The governing body or planning agency must render a decision on the application and communicate it to the applicant within 90 days from the date of the first regularly scheduled meeting following the date that the application is submitted.[25] If the next regularly scheduled meeting does not take place within 30 days of the

applicant's filing, the 90-day period begins to run on the thirtieth day after the filing.[26] Failure to render a decision and communicate it to the applicant within the 90-day period may result in a deemed approval.[27]

If the ordinance requires both the planning commission and the governing body to consider an application, final decisions by both bodies must be made and the governing body's decision must be communicated to the applicant within a single 90-day period.

Section 508(1) of the MPC[28] directs the governing body or planning agency to communicate its decision in writing to the applicant either personally or by mailing it to the applicant's last known address within 15 days after the decision has been made.[29] Failure to communicate the decision will result in a deemed approval.[30]

The 90-day time limit for action also applies when a final court order remands an application to a municipality.[31]

Municipalities are generally not required to take public school capacity into account when approving land development plans. However, each month, a municipality shall notify in writing the superintendent of a school district in which a plan for residential development was finally approved by the municipality during the preceding month.[32]

Upon the approval of a final plat, the developer shall record the plan with the county recorder of deeds within 90 days after the date of delivery of an approved plat signed by the governing body following completion of conditions imposed for the approval.[33] Whenever such plat approval is required by a municipality, the recorder of deeds of the county shall not accept any plat for recording, unless such plat officially notes the approval of the governing body and review by the county planning agency, if one exists.[34]

Where a landowner has substantially completed the required improvements of a land development as depicted on the final plat within five years of preliminary approval, no change of municipal ordinance or plan enacted subsequent to the date of filing of the preliminary plan shall modify or revoke any aspect of the approved final plat pertaining to zoning classification or density, lot, building, street or utility location.[35]

Securing Completion of Public Improvements

As a prerequisite to final approval, Section 509(a) of the MPC[36] authorizes the municipality to require either completion of improvements or the posting of financial security to cover the cost of the improvements. A municipality may not insist on completion of the improvements where the developer intends to provide financial security in lieu of completion. However, the municipality should insist on either completion of improvements or adequate security in lieu thereof because without either the municipality may be required to complete and maintain the improvements at municipal expense.

The improvements referenced in Section 509(a) are those required by the municipality's subdivision and land development ordinance which may include (but are not limited to) streets, walkways, curbs, street lights and storm and sanitary sewers.[37] A municipality cannot require an applicant to provide financial security for the costs of any impacts for which security is required by and provided to PennDOT in connection with the issuance of a highway occupancy permit.[38]

Types of Security

Section 509(c) of the MPC[39] specifically authorizes and deems acceptable the following types of financial security: federal or state chartered lending institution irrevocable letters of credit and federal or state chartered lending institution restrictive or escrow accounts. Section 509(c) authorizes the municipality to approve other types of financial security and provides that approval of such shall not be unreasonably withheld. Such financial security shall be posted with a bonding company or Federal or Commonwealth chartered lending institution chosen by the party posting the financial security, provided said bonding company or lending institution is authorized to conduct such business in Pennsylvania.[40]

Amount of Security Required

The developer's engineer is responsible for submission and certification of the cost estimate on which the amount of financial security is based.[41] The municipality may reject this estimate for good cause shown. If the municipality and developer cannot agree on an estimate, a third engineer chosen by the municipality and developer, and paid equally by both, shall determine the final estimate.

The MPC requires the amount of financial security to be 110 percent of the cost of completion of the improvements, estimated as of 90 days following the date scheduled for completion by the developer.[42] The municipality may adjust the required amount annually by comparing the actual cost of completed improvements and the estimated cost for completion of remaining improvements as of the 90th day following the date scheduled for completion. If the developer requires more than one year from the date of posting financial security to complete improvements, the municipality may increase the required amount by 10 percent per annum beyond the first anniversary of the posting of the financial security or to an amount not exceeding 110 percent of the cost of completion as reestablished on or about the expiration of the preceding one-year period.[43]

Where a development is projected over a period of years, the municipality may authorize submission of final plats by sections or stages of development subject to such requirements or guarantees as to improvements in future sections or stages of development.[44]

Duration of Security and Security for Maintenance of Completed Improvements

Security must be in place until the date fixed by the municipality for completion of improvements.[45] If improvements are not completed before the completion date, the developer must continue or extend the security in an amount sufficient to cover any additional costs.[46]

When the municipality accepts dedication of some or all of the required improvements following completion, it may require security to assure the structural integrity and functioning of the dedicated improvements for up to 18 months following acceptance.[47] The required security is the same type as that required for installation of the dedicated improvements and cannot exceed 15 percent of the cost of installation of the dedicated improvements.[48]

Final Release from Improvement Bond

Completion of all improvements is a prerequisite to release from the improvement bond.[49] Release can take place either on actual approval or deemed approval of improvements by the governing body. The developer must notify the governing body in writing of completion of the secured improvements. Within 10 days of receipt of the notice of completion, the governing body must authorize the municipal engineer to inspect the improvements. Within 30 days of receipt of authorization, the municipal engineer must complete a report to the governing body. The report must recommend approval or rejection, with a statement of reasons for rejection. A copy of the report must also be mailed to the developer by certified or registered mail within the 30-day period.

Within 15 days of receipt of the engineer's report, the governing body must notify the developer in writing, by either certified or registered mail, of the governing body's action on the engineer's report.[50]

If either the municipal engineer or the governing body fails to comply with the statutory time periods of Sections 510(a) or 510(b), all improvements will be deemed to have been approved entitling the developer to release of the security.[51] Following a deemed approval, the developer may bring a mandamus action to compel release of the security. In the event the developer's improvements are rejected, the developer may either continue work on completion of the improvements and again request release; or it may contest or question the rejection through legal proceedings or otherwise.[52]

Reimbursement of Fees

The MPC specifically authorizes the municipality to require the developer to reimburse the municipality for the "reasonable and necessary expense incurred for the inspection of improvements."[53] Such fees must be based on a schedule set by ordinance or resolution and cannot exceed customary fees charged by the municipality.

Municipal Remedies upon Developer's Default

A fundamental element of the subdivision and land development ordinance is the list of remedies available to the municipality upon developer's default.

If the developer fails to install improvements as provided in the subdivision and land development ordinance or fails to install improvements in accordance with the final plan, the municipality may look to the financial security posted by the developer to fund completion of improvements. Section 511 of the MPC grants the municipality "the power to enforce any corporate bond, or other security by appropriate legal and equitable remedies."[54]

If the security proves insufficient to meet the cost of completing or correcting improvements covered by the security, then the municipality may install a portion of the improvements in all or part of the development, and institute legal or equitable proceedings to recover the money necessary to complete the remainder of the improvements.[55] Section 511 restricts the municipality's use of proceeds from the security or from any legal or equitable action to installation of the improvements covered by the security.

Other Remedies

The municipality may institute an action at law or in equity to restrain, correct or abate violations, prevent unlawful construction, recover damages or prevent illegal occupancy.[56]

The municipality may also refuse to issue permits or grant approval necessary to develop land which has been developed or subdivided in violation of the municipality's subdivision and land development ordinance. The municipality's authority under Section 515.1(b) to deny permits and approval extends to the record owner, vendee or lessee at the time of the violation and subsequent owners, vendees and lessees.[57]

The municipality may also bring a civil enforcement action against any person, corporation or partnership who or which has violated the subdivision and land development ordinance.[58]

REFERENCES

1. 53 P.S. § 10107(a).
2. 53 P.S. § 10501.
3. *Id.*
4. *Id.*
5. *Id.*
6. 53 P.S. § 10502(c).
7. 53 P.S. § 10107(a).
8. 53 P.S. § 10504(a).
9. 53 P.S. § 10504(b).
10. 53 P.S. § 10502(a).
11. 53 P.S. § 10502(b).
12. *Id.*
13. 53 P.S. § 10502(c).
14. 53 P.S. § 10502.1(a).
15. 53 P.S. § 10502.1(b).
16. 53 P.S. § 10503(1).
17. *Croft v. Board of Sup'rs of Middletown Tp.,* 76 Pa.Cmwlth. 448, 464 A.2d 625 (1983).
18. 53 P.S. § 10501(1); *see Mountain Village v. Board of Sup'rs of Longswamp Tp.,* 582 Pa. 605, 874 A.2d 1 (2005) (reference in Section 503(1) to "consultant" does not include the municipal solicitor).
19. 53 P.S. § 10503(1).
20. 53 P.S. § 10503(1)(ii).
21. 53 P.S. § 10512.1(a).
22. 53 P.S. § 10512.1(b).

23. 53 P.S. § 10512.1(c).
24. 53 P.S. § 10508(3).
25. 53 P.S. § 10508.
26. *Id.*
27. 53 P.S. § 10508(3).
28. *See Narberth Borough v. Lower Merion Tp.,* 590 Pa. 630, 915 A.2d 626, n.14 (2007) (noting that Section 508(1) is generally no paragon of clarity).
29. 53 P.S. § 10508(1); s*ee Narberth Borough, supra* (communication must be in writing; date of mailing of the written decision controls the deadline for appeal and any deemed approval).
30. 53 P.S. § 10508(3); *Narberth Borough, supra.*
31. 53 P.S. § 10508.
32. 53 P.S. § 10508.1.
33. 53 P.S. § 10513(a).
34. *Id.*
35. 53 P.S. § 10508(a)(iv); see also 53 P.S. § 11703.1, *et seq.*
36. 53 P.S. § 10509(a).
37. *Id.*
38. *Id.*
39. 53 P.S. § 10509(c).
40. 53 P.S. § 10509(d).
41. 53 P.S. § 10509(g).
42. 53 P.S. § 10509(f).
43. 53 P.S. § 10509(h).
44. 53 P.S. § 10509(i).
45. 53 P.S. § 10509(e).
46. 53 P.S. § 10509(f).
47. 53 P.S. § 10509(k).
48. *Id.*
49. 53 P.S. § 10510(a).
50. 53 P.S. § 10510(b).
51. 53 P.S. § 10510(c).
52. 53 P.S. § 10510(d) and (e).
53. 53 P.S. § 10510(g).
54. 53 P.S. § 10511.
55. *Id.*
56. 53 P.S. § 10515.1(a).
57. 53 P.S. § 10515.1(b).
58. 53 P.S. § 10515.3.

XXIII. Sewage Facilities Planning and On-Lot Sewage Disposal

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The Pennsylvania Sewage Facilities Act, commonly known as Act 537,[1] imposes numerous duties upon a municipality, many of which are poorly understood by municipal officials and their solicitors. Basically, Act 537 requires municipalities to develop a plan for the disposal of sewage within the municipality and makes the municipality ultimately liable to ensure proper sewage disposal. The Department of Environmental Protection (DEP) has adopted extensive regulations to implement Act 537. These are found at Chapters 71, 72 and 73 of Title 25 of the Pennsylvania Code.

There are three separate and distinct activities that a municipality must undertake in relation to sewage facilities.

First, a municipality must adopt, by resolution of its governing body, an official sewage facilities plan, commonly called its "Official Plan" or "Act 537 Plan." The Act 537 Plan must be approved by DEP before it becomes effective.

Second, the municipality must revise its Act 537 Plan to address development plans proposed by landowners that are not specifically addressed in the adopted Act 537 Plan. This is generally done through the "planning module" process.

Finally, any municipality that is not completely served by a public sewer system must, through its certified sewage enforcement officer (SEO), issue permits for the installation, repair or alteration of on-lot sewage facilities. Although these three steps appear simple and straightforward, each can be both complex and obscure.

Act 537 Plan

Section 5 of Act 537[2] requires municipalities to adopt an official sewage facilities plan and to update that plan as required or when ordered by DEP. There are extensive regulations for the preparation and contents of the Act 537 Plan set forth in Chapter 71 of DEP's regulations. Unless a municipality is completely served by community wastewater treatment facilities that have sufficient capacity to absorb all future development in the municipality, preparing an Act 537 Plan can be a time consuming, expensive process.

An Act 537 Plan is generally prepared by an engineer or planning consultant, and a municipality would be wise to request proposals from several firms. It is not unusual for the preparation of an Act 537 Plan to take two years or cost tens of thousands of dollars.

The solicitor's initial involvement in the preparation of an Act 537 Plan will be minimal. The consultant, often with assistance of municipal employees, will test a representative sample of wells within the municipality for certain types of contamination and will map soils, incidents of malfunctions of on-lot sewage systems, wells which have tested greater than five parts per million of nitrogen-nitrates, soil limitations for on-lot sewage disposal, existing community sewer service areas, and other information requested by DEP. A "community sewage system" may be a public or private system collecting and conveying sewage for treatment.[3] The present usage of community sewer collection, conveyance and treatment systems and available future capacity of those systems will be addressed. There will also have to be a comparison between the Act 537 information and the municipality's comprehensive plan and zoning ordinance and map to ensure compatibility. For example, zoning which permits high-density residential development in an area that will not be served by a community sewer system is incompatible.

After all the relevant information is obtained, a plan will have to be developed to address existing and future sewage disposal needs within a ten-year planning period.[4] Existing needs can include developed areas with failing on-lot sewage systems and areas for which development plans have been approved but which cannot be constructed due to lack of sewage conveyance or treatment capacity. Future needs will depend on the municipality's projected growth. The Act 537 Plan is required to consider various alternatives to address these issues, estimate the cost of each alternative, and select an alternative of choice. The Act 537 Plan must also set forth a time scheduled and proposed financing for construction of any planned community sewage system and designate responsibility for implementing the Act 537 Plan. Solicitors may wish to review *Department of Environmental Protection v. Cromwell Tp.,* 613 Pa. 1, 32 A.3d 639 (2011), concerning the failure to comply with DEP and Commonwealth Court orders to implement an Act 537 Plan.

The action required during the ten-year planning period will depend upon the municipality's unique circumstances. If there are known areas of failing on-lot sewage disposal systems, the municipality will have to take action to address that situation. The municipality may also propose extending community sewer service into the area designated on its comprehensive plan and/or zoning map for high-density development. A municipality that is predominantly rural may not propose any community sewage facilities but may instead propose "non-structural" actions, such as a public education plan to encourage homeowners to properly maintain on-lot sewage disposal systems and use water conservation fixtures. An Act 537 Plan may also propose amendments to the zoning ordinance and/or subdivision and land development ordinance to ensure compatibility with the recommendations of the Act 537 Plan.

Solicitors should review the Act 537 Plan before it is adopted by the governing body to ensure that the Act 537 Plan cannot be used as a basis for an exclusionary zoning challenge or contain statements implying that the municipality will not allow additional community sewage service in order to prevent future growth. Any proposed ordinances that are included in the Act 537 Plan should also be reviewed. Solicitors should also ensure that any alternative chosen is within the power of the municipality to implement.

A public comment period of at least thirty days must be advertised in accordance with DEP's regulations.[5] Comments must be solicited from the municipal and county planning commissions.[6] Although there is no specific requirement for a public hearing, the public comment period advertisement may also include a date for a public hearing to ensure an opportunity for citizens to be heard.

An Act 537 Plan must be adopted by resolution of the governing body of the municipality, and DEP's regulations specifically require that the resolution contain a commitment to implement the alternatives of choice in accordance with an implementation schedule included in the Act 537 Plan.[7] It is vitally important that the solicitor review the implementation schedule to ensure that it is reasonable. It is also recommended that the implementation schedule be set forth in months or years after approval of the Act 537 Plan by DEP rather than by specific dates because DEP may require time-consuming revisions to the Act 537 Plan.

After the municipality approves an Act 537 Plan, it is forwarded to DEP for its review and approval. DEP has the ultimate responsibility to approve or disapprove Act 537 Plans.[8] After changes requested by DEP are made, DEP can approve the Act 537 Plan and the municipality should begin implementing the alternatives of choice.

Solicitors should be aware that if a municipality fails to implement an Act 537 Plan, DEP has the power to compel the municipality to implement one by instituting a ban on all further sewage permits within the municipality,[9] and, ultimately, requesting the courts to impose fines and other sanctions.[10]

Revisions to an Act 537 Plan (Planning Modules for Land Development)

Once a municipality has adopted its Act 537 Plan, DEP's regulations require that the municipality revise or supplement the Act 537 Plan to address proposed development not indicated within the Act 537 Plan or to agree that the proposed development falls within an exemption and definitions of types of official plan revisions.[11] Thus, when a developer proposes an extension of a sanitary sewer line to serve a new development outside of the existing service area, the developer must submit a planning module for land development. Submission and approval of a planning module is required for most types of development unless the development is occurring in an area

which is already served by a community sewer system or which is included within the Act 537 Plan as an area into which a community sewer system will be extended. The exemptions from the planning module process when on-lot sewage disposal is proposed are set forth in 35 P.S. § 750.7(b)(5), and the exemptions when community sewage disposal is proposed are set forth in 35 P.S. § 750.7(b)(5.1).

The governing body must act upon a complete planning module within 60 days or the module will be deemed approved.[12] The module is not complete until the county and municipal planning agencies have submitted their reviews or until such agencies have had the module for 60 days.[13] Under certain circumstances, a public comment period of not less than 30 days must be advertised. Generally this advertising requirement applies to subdivisions over 50 lots or subdivisions which require construction of a sewage treatment facility or result in public expenditure in excess of $100,000. The planning module is not complete until there is proof of this publication.[14]

Solicitors in municipalities that are not totally served by a community sewer system should be familiar with the regulations for the consideration of planning modules for land development. The municipality may deny a planning module for the grounds set forth in Section 71.53(f) of DEP's regulations. Basically, a planning module may be disapproved if the proposal for sewage disposal cannot be technically implemented; present and future sewage disposal needs are not adequately addressed; the proposed development is not consistent with municipal land use plans or ordinances; or the plan does not meet certain consistency requirements of DEP's regulations set forth at 71.21(a)(5). The consistency requirements require that the development plan be consistent with the objectives and policies of various statutes, regulations and plans such as comprehensive plans developed under the MPC, plans developed under the Clean Streams Law, county plans approved under the Storm Water Management Act, protection of rare, endangered or threatened plant and animal species identified by the Pennsylvania Natural Diversity Inventory, and Section 507 of the History Code.[15] Most importantly for some rural municipalities, consistency is also required with the policy to preserve prime agricultural soils set forth in Subchapter W of Chapter 7 of Title 4 of the Pennsylvania Code.

Many municipalities routinely approve planning modules. Some municipalities have adopted resolutions setting forth information that must be included with a submission of a planning module for land development in order that the municipality can perform its required review function. The municipal engineer should always be consulted, because the planning module process is highly technical. A good municipal engineer will be aware of any recent changes in the process used by DEP to review planning modules and the module components that must be submitted for various types of subdivisions.

Property owners in some areas are becoming more aware of the planning module process, and some citizens and municipalities have attempted to use the process to limit growth or stop development of neighboring properties. However, the Commonwealth Court has expressly stated that "it is well settled that the Sewage Facilities Act is not the proper forum in which to challenge planning, zoning or other such concerns."[16] If a governing body denies a planning module, the developer has a right to appeal to DEP.[17] There is no right to appeal the denial of a module to the court of common pleas under the Local Agency Law because Section 5 of the Sewage Facilities Act makes DEP the agency that has the power to approve or deny the planning module regardless of the municipality's actions.

Most of the reported cases concerning sewage planning are in the land use area. The Commonwealth Court has held that the sewer planning process is separate from the subdivision process, so there is no requirement that the sewer planning process be completed prior to the approval of a preliminary subdivision plan.[18] There are also Commonwealth Court decisions stating that a subdivision or land development plans or zoning approvals should be conditioned upon obtaining sewer planning approval.[19] Where it is clear that sewer planning approval will not be obtained without a lengthy litigation process, if ever, the municipality may deny the subdivision application.[20] The level of evidence a municipality may require an applicant for a special exception or conditional use approval to present on sewage disposal depends on the language of the ordinance.[21]

On-Lot Sewage Facilities

Permits to authorize the installation of an on-lot sewage facility are issued by the municipality's SEO. Act 537 requires municipalities to employ certified SEOs.[22] DEP certifies SEOs in accordance with Chapter 72 of its regulations. A single person may serve as SEO for numerous municipalities.

There are two basic types of sewage facilities that are installed on an individual lot -- disposal facilities and retainage facilities. On-lot sewage disposal systems are further classified as "conventional" (i.e. septic systems or sand mounds), "alternative" or "experimental." Act 149 of 1994 amended Act 537 to authorize municipalities to issue permits for individual residential spray irrigation systems.[23] A holding tank is an example of a retainage facility.

Generally a person must obtain a permit prior to installing or repairing an on-lot sewage disposal system. Act 537 contains some exceptions from the permit requirements. A municipality may enact an ordinance requiring all persons to obtain permits.[24] Even if there is an exemption, the person installing the system must notify the municipality, and the municipality may confirm that the system meets required setbacks.[25]

In order to obtain a permit to install a conventional on-lot sewage disposal system (sometimes called an "OLDS"), the landowner must perform tests under the supervision of the sewage enforcement officer to demonstrate that the soils on the lot are suitable. These tests are commonly called perks and probes, and the determination of suitability is made in accordance with standards set forth in Act 537 and DEP's regulations. The SEO has 20 working days to perform the tests after receipt of an application if the applicant has prepared the site and obtained a one-call number.[26] If the SEO does not meet these time limits, the municipality must refund the fees paid for the testing, and the applicant can submit tests performed by any certified sewage enforcement officer.[27] If the soils are suitable, the SEO can issue a permit for the installation of the system. The SEO must act on an application for a conventional on-lot sewage disposal system within seven days after receipt of a complete application.[28] The SEO is required to inspect the installation of the system before finalizing the permit.[29]

Applications for alternative sewage systems are processed differently depending on whether there is a "delegated agency."[30] There are also different requirements for retainage system such as holding tanks. There should be recorded agreements for operation and maintenance of alternative sewage systems and holding tanks. DEP requires an annual inspection of holding tanks and procedures and penalties for correction of malfunctions.[31] DEP requires that there be a maintenance agreement between a property owner and the municipality governing operation and maintenance for small flow treatment facilities.[32] Solicitors should ensure that these agreements are drafted, executed, and recorded.

Section 16(a) of Act 537 authorizes Local Agency Law appeals from determination of SEOs regarding permits.[33] Thus, a solicitor may be faced with an appeal from a determination of a SEO to revoke or deny a sewage permit. There are regulations for the conduct of such hearings and the timing and notification of such hearings set forth in Chapter 72 of DEP's regulations.[34]

A difficult legal point for most landowners and some municipal officials to grasp is that although there is a right to appeal to the governing body, the governing body has no authority to grant a variance from DEP's regulations. If the SEO applied the correct standards, the governing body is bound to uphold the action of its SEO in revoking or denying a permit.

These situations can often create significant hardship for an innocent lot owner. For example, DEP's regulations forbid the disturbance of the area that will be used as a drainfield. If the contractor building the house parks heavy construction equipment on that area of the lot or otherwise disturbs it by the placement or removal of fill, the SEO is required to revoke the sewage permit, and the governing body is required to uphold that decision. The landowner is then faced with performing additional tests on undisturbed areas of the lot in the hope that a new site suitable for an on-lot sewage system can be located.

Department regulations require an Act 537 Plan to address long-term maintenance of sewage disposal facilities.[35] Act 537 places ultimate responsibility upon municipalities by requiring that the municipality take action to assure maintenance.[36]

Many municipalities served by on-lot sewage disposal systems have enacted ordinances setting forth procedures for obtaining permits and requiring that each lot be shown to be able to have both an initial on-lot sewage disposal system and an area in which a replacement system can be installed if the initial system should fail. In response to DEP's regulations at Section 71.73,[37] many municipalities have voluntarily or under compulsion by DEP enacted ordinances requiring that landowners maintain on-lot sewage disposal systems in accordance with certain

schedules. These ordinances provide various mechanisms to insure compliance with the maintenance requirements. The type of ordinance to be selected by a municipality will depend, in part, on the requirements of DEP and the staffing level of the municipality.

If the property contains environmental constraints, an experimental disposal system or a small flow treatment plant may be proposed. The solicitor should consult DEP's regulations because installation of such systems may require advertisement of the consideration of the planning module.

Another type of on-lot sewage system is a system that retains sewage for transportation to an ultimate disposal at another location. These systems are called retaining tanks under DEP's regulations.[38] Retaining tanks include holding tanks that are used when an on-lot sewage system malfunctions and there is no suitable location for a replacement site and privies that may be used when the property is not served by water under pressure. In order to issue permits for such facilities, the municipality must enact an ordinance that assumes ultimate municipal responsibility for proper maintenance. The requirements for such ordinances are set forth in Section 71.63(c)(3) of DEP's regulations. DEP has sample ordinances, and municipal solicitors should carefully review such samples and DEP's regulations if a municipality is requested to authorize installation of holding tanks and/or privies. In addition, the solicitor should ensure that the municipality has financial security to guarantee the proper disposal of the waste water and a recorded instrument clearly stating the responsibility of the landowner to maintain the facility and the right of the municipality to enter upon the property, inspect the property, perform maintenance, and lien the property for the cost thereof if necessary.

The municipality has the obligation to address malfunctioning on-lot sewage disposal systems.[39] The municipality can institute summary criminal proceedings punishable by a fine of not less than $500 nor more than $5,000.[40] Municipalities may also bring equity actions to restrain or prevent violations.[41] Courts must impose at least the minimum fine where the municipality proves a violation of Act 537.[42]

Additional Information

Further information may be obtained from DEP, the Pennsylvania State Association of Township Supervisors, and municipal engineers and SEOs.

REFERENCES

1. 35 P.S. § 750.1, *et seq.*
2. 35 P.S. § 750.5.
3. 35 P.S. § 750.2.
4. 35 P.S. § 750.5(d).
5. 25 Pa. Code § 71.31(c).
6. 25 Pa. Code § 71.31(b).
7. 25 Pa. Code § 71.31(f).
8. 35 P.S. § 750.5.
9. 35 P.S. § 750.7(b)(4),
10. *See Commonwealth, Dept. of Environmental Protection v. Cromwell Tp.,* 613 Pa. 1, 32 A.3d 639 (2011).
11. *See* 35 P.S. § 750.5(a.1); 35 P.S. §750.2.
12. 35 P.S. § 750.5(a.1); 25 Pa. Code § 71.53(b).
13. 25 Pa. Code § 71.53(d)(2).
14. 25 Pa. Code § 71.53(d)(6).
15. 37 Pa.C.S. § 507.
16. *Oley Tp. v. Pennsylvania Dept. of Environmental Protection,* 710 A.2d 1228, 1230 (Pa.Cmwlth. 1998).
17. *See* 35 P.S. § 750.5(b); 25 Pa. Code § 71.14.
18. *Kohr v. Lower Windsor Tp. Bd. of Sup'rs,* 910 A.2d 152 (Pa.Cmwlth. 2006).
19. *Kohr, supra; Oasis v. Zoning Hearing Bd. of South Annville Tp.,* 94 A.3d 457 (Pa.Cmwlth. 2014).
20. *McGrath Const., Inc. v. Upper Saucon Tp. Bd. of Sup'rs,* 952 A.2d 718 (Pa.Cmwlth. 2008).

21. *In re Drumore Crossings,* L.P., 984 A.2d 589 (Pa.Cmwlth. 2009).
22. 35 P.S. § 750.8(b)(1).
23. 35 P.S. § 750.7c.
24. *See* 35 P.S. §§ 750.7(a), 750.7(a.1).
25. 35 P.S. § 750.7(a.1)(2).
26. 35 P.S. § 750.8(b)(5).
27. 35 P.S. § 750.8(b)(5)(iii).
28. 35 P.S. § 750.7(b)(2.1).
29. 35 P.S. § 750.7(b)(3).
30. *See* 35 P.S. § 750.7(b)(2.2), (2.3).
31. 25 Pa. Code § 71.63(c)(3).
32. 25 Pa. Code § 71.64(c)(5).
33. 35 P.S. § 750.16(a).
34. *See* 25 Pa. Code § 72.28, et seq.
35. 25 Pa. Code §§ 71.72, 71.73.
36. *See,* e.g., 35 P.S. § 750.7b(a)(2)(ii) (soil mottling); 35 P.S. § 750.7c(4) (individual residential spray irrigation systems).
37. 25 Pa. Code § 71.73.
38. 25 Pa. Code § 71.63.
39. 25 Pa. Code §72.42(a)(13).
40. 35 P.S. § 750.13.
41. 35 P.S. § 750.12(a).
42. *Commonwealth v. Wisor,* 928 A.2d 270, 2007 PA Super. 176 (2007).

XXIV. Pennsylvania Road Law

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Municipal Road Status

Some affirmative municipal act must occur for municipal rights to exist. Procedures vary depending on where the road is located within the Commonwealth. In townships of the second class, the board of supervisors may by ordinance enact, ordain, survey, layout, open, widen, straighten, vacate and relay all roads and bridges located wholly or partially within the township.[1] The board may also provide for the widening, straightening or improvement of a state highway, with the consent of the Department of Transportation.[2] Provisions of the Second Class Township Code also prohibit a road being laid out and opened through any cemetery, church, school or seminary unless the consent of the owner is first secured.[3] In the Commonwealth, a school district cannot block a township from taking a portion of the school district's property for construction of a needed roadway if no school structure has been built upon the subject tract, and the township's proposed road would not prevent the construction of school facilities in the future.[4]

Municipal road status is also created where a road has been used for public travel and maintained by the township for a period of at least twenty-one years.[5] Such a road is considered a public road having a right-of-way of thirty-three feet even though there is no public record of the laying out or dedication for public use of the road.[6]

Townships of the Second Class

The board of supervisors of a township of the second class may also, by resolution, accept any land dedicated by deed to the township to be used as a road, street or alley.[7] Upon the filing with the clerk of the court of common pleas of the county a certified copy of the resolution, the roads, streets or alleys become a part of the public road system of the township.[8] The other way a road becomes a municipal road is by the use of eminent domain proceedings. The Second Class Township Code grants townships of the second class the authority to acquire property by eminent domain for roads, drainage and sewer facilities.[9]

Boroughs

The new Borough Code (Act 37 of 2014) became effective on June 17, 2014.[10] Pursuant to the Borough Code, boroughs have the right to lay out or open a street which has been in "constant" use by the public for a period in excess of twenty-one years.[11] Boroughs also have the power to open streets by ordinance,[12] as well as the power to take over and open any street or portion thereof by exercise of its rights under the power of eminent domain,[13] Where a borough already has title to the land, it can, in its discretion, open a street without consent of abutting property owners.[14] When a particular roadway is a "street" and not a "highway" under Section 101.1 of the Borough Code, a borough has the power and right to condemn property for the widening of such roadway.[15]

Townships of the First Class

Townships of the first class have no "adverse possession" use provision comparable to that contained in the Second Class Township Code or the Borough Code. The board of township commissioners may enact, ordain, survey, layout, open, widen, straighten, vacate and relay all streets within the township.[16] Once the board of commissioners exercise their statutory power, a report, together with a survey of the street and the names of owners of the

property through the same shall pass is to be filed in the office of the clerk of the court of quarter sessions.[17] Citizens of the township are given thirty days to file exceptions to the report.[18] Townships of the first class can also accept a deeded offer of dedication,[19] or exercise eminent domain rights[20].

Platted Streets

Public rights in platted streets are acquired by an offer of dedication and acceptance by a municipality. An offer can be expressly set forth on a recorded subdivision or land development plan, which must then be formally accepted. Otherwise, the offer can come with the tender of the formal deed, which must also be formally accepted.[21]

Private Streets

Public rights in private streets can be established by condemnation.[22] The Private Road Act, which provides for taking of a private road on private property to benefit other property, does not violate the Pennsylvania Constitution's "Takings Clause," and does not unconstitutionally provide for taking of private property for private use.[23] In *Appeal of Heim*, the township condemned an unopened road within an existing development for use as an access road for a new residential development. The condemnees argued that the declaration of taking was improper because (1) the unopened road was originally shown in the plan for the existing development; (2) all of the landowners within that development had a property interest in the unopened road, i.e. the strip of land that was condemned; and (3) all of those landowners were not named as condemnees.[24] The court noted that when a municipality failed to open a dedicated street in a plan within twenty-one years, the owners of the property within the plan retained private rights of easement by implication over the unopened streets.[25] Because the additional, unnamed landowners would continue to have an easement over the road just as they did prior to the commencement of the condemnation proceedings, the court held they did not have a property interest which had been taken, injured or destroyed. Therefore, the court upheld the trial court's ruling that the additional owners did not have to be named as condemnees. More recently, before remanding the action back to the trial court, the Pennsylvania Supreme Court held that the taking of private land for a private road which leads to a landlocked parcel must be viewed under the standard of whether the public is the primary and paramount beneficiary of the taking.[26]

Public and Private Streets and Roadways

Rights of the Public. From the date that a plan is recorded showing platted streets, the public has a limited right to use the street. There is an implied grant to each purchaser that the streets will be forever open to the use of the public, and implied dedication of the street to the public use so that all persons can use it.[27] The public rights, which arise at the time of recording, stem from the theory that public access will benefit property owners whose land abuts the streets.[28] Since public rights and platted, undedicated streets are only corollary to the property rights of abutting lot owners, members of the public at large have no right to enforce claims for public access, only the abutters do.[29]

Because public rights in undedicated, platted streets are limited, some type of formal acceptance of the street by the municipality is essential in any area where utilities are contemplated, or where an unrestricted right of access is otherwise desirable. Public rights in unplatted, undedicated streets are generally determined by usage. Thus, if public use continues for twenty-one years or more, public rights are presumed.[30] The "public" nature of the use may be difficult to prove.[31] Use must be "unequivocal."[32] Without documentation, however, there is always a question as to what public rights are presumed; i.e. if the center line has never been laid out, how does one decide where the presumed thirty-three foot wide street width begins?[33] The law does not presume that the public use of a part of a street is sufficient to infer public dedication of the entire street.[34] Public rights inure to the public generally, not to individual members of the public wishing to use those rights for a specific individual purpose. Thus, "public" rights do not permit an individual to place a newsstand on the sidewalk of the right-of-way.[35]

Loss of Public Rights - Public rights can be lost through non-use. In boroughs, any street which has been laid out but unopened for use by the public for twenty-one years requires the consent of 1/2 of all abutters for public rights to be re-established.[36] The General Road Law calls for a similar result in unincorporated villages and towns.[37] In townships of the second class, roads laid out but physically unopened for only five years lose all of their public

attributes.[38] In townships of the first class, a five-year hiatus in the municipal process produces a similar result.[39] If public rights are established through a deed of conveyance, public rights arise contractually, not by virtue of the road laws, and are not, therefore, lost through non-use.[40] Public rights can also be extinguished by ordinance through the road vacation process spelled out in each municipal code.[41]

Private Rights. Certain private rights exist in each Pennsylvania road or street, whether or not public rights are present. In the absence of contrary evidence, the owner of land abutting a public street is presumed to own title to the centerline.[42] As noted by the Pennsylvania Supreme Court in *Nord v. Devault Contracting Co.,* it is natural for a grantee to expect access to boundary roads, and "the law merely gives effect to the intent implicit in the conveyance."[43] The presumption is a strong one, and is only rebuttable through express contractual language to the contrary, or clear, unequivocal, certain and immemorial usage. Even an express metes and bounds reference in a deed to a street edge is insufficient to rebut the presumption.[44] From a title perspective, this rule is quite practical, as it assures uniformity in the disposition of property rights when public rights in a road are vacated.[45] The abutter's title extends from the heavens to the center of the earth.[46] The rule is different, however, if the street is not dedicated. In that event, title is not presumed to run to the centerline.[47] When property abuts an alley (in contrast to a street), and the deed calls for a title to include the alley, the abutter takes title to the bed of the entire alley.[48]

The subdividing party's rights are "divested" by operation of law, upon the laying out of the street.[49] The subdividing party's rights are divested even if the abutter's lots are only laid out to the edge of the cartway, not to the centerline.[50]

A recorded plan showing streets imbues all lot owners with land abutting streets with easements over the entire road system shown on the plan.[51] This is the prevailing view among the states (there are others), and is based on the theory that the plat is an integrated whole in which each component gives value to the others.[52] Private rights on streets on recorded plans extend even to streets which have never been opened and to those streets which were opened, but were later abandoned.[53] Where roads are laid out by a municipality and unopened, and neither releases obtained or damage assessed, upon the request of an interested party, the governing body of a township (both first and second class) has an affirmative duty to "endeavor to obtain releases or assess damages."[54]

Unlike public rights, private rights are not lost through non-use nor abandonment of public streets by street vacation.[55] Although non-use will not deprive persons of private rights in Pennsylvania's roadways, those rights can always be extinguished through adverse possession.[56] Private rights can also be extinguished in vacated public streets if those asserting rights do not do so within statutorily mandated time constraints.[57]

Laying Out, Opening, Widening and Vacating Roads

Each municipal code calls out a formal process for laying out, opening, widening and vacating roads. For instance, for boroughs, the process for opening, vacating and laying out streets is set forth in the Borough Code.[58] In townships of the first and second class, the provisions are set forth in the First and Second Class Township Codes, respectively.[59] The criteria to act differ, depending upon the type of municipality involved. For example, boards of commissioners in townships of the first class must find that a vacation is "necessary for the public convenience" if fewer than a majority in interest of abutting property owner's petition for the vacation.[60] Borough councils, on the other hand, have no "necessity" requirement, but are precluded from vacating a street if doing so will deprive the property owner's street access.[61] The Second Class Township Code imposes no comparable restrictions on township supervisors. The process invariably requires public notice and a hearing. After an appropriate ordinance is adopted, aggrieved individuals can file exceptions or an appeal. The time for appeal differs from code to code. Appeals may result in board of view hearings to determine the extent to which objectors are aggrieved. Because the road docket (still found in the office of the clerk of courts, criminal division, in some counties) is the repository of the official record of a municipality's road system, copies of ordinances which alter the road network should be filed there. If reports are not properly filed, it will not toll the time in which aggrieved parties can challenge the action.

Public and Private Rights Following a Street Vacation

The purpose of a street vacation is to eliminate public rights in a particular street or a portion of a street. Generally, the relative rights of the parties and interested abutters change as of the date that the vacation ordinance becomes effective. Although it is commonly attempted, a municipality may not preserve utility and other easements when a street is vacated.[62] A street vacation eliminates all public rights. It is essential to know what easements and other use rights exist in a street which is to be vacated before the vacation process commences.

Private rights of abutters differ depending upon whether the road vacated was previously dedicated or not. If dedicated before the vacation, the abutters can claim title to the centerline after the vacation is completed.[63] If the street was never dedicated, or was unopened, the abutters claim is only to the near edge of the road.[64] In any case, the abutters retain an implied easement in the bed of the vacated street.[65]

Rails to Trails

Congress' intention in passing the Railroad Revitalization and Reform Act (National Act) was to preserve the loss of railroad lines and encourage the conversion of railroad tracks to recreational trails. Congress amended the National Act in 1983, and added subsection (d) to Section 1247. This subsection, in accord with the original intention of the National Act, preserved railroad right-of-way for future reactivation of rails service, to protect rail transportation corridors, and to encourage energy efficient transportation use.[66]

Following the federal lead, Pennsylvania enacted the Rails to Trails Act (State Act) on December 18, 1990, with an effective date of March 18, 1991.[67] In accord with the National Act, the State Act aims to preserve railroads by giving counties and municipalities the right to accept title to railroad right-of-ways.[68] This allows a railroad to transfer its possessory interests in the land by quitclaim deed or warranty deed for the limited purpose of interim recreational trail use under the Department of Conservation and Natural Resources.[69] The interim trail user holds the railroad company's land until the railroad needs to reactivate service on the rail line. In order to hold the property the interim user must comply with the standards laid out in 16.[70] The relevant portion of Section 1247(d) states that:

> If a State, political subdivision, or qualified private organization is prepared to assume full responsibility for management of such rights-of-way and for any legal liability arising out of such transfer or use, and for the payment of any and all taxes that may be levied or assessed against such rights-of-way, then the Board shall impose such terms and conditions as a requirement of any transfer or conveyance for interim use in a manner consistent with this chapter, and shall not permit abandonment or discontinuance inconsistent or disruptive of such use.[71]

The Pennsylvania Supreme Court held that a railroad right-of-way can be converted to recreational trail use even when there is a failure to file an application with the Interstate Commerce Commission (now the Surface Transportation Board)[72] so long as the proposed trail user complies with the requirements of Section 1247(d)[73]. The threshold for establishing abandonment is very high because the National Act and State Act heavily favor the preservation of rail lines. To establish the abandonment of a right-of-way, the evidence must show that the easement holder intended to give up its right to use the easement permanently. The mere failure to maintain and repair tracks is not sufficient to establish abandonment.[74]

Act 113 of 1998 makes non-profit corporations and municipal authorities created for recreation or conservation purposes subject to the jurisdiction of the Pennsylvania Public Utility Commission (PUC) for assignment of crossing maintenance and construction responsibilities.[75] In addition, the PUC has been granted express authority to allocate costs of construction, relocation, alteration, protection or abolition of rail crossings.[76] Furthermore, the jurisdiction of the PUC is not preempted by the Surface Transportation Board.[77]

Issues involving Section 2704 can arise if the crossing is used for pedestrians rather than motor vehicles because the exclusive power of the PUC is limited to rail-"highway" crossings.[78] In *Norfolk*, the court based its distinction on the fact that the township was not asking Norfolk to bear the cost to alter the crossing, but because Norfolk was violating an order issued prior to the establishment of the PUC.[79]

Over the last several years, many trail projects have continued to receive the necessary state and federal funding, which has allowed the Rails to Trails Conservancy to develop over 21,000 miles of trail. The continued development of recreational trails and bike paths will continue to impact local municipalities by creating efficient uses for abandoned land.

Practical Implications of the Road Laws for Municipal Solicitors

Ideally, a municipality should assure itself the right to perform a municipal function it desires within the rights-of-way of its public streets and roads. This should include the authority to improve, widen, straighten and realign the cartway. It should include the right to place utilities in the shoulder of the road, and given the current status of cable law, should permit the municipality to convey franchise rights in the rights-of-way. Lastly, maintenance responsibility for the surface of the right-of-way not used for a vehicular cart way should remain with the abutting property owners.

Historic roads in townships of the second class have a presumptive width of thirty-three feet, as declared by legislative fiat in 1933.[80] This statute reads as follows:

> Every road which has been used for public travel and maintained and kept in repair by the township for a period of at least twenty-one years is a public road having a right-of-way of thirty-three feet even though there is no public record of the laying out or dedication for public use of the road.

It is at least questionable whether a municipality has the right to use the portion of the thirty-three foot right-of-way not actually used in the past without paying just compensation to the abutters. After all or a portion of a street right-of-way goes unused and unmaintained by a municipality for an extended period of time, a solicitor should alert his or her client to the real possibility that compensation will be demanded for the use of that unused portion of the right-of-way.

Some municipal codes call out the distinction between alleys and streets as a function of width. For instance, in the Second Class Township Code, streets vary from thirty-three feet to 125 feet, while alleys are fifteen feet or greater.[81] In townships of the first class, there are no distinctions set forth, but public streets may not be less than twenty-four feet in width.[82] Under general road law, streets are thirty-three feet or greater, while alleys are fifteen feet or greater.[83] Lastly, the Borough Code sets forth no distinction.

In cases where municipal road rights are unclear, a token offer of just compensation to abutting owners, whose cooperation is needed, should be made. If they remain unsatisfied, provide them with at least a hearing on the matter before the governing body with due notice. Although you may be successful in placing a new utility line, or in widening the road without facing the compensation issue at the outset, an astute objector's counsel with civil rights experience will ultimately assist your client in paying more for your denial of his or her client's due process rights than you would have ever paid for the right-of-way alone. In addition, your gaffe will cost your municipality the full amount of the objector's counsel fees under 42 U.S.C. §§ 1983 and 1988 if the municipality's actions "shocks the conscience" of the court.[84]

Where a solicitor has an opportunity to obtain platted right-of-way from a developer, it should be done by deed. Assurances need to be made that a municipality's Subdivision and Land Development Ordinance not only requires developers to provide deeds in the form of the municipality's choosing, but also requires the developer's counsel to provide an opinion of record, title or title insurance to the municipality to assure that the municipality is getting the title interest that is desired. The title report is essential because foreclosure by the developer's lender which predates dedication of the street will eliminate the dedication altogether. The use of the deed eliminates the potential loss of public rights through non-use.[85] The suggested dedication format should convey an easement rather than a fee title, and require abutters to retain responsibility for the surface areas not encumbered by the cartway. These requirements are designed to minimize municipal tort liability for accidents caused by shoulder conditions, and to assure that the municipality has not contractually limited the abutter's statutory responsibility to install curbs and sidewalks when requested by the municipality.

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XXV. Municipal Fiscal Distress

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Recent trends in Pennsylvania, including population stagnation and suburbanization, have led municipalities to experience financial pressures. Population shifts have resulted in tax base disruption and expansion or modification of municipal service areas. This has been especially true in urban areas of the Commonwealth. In an effort to deal with these pressures on local governments,[1] the Commonwealth enacted the Municipalities Financial Recovery Act (Act 47)[2]. Act 47 is applicable to every county, city, borough, incorporated town, township and home rule municipality located within the Commonwealth.[3]

Monitoring of Financial Status

Act 47 requires DCED to develop a monitor system of municipalities and their financial statuses. Consequently, DCED annually surveys[4] each municipality to determine if the municipality's condition indicates fiscal distress.[5] In making the determination, the DCED Secretary will evaluate whether any of the following criteria exist:[6]

(1) The municipality has maintained a deficit over a three-year period, with a deficit of 1% or more in each of the previous fiscal years.

(2) The municipality's expenditures have exceeded revenues for a period of three years or more.

(3) The municipality has defaulted in payment of bonds, notes or rents due.

(4) The municipality has missed a payroll for 30 days.

(5) The municipality has failed to make payments to creditors for 30 days beyond the date a judgment was recorded.

(6) The municipality, for a period of at least 30 days beyond the due date, has failed to forward taxes withheld on the income of employees or has failed to transfer employer or employee contributions for Social Security.

(7) The municipality has accumulated and has operated for each of two successive years a deficit equal to 5% or more of its revenues.

(8) The municipality has failed to make the budgeted payment of its minimum municipal obligation as required by Municipal Pension Plan Funding Standard and Recovery Act,[7] with respect to a pension fund during the fiscal year for which the payment was budgeted and has failed to take action within that time period to make required payments.

(9) The municipality has sought to negotiate resolution or adjustment of a claim in excess of 30% against a fund or budget and has failed to reach an agreement with creditors.

(10) The municipality has filed a municipal debt readjustment plan pursuant to Chapter 9 of the Bankruptcy Code.[8]

(11) The municipality has experienced a decrease in a quantified level of municipal service from the preceding fiscal year which has resulted from the municipality reaching its legal limit in levying real estate taxes for general purposes.

If DCED determines that a municipality needs assistance to correct minor fiscal problems, DCED offers appropriate recommendations. If the municipality adopts those recommendations, DCED takes no further action.[9] However, upon an indication of distress in a municipality, DCED will suggest the municipality consider entering the Early Intervention Program or will declare the municipality financially distressed, depending on the severity of the fiscal problems.

Early Intervention Program

The second form of assistance Act 47 provides is through the Early Intervention Program.[10] The program is a preemptive step for municipalities that have not yet been formally declared to be distressed.[11] The program is open to every county, city, borough, incorporated town, township and home rule municipality located within the Commonwealth. The plan is designed to meet the individual and specific needs of each municipality that realizes it is having difficulties and is seeking to improve its financial position.

A municipality interested in being part of the program will apply to DCED on the Single Application. DCED will review the application and provide grants of up to $100,000 for the development of a plan on a 50/50 local matching percent basis. The DCED Secretary awards the grants based on the availability of funds.

A typical plan includes a financial condition assessment, financial trend forecasting, emergency plans for critical cash flow situations, management audits, a schedule for regular public input and the adoption of a multi-year plan identifying top priorities including what each municipality hopes to achieve. It will also include the budgetary impact, timelines and ultimate responsibility for each priority. The plan may also include goals for training municipal officials and key staff in order for them to more effectively serve the municipality.[12]

The program's intent is that the multi-year plan becomes institutionalized within the municipality so that the municipality will improve its long-term financial position.

Municipal Financial Distress

Determination of Municipal Financial Distress The following persons[13] have standing to request a determination by the DCED Secretary as to whether a municipality is financially distressed:

(1) DCED.

(2) The governing body of the municipality. A request by a governing body may only be made after the governing body passes a resolution at a special public meeting complying with the Sunshine Act.[14]

(3) A creditor who is owed at least $10,000. A creditor only has standing if the creditor agrees in writing to suspend pending actions and to forbear from bringing legal action against the municipality to collect the debt for a period of nine months or until the municipality adopts a recovery plan, whichever occurs first. However, if the municipality files a Federal municipal debt adjustment action[15] during the nine-month period, the forbearance obligation is cancelled.

(4) Ten percent of the electors of the municipality that voted at the last municipal election.

(5) Ten percent or more of the beneficiaries of a pension fund if the municipality has not timely deposited its minimum obligation payment under the Municipal Pension Plan Funding Standard and Recovery Act to the pension fund.

(6) Ten percent of the employees of the municipality if they have not been paid for over 30 days from the time of a missed payroll.

(7) Trustees or paying agents of a municipal bond indenture.

(8) The elected auditors, appointed independent auditors or elected controllers of a municipality if they have reason to believe the municipality is in a state of financial distress.

(9) A trustee or actuary of a municipal pension fund, if the municipality has not timely deposited its minimum obligation payment under the Municipal Pension Plan Funding Standard and Recovery Act to the pension fund.

(10) The chief executive officer of any city.

If a person has standing, he may request the DCED Secretary to determine whether the municipality involved is a financially distressed municipality.[16] All requests must include a statement alleging standing, a statement why he believes the municipality is distressed, a list of any judgments recorded against the municipality and any other material allegation. Additional information is required for certain types of requestors.[17]

Upon receipt of a request, the DCED Secretary will set a time and place for a public hearing within the county where the municipality is located.[18] Prior to the hearing, the DCED Secretary may investigate the financial affairs of the municipality.[19] The DCED Secretary shall notify officials within the municipality and publish notice of the hearing in accordance with the Sunshine Act. The DCED Secretary will conduct the hearing and, within 30 days after the hearing, issue a determination of whether the municipality is financially distressed and reasons for the determination.[20]

In making the determination, the DCED Secretary will consider the factors listed above. However, the DCED Secretary will not consider non-payments resulting from the Commonwealth's failure to make timely payments to the municipality.[21]

If the DCED Secretary disapproves the application, his decision may be appealed in accordance with the Administrative Procedures Act.[22] If the DCED Secretary determines that a municipality is distressed, the DCED Secretary will notify all Commonwealth agencies of the distressed status of the municipality[23] and appoint a coordinator[24] for the municipality.[25] After reviewing the municipal records, the coordinator will prepare a plan addressing the municipality's financial problems.[26]

A plan formulated by a coordinator must include any factors which are relevant to alleviating the financially distressed status of the municipality. These factors include projections of revenues and expenditures; recommendations regarding payments of debts and current and future operational and capital budgets; recommendations regarding labor agreements[27] and staffing levels; recommendations regarding the use of Federal remedies and additional Commonwealth programs; an analysis of the municipality's viability and potential structural changes for municipal services; and recommendations for any changes in ordinances or the need for special audits or studies.[28]

Within 90 days of being appointed, the coordinator must formulate and deliver a plan for relieving the municipality's financial distress to the DCED Secretary and local municipal officials.[29] Upon delivery, the plan is open for public inspection. Creditors of the distressed municipality may consent or reject to the handling of their claim by the plan. If a creditor rejects the plan, the municipality and the creditor, with the assistance of the coordinator, are encouraged to negotiate a resolution of the claim.[30] Concurrent with these negotiations, the coordinator is required to hold a public meeting to receive public comment on the plan.[31] The coordinator may consider comments made on the plan and any resolution of claims as a result of negotiations with creditors and revise the plan in consultation with the Secretary and municipal officials.[32]

Shortly after the coordinator's public meeting, the municipality's governing body shall either enact an ordinance approving the implementation of the plan or the revised plan, or shall reject the coordinator's plan.[33] If the coordinator's plan is approved, the coordinator will implement the plan and report monthly to DCED on his progress.[34] If the plan is rejected, then depending on the form of government, the chief executive officer or the governing body shall develop a plan.[35] A public hearing must be held on the chief executive officer's plan or the governing body's plan, as applicable. At the public hearing, the coordinator must testify on the chief executive officer's plan or the governing body's plan. Following the public meeting on the chief executive officer's plan or the governing body's plan, the governing body may enact an ordinance approving the chief executive officer's plan or the governing body's plan.[36] If the plan adopted is the plan proposed by the chief executive officer, the chief executive officer will implement the plan.[37] If the plan adopted is the plan proposed by the governing body, a person designated by the governing body will implement the plan.[38] Additionally, if a plan other than the coordinator's plan is adopted, it must be reviewed by the DCED Secretary to determine if the plan will overcome the municipality's financial distress.[39] If the DCED Secretary determines that the plan is insufficient, the Secretary shall notify the municipality that Commonwealth funds shall be withheld.[40] Finally, if no plan is adopted, the municipality shall not receive a grant, loan, entitlement or payment from the Commonwealth or any of its agencies.[41] Moneys withheld shall be held in escrow by the Commonwealth.[42] Additionally, no long-term debt or funding will be approved by DCED for the municipality under the Local Government Unit Debt Act[43] until the municipality adopts a plan by ordinance.[44]

If during implementation of a plan it becomes apparent that an amendment to the plan is prudent, the amendment may initiated by the coordinator, chief executive officer or the governing body of the municipality, as the case may be.[45]

A municipality which has adopted a plan may file a petition[46] with the court of common pleas of the county in which it is located to increase rates of taxation for earned income, real property, or both, beyond maximum rates provided by law.[47] The court may extend annually the increased taxing powers of the municipality until the adopted plan expires.[48] Additionally, two or more taxing authorities having taxing power over the properties within a municipality which has adopted a plan may file a petition with the court of common pleas of the county in which the municipality is located to compromise delinquent taxes they are due on a property located within the municipality. The court may order the property to be sold and the proceeds divided among all authorities that are owed taxes for the property sold.[49]

When the financial conditions of a distressed municipality have improved, the DCED Secretary, whether on his or her own or upon the petition of the distressed municipality, will hold a public hearing to determine whether the conditions which led to the declaration of financial distress no longer persist. In making the determination, the DCED Secretary will consider the monthly reports submitted by the coordinator, if accrued deficits have been eliminated, if debts have been retired and if there is a positive operating balance for at least one year. If the DCED Secretary determines that financial distress no longer persists, the DCED Secretary will rescind the distressed status of the municipality.[50]

Application of Federal Law A municipality desiring to file a municipal debt adjustment action under the Bankruptcy Code (i.e., a Chapter 9 Bankruptcy Petition) must first obtain permission from the DCED Secretary.[51] Upon receipt of an application for permission, the DCED Secretary will, within 30 days, determine whether to approve or deny the application. Failure of the DCED Secretary to act within 30 days is a deemed a denial.[52] An application will only be granted if an action is imminent by a creditor or supplier of goods or services which is likely to substantially interrupt or restrict the ability of the municipality to provide health or safety services to its citizens; creditors of the municipality have rejected the proposed or adopted plan, and efforts to negotiate resolution of their claims have been unsuccessful for a ten-day period; a condition affecting the municipality's financial distress is solvable only by utilizing a remedy of the Federal Municipal Debt Readjustment Act;[53] or the governing body of a municipality determined to be financially distressed has failed to adopt a plan or to carry out the recommendations of the coordinator.[54] If the DCED Secretary approves the application, the municipality by a majority vote of its governing body may file for municipal debt adjustment action under Federal law.[55]

A municipality which files a municipal debt adjustment action under Federal law is deemed to be a financially distressed municipality.[56] The municipality is required to immediately notify the DCED Secretary and the plan coordinator, if one has been assigned, of the Federal filing. Upon receipt of notice of filing of the Federal action by the municipality, the DCED Secretary will appoint a plan coordinator, if none has yet been appointed.

Act 47 includes a number of requirements that apply once a Chapter 9 Bankruptcy Petition has been filed. For instance, Act 47 states that the coordinator[57] is to formulate a plan approvable by the Federal court;[58] the municipality is to utilize any existing plan and the expertise of the plan coordinator to develop a revised plan, incorporating Federal remedies as appropriate, to be presented in the Federal action;[59] and the municipality is to concurrently utilize the procedures set up by Act 47, so as to efficiently expedite the formulation of a plan, its timely confirmation by the Federal court, its adoption by ordinance and its implementation.[60] However, the enforceability of such provisions is unclear as the Bankruptcy Code reserves to the municipality alone the right to file a plan,[61] and a number of courts have held that, in the event of a conflict between state law and Federal bankruptcy law, the Federal law controls.[62]

A financially distressed municipality which fails to adopt or implement a plan within the period set by the Federal court, or which fails or refuses to follow a recommendation by its coordinator, will be notified by the coordinator that he is requesting the DCED Secretary to suspend Commonwealth funding to the municipality.[63] Unless the municipality demonstrates adequate cause for the failure, each grant, loan, entitlement or payment by the Commonwealth or any of its agencies will be suspended pending adoption of a plan calculated to fully resolve the municipality's financial distress.[64] Suspended funds are held in escrow by the Commonwealth until released by the DCED Secretary. However, funds for capital projects in progress, funds received by a municipality resulting from a declared disaster, pension fund disbursements and emergency financial aid under this Act will not be withheld.[65]

Economic Assistance - Unless a distressed municipality has failed to adopt or implement an adequate plan; has failed to adopt or implement a plan within a period set by a Federal court, or has failed or refused to follow a recommendation by a coordinator, the distressed municipality will receive priority in all economic and community

development programs funded by the Commonwealth.[66] Although the distressed municipality will have priority in the awarding of new funds, those funds will only be released upon the approval of the municipality's coordinator that the program to be funded is consistent with efforts to alleviate the financially distressed status of the municipality.[67]

Financial Aid Act 47 established a program within DCED to provide emergency grants and loans to municipalities which are declared distressed.[68] In furtherance of this goal, Act 47 established the Municipalities Financial Recovery Revolving Aid Fund. Money in that fund may be used by DCED to make grants and loans to cities of the third class, borough, incorporated towns, townships and home rule municipality[69] which are not cities of the first or second class or counties.[70] Additionally funds may be used to pay the salaries of plan coordinators.

Typically, a financially distressed municipality or its plan coordinator may apply to the DCED Secretary for a grant or loan subsequent to the adoption of a plan by the municipality. If the adopted plan was formulated by the chief executive officer or governing body of a municipality, the chief executive officer or the person designated by the governing body may apply to the DCED Secretary for a grant or loan.[71] Upon receipt of an application, the DCED Secretary is required to hold a hearing within the municipality no sooner than ten days nor later than 30 days from receipt of the application. At the hearing the DCED Secretary will receive evidence regarding the necessity for the funds requested. If the DCED Secretary determines that there is sufficient evidence of need, the DCED Secretary will approve the application and award the grant or loan.[72] If the DCED Secretary disapproves the application, his decision may be appealed in accordance with the Administrative Procedures Act.[73]

A loan or grant awarded to a financially distressed municipality may be used solely for the payment of current expenses of the municipality.[74] Additionally, if the DCED Secretary approves a loan, the loan is made free of interest and is repayable in accordance with the schedule in the adopted plan.[75]

The DCED Secretary is also authorized to provide emergency financial aid prior to the adoption of a plan by a distressed municipality. The distressed municipality or its plan coordinator may apply to DCED for an expedited loan or grant to immediately assist the distressed municipality if the applicant believes that the municipality is in imminent danger of insolvency or that there is a clear and present danger to the health and safety of residents of the municipality.[76] Upon receipt of an application, the DCED Secretary will review all data immediately available and determine whether emergency funds are warranted. The DCED Secretary or the applicant may request a hearing for additional evidence of need to be presented and, if requested, the hearing must be held within 15 days from the date the application is received. If the DCED Secretary determines that emergency funds are warranted, the DCED Secretary will approve the application and award the grant or loan.[77] If the DCED Secretary disapproves the application, his or her decision may be appealed in accordance with the Administrative Procedures Act.[78]

Labor and Collective Bargaining Agreements Act 47 provides that any collective bargaining agreements and settlements, including interest arbitration awards, entered into AFTER the municipality adopts an Act 47 Recovery Plan must abide by and be consistent with the Recovery Plan.

Act 47 was amended in 2012 following the Pennsylvania Supreme Court's decision in cases involving the City of Scranton in which it held that the prior version of Act 47 did not apply to interest arbitration awards issued under Act 111, the police and fire collective bargaining statute. The Supreme Court held that the prior version of Act 47 did not clearly include an arbitration "award" in the term "arbitration settlement" used in the statute, and that if the legislature intended that it include "awards" as well as "settlements" then it needed to clearly so state in the legislation.

The 2012 amendment specifically provides that the term "arbitration settlement" in Section 252 of Act 47 now includes final or binding arbitration awards, which includes interest arbitration awards under Act 111. The 2012 amendments specifically added two new definitions. "Arbitration settlement" is now defined as: "An adjustment or settlement of a collective bargaining agreement or dispute. The term includes a final or binding arbitration award or other determination." The other new definition is "Plan" or "recovery plan," which is now defined as: "A recovery plan developed under this Act." Further, Section 252 governing collective bargaining agreements was also amended by adding several new sections, including specific sections concerning arbitration settlements for policemen and firemen under Act 111.

The amended Act 47 provides that the Recovery Plan shall include limits on projected expenditures for individual collective bargaining units that may not be exceeded by the distressed municipality, giving due consideration to the projection of revenue and expenses required by Act 47.

The amendment to Section 252, *Plan not affected by certain collective bargaining agreements or settlements,* subsection (a), *General Rule,* states: "*Except as provided in subsection (b),* a collective bargaining agreement or arbitration settlement executed after the adoption of a plan shall not in any manner violate, expand or diminish its provisions." Note: The italicized and underlined phrase was added in 2012.

Subsection (b) added all new language applicable to arbitration settlements for police and fire under Act 111, and provides that such arbitration settlements (awards) may deviate from the plan, but only if such settlement (award):

(1) except as set forth in subsection (b.1), will not cause the distressed municipality to exceed any limits on expenditures for individual collective bargaining units imposed under the Plan;

(2) will not further jeopardize the financial ability of the distressed municipality, as measured by the criteria set forth in section 201;

(3) is not inconsistent with the policy objectives set forth in section 102(a) to relieve the financial distress of the distressed municipality.

Subsection (b.1) provides an exception that (b)(1) above shall not apply to a limit on expenditures for an individual bargaining unit that is determined to be arbitrary, capricious or established in bad faith.

Subsection (c) provides that the issue of whether an arbitration settlement (award) deviating from the plan satisfies the criteria under subsection (b) and any exception under subsection (b.1) must be determined by the arbitration panel appointed under Act 111 and reflected in findings of fact that are supported by substantial evidence and consistent with this section. During the hearing before the arbitration panel, the testimony of experts in municipal finance called by the distressed municipality or the union is admissible as evidence before the panel. An arbitration settlement (award) deviating from the plan must be supported by credible testimony of an expert in municipal finance that the arbitration settlement (award) satisfies the criteria in subsection (b) and any exception under subsection (b.1). "Expert in municipal finance" means an individual holding an advanced degree who has at least eight years of experience in issues relating to municipal finance.

Subsection (d) provides that an arbitration settlement (award) deviating from the Plan under subsection (b) must be provided to the coordinator by the arbitration panel within 48 hours of issuance, and the coordinator shall review the award to determine whether it violates this section of Act 47.

Subsection (e) provides for an appeal to Commonwealth Court from an arbitration settlement (award) which deviates from the plan by either: 1) the distressed municipality; 2) the union; or 3) the coordinator. The sub-subsections to this provision provide:

(1) The appeal must be commenced within 30 days after issuance of the arbitration settlement (award).

(2) The record of the arbitration case becomes part of the record on appeal and the court may supplement the record (important because often no court reporter at the interest arbitration hearings).

(3) The standard of review is de novo to the extent the appeal alleges that the arbitration settlement/award violates this section of Act 47. The Commonwealth Court is not bound by the factual or legal conclusions of the arbitration panel. This is an important provision, as the usual standard of review in labor grievance arbitration cases is extremely limited, and there is practically no appeal of an interest arbitration award unless it would require the municipality to do an unlawful or ultra vires act, over the objection of the municipality. Otherwise, the standard of review is not affected.

(4) The coordinator's decision setting a limit on expenditures for an individual bargaining unit shall not be disturbed on appeal unless the limit is determined to be arbitrary, capricious or established in bad faith.

Section 241 details what may be included in an Act 47 Recovery Plan, and includes projected expenditures for the Workforce in subsection (1)(ii)(B), and "Possible changes in collective bargaining agreements and permanent or temporary staffing level changes or changes in organization" in Subsection (3). The Recovery Plans generally include initiatives for changes in the collective bargaining agreements including such things as:

- wage and salary reductions or freezes
- reductions or freezes in longevity pay
- limitations on overtime
- elimination or reduction of compensatory time
- reductions or limitations on other paid leave such as sick leave, vacation leave, personal leave and paid holidays
- cost reductions and/or limitations for health insurances, such as maximum cost increases for the municipality's contributions toward health insurances, increased employee contributions, plan design changes
- pension reductions for new hires and other limitations
- limitations on post-retirement benefits, especially post-retirement health insurance.

Thus, the Act 47 Plan: 1) establishes maximum expenditures for each collective bargaining unit for each year, and 2) requires changes to the actual provisions of future collective bargaining agreements. The individual collective bargaining units are typically: 1) police, 2) fire, and 3) non-uniformed employees, including streets, public works, all administrative and clerical employees. This is a significant change, as prior Act 47 plans may have set forth projected expenditures for the entire workforce, not necessarily for each individual collective bargaining unit. Further, prior plans did not establish maximum expenditures for each individual collective bargaining unit for the upcoming years.

Supervisory non-uniformed employees and management employees are not included in any bargaining unit. The plan provisions can apply to them immediately. For those in collective bargaining units, the plan provisions will apply to collective bargaining agreements and arbitration settlements (awards) entered into or issued *after* adoption of the Recovery Plan by the municipality. The plan will not affect existing collective bargaining agreements.

Currently, under Act 111 for police and fire employees, the municipality and the union engage in "collective bargaining" but if no agreement is reached then the parties must proceed to binding interest arbitration before a panel of three arbitrators. One arbitrator is selected by the municipality, one arbitrator is selected by the union, and the third is a neutral arbitrator selected by the two parties (other arbitrators). The parties have a hearing before the arbitration panel, and the arbitration panel issues an award which sets all of the terms and conditions of employment including for example wages, health insurance, pension benefits, post-retirement health insurance benefits, paid sick leave, paid vacation leave, paid holidays, possibly minimum manning requirements, etc. The award only needs to be signed by two of the three panel members. Act 111 specifically requires a municipality to adopt a tax increase if that is necessary to implement the interest arbitration award. There was a Pennsylvania constitutional amendment that was enacted specifically for the purpose of making this provision of Act 111 lawful. There is an extremely limited basis for appealing an interest arbitration award. Act 111 does not impose any ability to pay requirements on the arbitration panel.

However, if a municipality has adopted an Act 47 Recovery Plan, then the arbitration panel is limited by the plan requirements. The recent 2012 amendments do provide some ability to "swap" dollars, i.e., the union could propose alternate provisions that equal the same dollar expenditures, and provided this proposal complies with the three criteria in Section 252, subsection (b), the arbitration panel could deviate from the plan by including this "swap." Also, the union can argue that the maximum expenditures for its bargaining unit are arbitrary, capricious or were established in bad faith and seek to avoid the constraints of the plan.

A collective bargaining agreement or interest arbitration award that that is entered into or issued after the adoption of an Act 47 Plan is subject to the plan, and should be binding throughout its term, regardless whether the municipality exits Act 47 prior to its expiration, unless of course the agreement or award says otherwise. However,

subsequent collective bargaining agreements and interest arbitration awards entered into or issued after a municipality exits Act 47 are not covered by the restrictions and limitations of any Act 47 Plan, as there would not be any active Act 47 Plan in effect at such time.

Fiscal Emergencies in Cities of the Third Class If a city of the third class which has been declared by the DCED Secretary to be distressed continues to experience financial difficulties, the Governor may declare a state of fiscal emergency in the city. A fiscal emergency exists if the Governor finds that the city failed to adopt or implement the coordinator's plan or an alternative plan approved by the DCED Secretary and that the city currently is, or within 180 days or less will be, unable to meet its financial obligations when they come due, or is unable to ensure the continued provision of vital and necessary services such as police, fire, ambulance or rescue services; water or wastewater services; refuse or snow removal; or payroll, pension or other debt obligations.[79]

If the Governor declares a fiscal emergency, the Governor must notify the municipal officials of the city that he has declared a fiscal emergency and direct the Secretary to develop an emergency action plan to ensure that the vital and necessary services are maintained within the city during the state of fiscal emergency.[80] In developing the emergency action plan, the Secretary will consider the coordinator's plan and any other plan or information the Secretary deems appropriate.[81]

Once an emergency action plan has been developed, the DCED Secretary will posted the action plan on DCED's website, notify the elected municipal officials of the distressed city and publish in a newspaper of general circulation that the emergency action plan has been completed.[82]

During the state of fiscal emergency, the Governor or his designee will exercise the authority of the elected or appointed officials of the distressed city, and of the officials of any authority or corporate entity that is directly or indirectly controlled by the distressed city or which the distressed city has power of appointment, to ensure the provision of vital and necessary services. Specifically, the Governor or his designee will collect funds payable to the distressed city and its authorities; obtain emergency financial aid for the distressed city and its authorities; and enter into contracts and agreements on behalf of the distressed city and its authorities so that funds collected, aid obtained or contract entered will pay or provide for vital and necessary services. Moreover, the Governor or his designee will modify the emergency action plan or exercise any other power of the elected or appointed officials of the distressed city or its authority to ensure the provision of vital and necessary services.[83]

While the Governor has great authority to run the financial affairs of a distressed city during a state of fiscal emergency, his power is not unlimited. The Governor may not unilaterally levy taxes; unilaterally abrogate, alter or otherwise interfere with a valid debt obligation or its priority; unilaterally impair or modify existing bonds, notes, municipal securities or other lawful contractual or legal obligations; use the proceeds of the sale, lease, conveyance, assignment or other use or disposition of the assets of the distressed city or its authorities in any prohibited manner; or pledge the full faith and credit of the Commonwealth.[84]

In order to expeditiously implement the emergency action plan, the municipal officials of the distressed city and its authorities continue to carry out most of the duties of their respective offices.[85] The Governor or his designee will direct the municipal officials to implement portions of the emergency action plan and to refrain from taking any action that would interfere or impede the implementation of the emergency action plan.[86] If a municipal official refuses to implement the emergency action plan as directed, or interferes with the implementation of the emergency action plan, the Governor or his designee may request the Commonwealth Court to issue a writ of mandamus compelling the municipal official act according to the directions of the Governor or the designee.[87]

Within eight days of the Governor declaring a state of fiscal emergency, the municipal officials of the distressed city are required to hold a special public meeting to negotiate a consent agreement.93 The purpose of the consent agreement is to provide long-term financial stability to the distressed city after the termination of the fiscal emergency.[88] The consent agreement must address how the distressed city intends to provide vital and necessary services, pay financial obligations of the distressed city and its authorities, make timely payments to the pension funds in which the distressed city and its authorities participates and take action by the municipal officials during the term of the consent agreement.[89] The consent agreement may address other issues such as disposition of assets and approval or modification of new[90] or existing[91] contacts. However, the consent agreement may not include the

projection of tax revenue not authorized by current law,[92] unilaterally abrogate, alter or otherwise interfere with a valid debt obligation or its priority; unilaterally impair or modify existing bonds, notes, municipal securities or other lawful contractual or legal obligations unless by court order; use the proceeds of the sale, lease, conveyance, assignment or other use or disposition of the assets of the distressed city or its authorities in an unlawful manner; increase in the rate of an earned income tax imposed on nonresident workers while the city is declared in a state of distress;[93] or authorize the city to file for municipal debt adjustment action under the Bankruptcy Code.[94]

Upon approval of the consent agreement by a majority vote of the governing body of the distressed city, the city must present the consent agreement to the DCED Secretary for approval. If the DCED Secretary determines that the consent agreement is sufficient to overcome the city's financial distress, the governing body shall enact the consent agreement in the form of an ordinance. In addition to the consent agreement, the ordinance must consent to the Governor instituting a receivership in the event of a breach or unilateral modification of the consent agreement by municipal officials.[95] Upon enactment of the ordinance implementing the consent agreement, the Governor's emergency powers are suspended.[96]

In addition to breach or unilateral modification of a consent agreement, the distressed city is deemed to consent to the appointment of a receivership if the distressed city fails to convene a valid special public meeting to develop the consent agreement; fails to enact a valid ordinance implement the consent agreement; fails to comply with the consent agreement or ordinance enacting the consent agreement; or enacts an unapproved amendment to the ordinance enacting the consent agreement.[97]

The state of fiscal emergency for a distressed city ends when the DCED Secretary certifies that the city is no longer financially distressed.[98]

Receivership in Cities of the Third Class If the Governor declares a fiscal emergency in a distressed city of the third class, he may order the DCED Secretary to petition Commonwealth Court to appoint a receiver for the distressed city. The Commonwealth Court may only appoint the individual named in the petition as the receiver.[99] The Secretary is required to notify the municipal officials and the public.[100] The Commonwealth Court will conduct a hearing within 15 days on the petition.[101] Within 60 days of the hearing if the Commonwealth Court finds by a preponderance of the evidence that 30 days have passed since the declaration of a fiscal emergency, a fiscal emergency still exists, and the city has not adopted or implemented a consent agreement or the Governor's emergency action plan; the Commonwealth Court will appoint the individual as receiver,[102] order him to develop a recovery plan and order him to implement the emergency action plan until the recovery plan is developed.[103]

Additionally, the Governor may order the DCED Secretary to petition the Commonwealth Court to appoint a receiver for the distressed city if the distressed city failed to comply with the ordinance or has amended the ordinance adopting the consent agreement without the approval of the DCED Secretary. If the court finds by a preponderance of the evidence that the distressed city failed to comply with the consent agreement or has amended it without the DCED Secretary's approval, the court will appoint the individual as receiver,[104] order him to develop a recovery plan and order him to implement the emergency action plan until the recovery plan is developed.[105]

Within 30 days of being appointed receiver, the receiver is required to file a recovery plan with Commonwealth Court, the DCED Secretary and local municipal officials.[106] The receiver may consider other plans which have been prepared for the distressed city, but the recovery plan must provide at a minimum for the continued provision of vital and necessary services such as police, fire, ambulance or rescue services; water or wastewater services; refuse or snow removal; and the payment of payroll, pension or other financial obligations. It may provide for the use or disposition of the assets of the distressed city or its authorities and for the execution, modification or termination of contracts of the distressed city or its authorities in accordance with law.[107] The recovery plan may not unilaterally levy taxes; unilaterally abrogate, alter or otherwise interfere with a valid debt obligation or its priority; unilaterally impair or modify existing bonds, notes, municipal securities or other lawful contractual or legal obligations; or use the proceeds of any use or disposition of the assets of the distressed city or its authorities in a manner contrary to any prohibitions placed on receiverships.[108]

Upon completion of the recovery plan, the receiver will file the plan with the Commonwealth Court. Unless the Commonwealth Court finds by clear and convincing evidence that the plan is arbitrary, capricious or wholly inadequate to alleviate the fiscal emergency in the distressed city, the court will confirm the plan.[109] Once confirmed by the Commonwealth Court, the recovery plan may only be modified by an order of court.[110] A confirmed recovery plan supersedes all other plans and imposes on the municipal officials of the distressed city and its authority a mandatory duty to undertake the acts set forth in the recovery plan and suspends their ability to lawfully act in a manner that would interfere with the receiver or the goals[111] of the recovery plan.[112] However, a confirmed recovery plan does not change the form of government of the distressed city or restrict the actions of municipal officials which do not interfere with the receiver or the goals of the recovery plan.[113]

If during the course of a receivership, a vacancy in the office of receiver occurs, the DCED Secretary will petition the court for the appointment of a new receiver.[114] The DCED Secretary may also petition the court to remove the receiver[115] or for one or more extensions of the receivership. If the DCED Secretary establishes by a preponderance of the evidence that further implementation of the recovery plan is necessary to end the fiscal emergency, the court will grant the extension.[116]

Under a confirmed recovery plan, a receiver will implement, and, if needed, petition the court to modify, the recovery plan; require the distressed city and its authority to negotiate intergovernmental cooperation agreements in order to eliminate and avoid deficits, maintain sound budgetary practices and avoid interruption of municipal services; require the distressed city or its authorities to cause the sale, lease, conveyance, assignment or other use or disposition of the distressed city's or its authorities' assets; approve, modify or terminate contracts and agreements with the distressed city or its authorities consistent with law. Finally, if after July 1, 2012, he finds it prudent and the DCED Secretary agrees, the receiver may file a municipal debt adjustment action under the Bankruptcy Code and act on the city's behalf in the proceeding.[117]

In performing these duties, the receiver may employ financial or legal experts deemed necessary to develop and implement the recovery plan. The receiver will attend executive session of the distressed municipality and meet and consult with the advisory committee. He is required to make regular reports to the municipal officials, DCED and the public on the progress and implementation of the recovery plan.[118] The receiver may issue orders to municipal officials of the distressed city or its authority to assist him in implementing any provision of the recovery including ordering them to refrain from taking any action that would interfere with his powers or the goals of the recovery plan.[119] If a municipal official refuses to implement the recovery plan as directed or interferes with the implementation of the recovery plan, the receiver may request the Commonwealth Court to issue a writ of mandamus compelling the municipal official act according to the directions of the receiver.[120] However, if a municipal official of a distressed city or its authority believes that a receiver has exceeded his scope of authority under this act, the municipal official may petition the Commonwealth Court to enjoin the action of the receiver.[121]

Like the Governor during a state of fiscal emergency, a receiver during a receivership has great authority to run the financial affairs of a distressed city; however, his power is not unlimited. The receiver may not unilaterally levy taxes; unilaterally abrogate, alter or otherwise interfere with a valid debt obligation or its priority; unilaterally impair or modify existing bonds, notes, municipal securities or other lawful contractual or legal obligations; or use the proceeds of the sale, lease, conveyance, assignment or other use or disposition of the assets of the distressed city or authorities in any prohibited manner.[122]

If during a receivership a distressed city or its authorities sell, lease or dispose of assets; the proceeds from any sale, lease, conveyance, assignment or other use or disposition of assets must be applied to the payment of outstanding debt obligations owed by the distressed city or its authorities, subject to any encumbrance. Any remaining proceeds may be used by the receiver to restructure or provide escrow for the payment of future debt obligations or to meet operating and capital needs of the distressed city or authority. However, during the course of the transaction the receiver may not unilaterally abrogate, alter or otherwise interfere with a valid debt obligation or its priority.[123]

Upon the granting of a petition for the appointment of a receivership, the Governor shall appoint a municipal financial recovery advisory committee for the distressed city. The committee will meet and consult with the receiver to provide recommendations and feedback to the receiver on the implementation of the recovery plan. The

committee shall be composed of the chief executive officer of the distressed city, the president of the governing body of the distressed city, one member appointed by the county commissioners of the county where the distressed city is located, and one member appointed by the Governor. Prior to most actions on behalf of the distressed city, the receiver is required consult with the advisory committee.[124]

A receivership for a distressed city ends two years from the date it was appointed unless renewed by the DCED Secretary.[125]

REFERENCES

1. *See* Mike Bucsko, Distressed City has Financial Problems: New Castle Seeks Road to Recovery, Pittsburgh-Post Gazette, March 11, 2007 at B-1.
2. The Act of July 10, 1987 (P.L. 246, No. 47) known as Municipalities Financial Recovery Act (53 P.S. §11701.101, *et seq.*).
3. 53 P.S. § 11701.103.
4. A municipality must complete the survey prior to receiving any disbursement under the act of June 1, 1956 (1955 P.L.1944, No.655), referred to as the Liquid Fuels Tax Municipal Allocation Law. *See* 53 P.S. § 11701.123(a).
5. 53 P.S. § 11701.121(a)(2).
6. 53 P.S. § 11701.201.
7. The Act of December 18, 1984 (P.L.1005, No.205), known as the Municipal Pension Plan Funding Standard and Recovery Act.
8. 11 U.S.C. § 901, *et seq.*
9. 53 P.S. § 11701.121(b).
10. DCED is directed in 53 P.S. §11701.121(f) to develop an early warning system. The current Early Intervention Program is established by guidelines. *See* Pennsylvania Governor's Center for Local Government Services, Early Intervention, Department of Community and Economic Development, January 2009.
11. Fifty-three municipalities have entered Early Intervention Program since 2004. *See* Local Government Commission, 2013 Task Force Report, General Assembly of the Commonwealth of Pennsylvania, October 16, 2013 at 21.
12. Early Intervention at 2-4.
13. 53 P.S. § 11701.202.
14. 65 Pa.C.S. § 701, *et seq.*
15. 11 U.S.C. § 801, *et seq.*
16. 53 P.S. § 11701.203(a).
17. 53 P.S. § 11701.203(a.1).
18. 53 P.S. § 11701.203(b).
19. 53 P.S. § 11701.203(c).
20. 53 P.S. § 11701.203(f).
21. 53 P.S. § 11701.204.
22. 2 Pa.C.S. § 501, *et seq.*
23. Each Commonwealth agency is required to review all pending matters and programs concerning the distressed municipality. If the agency identifies an action which will help to improve the distressed municipality's financial situation the agency is required to report it to DCED.
24. *See* 53 P.S. § 11701.221 (the coordinator must be a neutral party that is experienced in municipal administration and finance; an elected or appointed official or employee of the municipality may not be appointed the coordinator of the municipality).
25. 53 P.S. § 11701.221(a).
26. 53 P.S. § 11701.242.
27. Provisions concerning collective bargaining agreement or settlements will be addressed in the subpart entitled "Labor and Collective Bargaining Agreements."
28. 53 P.S. § 11701.241.
29. 53 P.S. § 11701.242(a).
30. 53 P.S. § 11701.243.
31. 53 P.S. § 11701.242(e).
32. 53 P.S. § 11701.244.
33. 53 P.S. § 11701.245.
34. 53 P.S. § 11701.247(a).
35. 53 P.S. § 11701.246.
36. 53 P.S. § 11701.246(c).

37. 53 P.S. § 11701.247(b).
38. 53 P.S. § 11701.247(c).
39. 53 P.S. § 11701.247(d).
40. 53 P.S. § 11701.247(d)(3).
41. 53 P.S. § 11701.248.
42. 53 P.S. § 11701.251.
43. 53 Pa.C.S. § 8001, et seq.
44. 53 P.S. § 11701.250.
45. 53 P.S. § 11701.249.
46. 53 P.S. § 11701.123(c)(3).
47. 53 P.S. § 11701.123(c).
48. 53 P.S. § 11701.141(a).
49. 53 P.S. § 11701.141(b).
50. 53 P.S. § 11701.253.
51. 53 P.S. § 11701.261(a).
52. 53 P.S. § 11701.261(c).
53. 48 Stat. 798.
54. 53 P.S. § 11701.261(a).
55. 53 P.S. § 11701.261(b).
56. 53 P.S. § 11701.262(a).
57. 11 U.S.C. § 941 (plan must be filed by the debtor).
58. 53 P.S. § 11701.262.
59. 53 P.S. § 11701.263(a).
60. 53 P.S. § 11701.263.
61. 11 U.S.C. § 941.
62. *In re City of Stockton*, 475 B.R. 720, 727-29 (2012); *In re County of Orange,* 191 B.R. 1005, 1021 (Bankr.C.D.Cal. 1996).
63. 53 P.S. § 11701.264(a).
64. 53 P.S. § 11701.264.(c).
65. 53 P.S. § 11701.264(d).
66. 53 P.S. § 11701.264(a).
67. 53 P.S. § 11701.282(b).
68. 53 P.S. § 11701.301.
69. 53 P.S. § 11701.301(c).
70. 53 P.S. § 11701.303(c).
71. 53 P.S. § 11701.302(a).
72. 53 P.S. § 11701.302(c).
73. 2 Pa.C.S. § 501, et seq.
74. 53 P.S. § 11701.303(a).
75. 53 P.S. § 11701.301(b).
76. 53 P.S. § 11701.302(b).
77. 53 P.S. § 11701.302(c)(2).
78. 53 P.S. § 11701.302.
79. 53 P.S. § 11701.601(a).
80. 53 P.S. § 11701.602(b).
81. 53 P.S. § 11701.602(c).
82. 53 P.S. § 11701.603.
83. 53 P.S. § 11701.604(a).
84. 53 P.S. § 11701.604(c).
85. 53 P.S. § 11701.605.
86. 53 P.S. § 11701.604(b).
87. 53 P.S. § 11701.606.
88. 53 P.S. § 11701.607(a).

89. 53 P.S. § 11701.607(b).
90. 53 P.S. § 11701.607(f).
91. 53 P.S. § 11701.607(b).
92. 53 P.S. § 11701.607(a).
93. 53 P.S. § 11701.609(b).
94. 53 P.S. § 11701.607(c).
95. 53 P.S. § 11701.608(b).
96. 53 P.S. § 11701.607(d).
97. 53 P.S. § 11701.608(a).
98. 53 P.S. § 11701.702(a).
99. 53 P.S. § 11701.702(b).
100. 53 P.S. § 11701.702(c).
101. 53 P.S. § 11701.705.
102. 53 P.S. § 11701.702(e).
103. 53 P.S. § 11701.705.
104. 53 P.S. § 11701.702(f).
105. 53 P.S. § 11701.703(a).
106. 53 P.S. § 11701.703(b).
107. 53 P.S. § 11701.703(c).
108. 53 P.S. § 11701.703(d).
109. 53 P.S. § 11701.703(e).
110. 53 P.S. § 11701.704(c).
111. 53 P.S. § 11701.704(a).
112. 53 P.S. § 11701.704(b).
113. 53 P.S. § 11701.705.
114. 53 P.S. § 11701.705(d).
115. 53 P.S. § 11701.710(b).
116. 53 P.S. § 11701.706(a).
117. 53 P.S. § 11701.706(a).
118. 53 P.S. § 11701.708(a).
119. 53 P.S. § 11701.709(a).
120. 53 P.S. § 11701.709(b).
121. 53 P.S. § 11701.706(b).
122. 53 P.S. § 11701.707.
123. 53 P.S. § 11701.711.
124. *Id.*
125. 53 P.S. § 11701.710.

XXVI. Regulation of Oil and Natural Gas Operations

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It is almost certain that no area of municipal solicitors' practice has changed more since the last edition of the *Solicitors Handbook* than the local regulation of oil and natural gas operations. With the discovery and rapid exploration of the substantial natural gas reserves in the Marcellus Shale (and Utica), which encompasses a significant swath of the Commonwealth, hundreds of municipalities have been faced with the issue of what they can and cannot do (and should and should not do) to regulate operations, including the location of wells and compressor stations, and all of the various supporting operations. In many instances, these municipalities have been caught unprepared and unable to take action that they might otherwise have been inclined to take. In others, municipalities had the foresight to plan ahead and impose reasonable restrictions on the natural gas industry, yet at the same time generate economic development opportunities. Still other municipalities, including those inside and outside the Marcellus Shale region, have addressed or are addressing the prospect of natural gas pipelines traversing their borders. All of these municipalities also have citizens and citizens groups from across the political spectrum that they may answer to in order to address issues and avoid problems.

It is important to note that this section is not intended to comprehensively address all of the oil and natural gas issues that municipal solicitors and their clients will face. It is just as important to note that the state of the law in this area continues to evolve and, in many instances, do so rapidly. Therefore, this section is merely intended to highlight many of the more commonly seen issues and to provide an additional resource for solicitors as they work through these and related issues.

"Where vs. How" - The Pennsylvania Oil and Gas Act (pre-2012)

Prior to February 2012, when the General Assembly enacted Act 13 of 2012,[1] which was a comprehensive rewrite of the Pennsylvania Oil and Gas Act, the primary question for municipal solicitors was whether a municipality's plans or actions were in compliance with Section 602 of the Oil and Gas Act. Section 602 provided that the Oil and Gas Act preempted local ordinances that attempted to regulate oil and gas operations except to the extent that those ordinances were adopted pursuant to the Municipalities Planning Code or Flood Plain Management Act. Ordinances adopted under those statutes may not "accomplish the same purposes" as those set forth in the Oil and Gas Act or "contain provisions which impose conditions, requirements or limitations on the same features of oil and gas well operations" regulated by the Oil and Gas Act.[2]

The Pennsylvania Supreme Court provided additional guidance regarding the extent of permissible municipal regulation of oil and natural gas operations in 2009, when it issued decisions in *Huntley & Huntley, Inc. v. Borough Council of Borough of Oakmont, and Range Resources-Appalachia, LLC v. Salem Tp.*

In Huntley, the Supreme Court upheld the rejection of a borough's denial of a conditional use application for a natural gas well in a residential zoning district. In doing so, it found that "Section 602's reference to 'features of oil and gas well operations regulated by this act' pertains to technical aspects of well functionality and matters ancillary thereto (such as registration, bonding, and well site restoration), rather than the well's location" and that the municipality's zoning ordinance serves different purposes than the Oil and Gas Act.[3] Therefore, this decision stood for the proposition that municipalities could, within reason, control the location of natural gas drilling activities.

In Salem Tp., however, the Supreme Court ruled that the township's ordinance was invalid because it was regulating the same features of natural gas operations as those regulated by the Oil and Gas Act. Therefore, the Oil and Gas Act preempted the ordinance.[4]

These two decisions led municipal practitioners to generally follow the "where vs. how" dichotomy, which refers to the fact that after *Huntley and Salem Tp.,* it was considered permissible for municipalities to regulate the location of oil and gas operations, provided that they do so reasonably and in compliance with the MPC, but not the activity itself, such as by establishing rules regarding the casing of wells and other technical aspects of the activity.

Despite the fact that these two decisions provided guidance to municipal solicitors regarding the extent to which they and their clients could and could not go when regulating oil and gas operations, they did not answer every question on the matter. In addition, while many municipalities adopted zoning ordinances that were entirely appropriate under then-existing law, others adopted ordinances that were overly restrictive. The difference between municipal ordinances was among the main reasons why the natural gas industry pushed for a statewide law that would provide uniform standards for the regulation of oil and oil operations. That push resulted in Act 13 of 2012, which is discussed in more detail below.

Act 13 of 2012

In February 2012, Act 13 went into effect and with it came significant controversy over the impact that Chapter 33 of Act 13 would have on municipalities' ability to regulate oil and gas operations.

Section 3302 of Act 13 kept in place preemption language that was substantially identical to the language of Section 602 of the Oil and Gas Act.[5]

Section 3303 imposed an additional provision that preempts local ordinances regulating oil and gas operations that are also regulated by "environmental acts," which was broadly defined to include "[a]ll statutes enacted by the Commonwealth relating to the protection of the environment or the protection of the public health, safety and welfare, that are administered and enforced by [the Pennsylvania Department of Environmental Protection] or by another Commonwealth agency, including an independent agency, and all Federal statutes relating to the protection of the environment, to the extent those statutes regulate oil and gas operations."[6]

Section 3304 established uniform requirements on where various types of oil and gas operations, including seismic testing activities, wells, freshwater and wastewater impoundments, pipelines, compressor stations and processing plants, may be sited. For example, except to a limited extent in residential zoning districts, the drilling of oil and gas wells was permitted in all zoning districts, as were assessment operations, including seismic testing. Restrictions on such things are structure heights, screening, fencing, lighting and noise relating to permanent operations that were now prohibited from being more stringent than those imposed on other industrial uses or other land development within the zoning district. Section 3304 also significantly shortened the review period for municipal permitting.[7]

Section 3304, in effect, did away with the "where vs. how" paradigm that was established through the Supreme Court's 2009 decisions. In its place was, in most respects, a "one size fits all" regulatory scheme.

Sections 3305 through 3307 established the manner in which persons, including owners and operators of oil and gas operations, could challenge local ordinances before the Pennsylvania Public Utility Commission or the Commonwealth Court and municipalities could seek the review and blessing of their local ordinances by the PUC. The provisions also provided for the possibility of the imposition of attorneys' fees against any municipality that enacted or enforced a local ordinance with willful or reckless disregard for the MPC or Act 13 and against any plaintiff that brought a claim without substantial justification for doing so.[8]

Section 3308 created a "carrot and stick" approach for municipalities that receive a share of the impact fee imposed on oil and gas operators pursuant to Chapter 23 of Act 13. It required that if the PUC, the Commonwealth Court or Supreme Court issued an order that a local ordinance was in violation of the law, the offending municipality became immediately ineligible to receive its share of the impact fee. It would remain ineligible until it addressed the deficiency or the order was reversed on appeal.[9]

Section 3309 provided that Chapter 33 applied retroactively to those local ordinances in effect as of the effective date of Act 13.[10]

Robinson Township v. Commonwealth: Supreme Court Invalidates Key Zoning Provisions in Act 13

Shortly after Act 13's enactment, in *Robinson Tp. v. Commonwealth*, a handful of municipalities, along with an environmental group and a medical doctor, filed a petition in the Commonwealth Court challenging the constitutionality of Act 13. In July 2012, the Commonwealth Court issued an order granting in part and denying in part the petitioners' claims. Of particular importance, the court ruled that the uniform zoning provisions violated principles of due process. The parties filed cross-appeals.[11]

In December 2013, after an expedited appeal and amicus curiae briefs from dozens of parties and interest groups, the Pennsylvania Supreme Court issued a plurality opinion striking down the uniform zoning provisions in Chapter 33. Then-Chief Justice Castille, writing for the plurality, determined that the provisions violated the Environmental Rights Amendment (Article I, Section 27) to the Pennsylvania Constitution, which states that the people have a right to "clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment" and that the Commonwealth must maintain those resources as a public trust. The Supreme Court held that Act 13 "commands municipalities to ignore their obligations under Article I, Section 27 and further directs municipalities to take affirmative actions to undo existing protections of the environment." It also found that the framers of the Environmental Rights Amendment intended it "as a bulwark against enactments, like Act 13, which permit development with such an immediate, disruptive effect" on the Commonwealth. With respect to the zoning restrictions in Section 3304, the Court found that "permitting industrial uses as a matter of right in every type of pre-existing zoning district is incapable of conserving or maintaining the constitutionally-protected aspects of the public environment."[12]

Justice Baer concurred with the result, but relied on due process grounds. He stated that Act 13 forces municipalities to enact zoning ordinances that do not protect the due process rights of their citizens and that different landowners will be "arbitrarily impacted."

Justices Saylor and Eakin dissented. Justice Saylor argued that Act 13 is nothing "other than a non-arbitrary and non-discriminatory exercise of the General Assembly's police powers" designed to further the Commonwealth's economic and environmental interests. Justice Eakin stated that the Court relied on a theory not presented by the parties and that letting municipal officials sue the Commonwealth based on alleged violations of individual constitutional rights could lead to a "tide of mischief."

The Supreme Court resolved other issues, including the standing of the municipal petitioners, environmental group and medical doctor and the justiciability of the claims, but because those issues do not have a direct bearing on the practice of municipal solicitors, they are not a focus of this section.

The Supreme Court also remanded the case back to the Commonwealth Court with instructions for it to determine whether additional sections of Act 13 were not capable of being severed from the sections that the Supreme Court ruled to be unconstitutional. The primary section was Section 3305, which granted the PUC authority to review local ordinances and issue orders as to whether those ordinances were in violation of Act 13 or the MPC. The PUC argued that Act 13's requirement that municipalities lose their share of impact fee funds mandated that it exercise that authority, while the municipal petitioners contended that those provisions were not severable from the unconstitutional sections.

On remand, the Commonwealth Court presented the issue as "whether the PUC's jurisdiction is so hollowed out that its remaining jurisdiction to consider whether a local ordinance violates Chapter 32 is non-severable." The court held that because Sections 3303 and 3304 were unconstitutional, the final sentence of Section 3302 was "necessarily incapable of execution and is severed from the remaining valid provisions" of Section 3302. In addition, it found that the statutory scheme of Chapter 33 could not be implemented in the absence of Sections 3302 through 3304. As a result, "[l]ocal zoning matters will now be determined by the procedures set forth under the MPC and challenges to local ordinances that carry out a municipality's constitutional environmental obligations."[13]

The parties appealed the Commonwealth Court's July 2014 decision back to the Supreme Court, where it is pending.

Post-*Robinson Township* Decisions

Despite the certainty that the *Robinson Township* decision provided in terms of whether municipalities must satisfy the zoning requirements in Act 13, the decision also created a significant amount of uncertainty as to how much due diligence municipal governing bodies must conduct to ensure compliance with the Environmental Rights Amendment before they make decisions to approve or reject proposed natural gas operations (or other types of operations that are wholly unrelated to the natural gas industry; that question is not the subject of this chapter).

There have been many lower court decisions that have since cited *Robinson Township* in some manner. However, at the appellate level, there is not currently a body of case law sufficient to give solicitors a firm understanding of how the Pennsylvania courts will apply *Robinson Township.*

For example, in 2014, the Lycoming County Court of Common Pleas issued a ruling in a case in which a township granted a conditional use approval for a well pad in a residential agricultural district.[14] There was one home within 1,000 feet, but a large development within 3,000 feet. The court first ruled that the township's ordinance did not provide for oil and gas operations of the type proposed. It found that the proposed use was neither specifically permitted nor denied in the zoning ordinance. The court also found that the township did not make specific findings that the proposed use met three sections of its ordinance.

The first section required that the permitted use be similar to and compatible with other uses in the zone. The court found that many of the questions on this point were unanswered by the applicant and that no one testified that the proposed use was similar to other uses in the district. The proposed use must be similar to explicitly permitted uses and, as referenced above, oil and gas drilling of this type was not expressly permitted in this zoning district. The court also rejected the argument that it was similar to public service facilities.

The second section required that the proposed use meet the general purposes of the ordinance. The court found that the residential agricultural district had the purposes that you would expect of such a district and that the facts that were developed at the hearing conflicted with that purpose (volume of truck traffic, noise, flaring, length of disruption, etc.). The court also noted that the ordinance stated that proposed uses must "in no way" conflict with the general purposes of the ordinance. That meant there must be a 0% chance of a conflict, making it a nearly impossible standard to meet.

The third section dealt with the health, safety and welfare of the neighborhood. The court noted that the applicant gave cursory testimony about the purported lack of an adverse impact, while, in contrast, the court found that the objectors "presented substantial evidence that there is a high probability that the use will adversely affect the health, welfare and safety of the neighborhood."

The court further held that "[n]either the Applicant nor the Board explained how unconventional natural gas operations are compatible with the permitted uses in this residential district" and referenced portions of the *Robinson Tp.* decision in which the Supreme Court discussed the impact of shale drilling does violence to the landscape. That case is currently pending before the Commonwealth Court and may provide additional guidance regarding the application of the Environmental Rights Amendment.

More recently, in *Pennsylvania Environmental Defense Foundation v. Commonwealth,* in which the Commonwealth Court rejected challenged to the leasing of state land for natural gas operations, the Commonwealth Court gave some additional guidance to practitioners regarding the weight to be given to the Supreme Court's decision in *Robinson Tp.,* given that it was rendered by a plurality of justices. The court cautioned that the decision is persuasive authority "to the extent it is consistent with binding precedent from [the Commonwealth] Court and the Supreme Court on the same subject."[15] Furthermore, it referenced the continuing viability of its test for constitutionality under the Environmental Rights Amendment, which it set forth in *Payne v. Kassab*.[16]

There are also numerous substantive validity challenges that are pending in townships, many of which address the issue of whether municipalities have done enough to protect the environment.

Other Natural Gas Issues

As the natural gas industry continues to develop in Pennsylvania, there are numerous additional issues that municipalities are facing on a consistent basis. Unfortunately, for many of these issues, the body of law is not fully developed, leading to some uncertainty for municipal solicitors attempting to give their municipal clients a clear answer.

Seismic Testing. Seismic testing is used by natural gas operators to locate natural gas deposits. Because it sometimes involves trucks using "vibrosis," or the vibrating method, and targeted blasting of explosives, it is common for municipalities to be concerned about the impact that the activity will have on their roads and on the property of their residents. In some instances, they have attempted to regulate them.

In one case, a federal district court held that a township violated a seismic testing company's due process and equal protection rights when it attempted to ban seismic testing on township roads by refusing to enact an ordinance. The court made clear that seismic testing is permitted in Pennsylvania and that the township cannot "ban seismic testing by refusing to address the issue in a duly passed ordinance and by refusing to acknowledge the legitimate rights of seismic operators."[17]

In another, the Commonwealth Court ruled that agreements between the township and seismic testing company were not resolutions or ordinances entitled to the force of law.[18]

Compressor Stations. There have also been lawsuits involving applications for compressor stations, including one that involved a request for a special exception to place compressor stations within a light industrial zoning district. In that case, the court found that a zoning hearing board erred in denying the request because it made no findings that objectors to the application demonstrated a high degree of probability that the proposed compressor station would substantially affect the health and safety of the community.[19]

Pipelines. The extent to which municipalities may regulate pipelines is the latest front to open as the natural gas industry grapples with building the infrastructure necessary to bring natural gas to market and certain municipalities and citizen and environmental groups seek to stop or exert at least some control over them. There are numerous major projects planned or started, which will impact virtually the entire Commonwealth in some manner.

Interstate pipelines are subject to the jurisdiction of the Federal Energy Regulatory Commission and safety issues affecting them are addressed by the United States Department of Transportation's Pipeline and Hazardous Materials Safety Administration. As a result, municipalities cannot prohibit the placement of a properly permitted interstate pipeline. However, they may work to influence the decision of FERC by providing evidence of the anticipated impacts of the pipeline. There are also many resources available to municipalities and their residents, including publications prepared by FERC and Penn State Extension.[20]

In addition, the Public Utility Commission was recently faced with almost three dozen petitions filed by Sunoco Pipeline, which is seeking to construct the Mariner East pipeline, which will traverse the southern portion of the state. Sunoco Pipeline sought an order from the PUC that the valve control and pump stations that would be placed along the length of the pipeline do not need to satisfy zoning requirements. Two administrative law judges initially recommended that the PUC dismiss Sunoco Pipeline's petitions, but the PUC overruled their recommendation, found that Sunoco Pipeline was a public utility corporation and remanded the matter back to the administrative law judges for a determination as to whether the proposed facilities were necessary such that they need not satisfy the zoning requirements. However, Sunoco Pipeline withdrew the petitions after it determined that it could satisfy the affected municipalities' zoning requirements or reconfigure the planned valve control and pump stations.[21]

Leases. While municipal solicitors do not generally need to get involved in the negotiation or adjudication of oil and gas leases, the issue continues to be one ripe for dispute. There are numerous cases decided within the past couple of years that provide a good discussion of the current state of the law.[22]

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XXVII. Right-of-Way Management, Fee Assessment & Cost Recovery

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Pursuant to their police powers and other legal authority, townships of the second class have the right to manage their public rights-of-way and to assess fees for the use of those rights-of-way. While most townships currently charge minimal fees with respect to companies that use rights-of-way, recent developments have caused many municipalities to reevaluate their needs and assess more reasonable fees. One such development is that more companies are seeking to install wires, pipes, wireless facilities, and other equipment in the public rights-of-way. The growing number of installations creates a physical strain on the public rights-of-way and accelerates street life degradation, both of which require townships to invest more money in the maintenance and upkeep of affected rights-of-way. In Pennsylvania, townships are permitted to impose fees on companies using the rights-of-way, although such fees must be related to the township's actual costs in managing the rights-of-way. The following is a summary of such authority granted to townships under state statutory law, as well as case law.

Legal Rights Regarding the ROW

Under Pennsylvania statutory law, townships of the second class have significant power over the streets and roads within their jurisdictional boundaries. One such power enumerated in the Second Class Township Code, entitled "Public Safety," provides that the board of supervisors "may adopt ordinances to secure the safety of persons or property within the township and to define disturbing the peace within the limits of the township."[1] Known as a township's "police powers," it is well established that these powers are broad and substantial; they provide townships with significant discretion as to their exercise, and empower municipalities to enact regulations in furtherance of public safety.

These police powers are strengthened by Section 1506 of the Second Class Township Code, entitled "General Powers." This section affords a township the authority to "make and adopt any ordinances, bylaws, rules and regulations not inconsistent with or restrained by the Constitution and laws of this Commonwealth necessary for the proper management, care and control of the township and its finances and the maintenance of peace, good government, health and welfare of the township and its citizens, trade, commerce and manufacturers."[2] When read together, these two provisions provide considerable power to townships of the second class to adopt regulations in order to promote the general welfare and safety of township residents.

Unlike similar provisions in the First Class or Third Class City Codes, the police powers provision of the Second Class Township Code has encountered little litigation related to fee assessment. That being said, it is likely that a Pennsylvania court reviewing such a matter would turn to related municipal authority for guidance and instruction when making a decision as to a township's breadth of authority over fee implementation and regulation. There are several influential cases involving the regulation of fee assessments pursuant to the Third Class City Code that may be utilized to provide a better understanding of the rights and restrictions to which municipalities are subject.

In *Adams v. City of New Kensington*, the Pennsylvania Supreme Court, in interpreting police powers under the Third Class City Code, noted that "it is at once obvious that this provision [of the Code] constitutes a grant of extremely broad powers, and such 'general welfare clauses' have always been liberally construed to accord to municipalities a wide discretion in the exercise of the police power." Additionally, the Supreme Court observed that a city's police

powers inherently include the power to assess reasonable fees to defray the expense of exercising that power. The Supreme Court stated that "[w]here the power exists to enact an ordinance as an exercise of the police power, there necessarily exists also the concomitant power to impose a license fee to cover the expense of regulation and supervision if such regulation and supervision are necessary or desirable for the public good."[3]

In *G.C. Murphy Co. v. Erie Redevelopment Authority*, the Erie Redevelopment Authority created a "transitway mall" district, which included the narrowing of State Street, the creation of a pedestrian walkway and the restriction of vehicular traffic. Commercial owners on State Street brought suit against the plan and the case was eventually appealed to the Pennsylvania Supreme Court. After citing the "police powers" provision, as well as provisions relating to the City's power over streets (discussed below), the Court declared that there is "no doubt that the broad grant of powers" reflected in these provisions "includes the power to make the physical alterations in State Street contemplated by the City Council and the Authority."[4]

In the context of public utilities regulation, however, there are some constraints on the exercise of a township's police powers. In *Bell Telephone v. Bristol Tp.,* Bristol Township imposed a "license charge or inspection fee of 25 cents per pole per annum on all telegraph, telephone, trolley, electric light and similar poles erected within any public highway, road, street, avenue, lane or alleyway in the township." The ordinances enacting the fee structure did not contain any provisions requiring the township to inspect the poles. Also, the yearly bills that the township sent to the owners of such poles "denominated the charge as a tax on the poles." At trial, Bell Telephone asserted that the Public Utility Commission (PUC), rather than the township, had the power to regulate utilities within the boundaries of the township. The Bucks County Court of Common Pleas found in favor of Bell Telephone and held the "inspection fee" to be invalid. The court specifically noted that the regulation of public utilities falls under the purview of the PUC.[5]

Though the verdict was not rendered in favor of Bristol Township, the court's review of the ordinance in the *Bristol Township* case is instructive in determining how to craft an effective, legally enforceable right-of-way ordinance, particularly as it applies to public utilities. Notably, the Bucks County Court of Common Pleas was clearly influenced by the fact that the ordinance in question was not a pole inspection fee, but rather a revenue-raising tax. The court was particularly swayed by the fact that the township referred to the inspection fee as a "tax" when collecting it from the owners of the poles. Furthermore, the court specifically stated that "th[e] ordinance fails to set any regulatory provisions which can in any way be related to the police powers of the municipality," such as the general welfare or safety of the township's residents. In articulating its holding, the court reiterated this point:

> If the assessment is not considered to be a tax, it must be considered to be as in the nature of either an inspection or regulations charge of some sort. Obviously, an inspection fee without commensurate and appropriate follow up would be entirely valueless and meaningless… In any event, we are satisfied that if this assessment is for the purpose of in any way regulating or administering these facilities of the utility, the assessment is void and must be stricken.[6]

If a township chooses to asses a fee on public utilities as part of its prescribed police powers, then it must clearly state the purpose of that fee, how the fee connects to the promotion of health, safety and/or welfare of township residents and the specific regulatory activities which the fee supports. Moreover, the mechanism for obtaining payment must be a "fee," not a "tax," that is, its purpose must be cost recovery, not revenue generation. The principle of cost recovery is more legally compelling than raising revenue. As far back as the case of *Kittanning Borough v. American Natural Gas Co.*, the Supreme Court stated that "[i]f anything can be considered as settled under the decisions of our Pennsylvania courts, it is that municipalities under the guise of a police regulation cannot impose a revenue tax."[7]

Authority over Streets

Townships of the second class have authority and control over the improvement of streets with their jurisdictional boundaries. Section 1671 of the Municipal Code states "[t]hat the municipal authorities and courts having jurisdiction in any city of this commonwealth shall have exclusive control and direction of the opening, widening, narrowing, vacating and changing grades of all streets, alleys, and highways within the limits of such city…"[8] While this provision of the Municipal Code specifically affords such power over streets to cities, the Commonwealth Court has extended those powers to townships, as well.[9]

The townships' authority over streets is underscored and arguably strengthened in the Second Class Township Code. Section 2304 of the Second Class Township Code states that "[t]he board of supervisors may by ordinance enact, ordain, survey, lay out, open, widen, straighten, vacate and relay all roads and bridges and parts thereof which are located wholly or partially within the township."[10] The Second Class Township Code expressly authorizes townships of the second class to control the appearance, construction and maintenance of their streets and roads. Similarly, Section 2308 of the Second Class Township Code addresses streets openings and repairs. It mandates that "[p]ublic roads in townships shall, as soon as practicable, be effectually opened. All public roads shall at all seasons be kept in repair and reasonably clear of all impediments to easy and convenient traveling at the expense of the township."[11] This provision is significant as it speaks to the township's police powers; it is also critical to the condition of one of the township's most important assets — its streets.

Finally, while the Second Class Township Code does not contain a provision addressing a township's regulation of electric and telecommunication wires, it is likely that a court reviewing such regulation would find Section 50 of the Third Class City Code, and the cases related thereto, to be quite instructive in affording similar rights to a township of the second class. The Third Class City Code includes a provision granting specific authority to the city over streets, with respect to electric and telecommunications wires. Section 50 of the "Specific Powers" provision of the Third Class City Code grants a city the power to "define a reasonable district within which all electric light wires, telephone and telegraph wires shall be placed under ground in conduits owned and constructed either by the municipality or by corporations owning such wires."[12] Courts have upheld the implementation of this provision provided that the municipality does so in a reasonable manner. For example, In *Penelec v. City of Erie,* the Erie County Court of Common Pleas upheld a City of Erie ordinance requiring all wires to be placed underground by stating: "A company accepting a franchise that involves the use of the public streets of a city…must accept it subject to the continuous right of such municipality to perform its strictly legal functions and obligations. Such municipality must not divest itself of the governmental or police powers which it holds in trust for the public…"[13]

Powers and Limitations with Respect to Public Utilities

In addition to its general police powers and its authority over streets, townships also have specific statutory powers with respect to public utilities. Section 1991 of the Municipal Code, entitled "Use of Streets by Public Utilities," provides, in pertinent part, that:

> The proper corporate authorities of [a] municipality shall have the right to issue permits determining the manner in which public service corporations…shall place, on or under or over such municipal streets or alleys…pipes, conduits, telegraph lines, or other devices used in furtherance of business; and nothing herein contained should be construed to in any way affect or impair the rights, powers, and privileges of the municipality in, on, under, over or through public streets or alleys of such municipalities, except as herein provided.[14]

The operative part of this section is that municipalities have the legal right to issue permits to public utilities. The right to issue permits carries with it a concomitant right to charge a fee for such permits.

A similar right for municipalities with respect to public utilities is embedded in the Pennsylvania Business Corporation Law. Section 1511, entitled "Additional Powers of Certain Public Utility Corporations," primarily provides public utilities with the right to condemn property for utility-related purposes. Subsection (e) of the section, however, outlines the rights of utilities to use the streets and the parallel rights of municipalities to regulate that use. In pertinent part, that section states that "[b]efore entering upon any street, highway or other public way, the public utility corporation shall obtain such permits as may be required by law and shall comply with the lawful and reasonable regulations of the governmental authority having responsibility for the maintenance thereof."[15] This section mirrors Section 1991, described above, except from the perspective of the public utility. Section 1511(e) requires public utilities to obtain permits from the municipality, but it also requires that they comply with the "lawful and reasonable regulations" of the municipality.

The challenge for municipalities occurs when their rights with respect to public utilities come into potential conflict with the regulatory authority of the PUC. The PUC was created by the Pennsylvania General Assembly in 1937 as a successor to the Public Service Commission, which was established in 1913. Pennsylvania Act 116 of 1978 created the

Public Utility Code as the primary source of the PUC's authority. There have been numerous cases that have addressed the relative powers of the PUC and municipalities, and the recent trend has been to limit municipal power over utilities. That being said, certain municipal powers remain and a carefully crafted regulatory ordinance with reasonable cost recovery fees will most likely be legally sustainable and withstand legal challenge.

The general rule of thumb is that the Public Utility Code gives the PUC all-encompassing regulatory jurisdiction over the operation and rates of public utilities. For example, the Public Utility Code requires that "every public utility shall furnish and maintain adequate, efficient, safe and reasonable service and facilities...," and that such service and facilities "shall be in conformity with the regulations and orders of the Commission."[16] Pennsylvania courts have consistently upheld this principle regarding the operation of public utilities ever since Public Service Commission was established.[17]

In one instance, the Pennsylvania Supreme Court stated: "The legislature has vested in the [PUC] exclusive authority over complex and technical service and engineering questions arising in the location, construction and maintenance of all public utilities' facilities." The Supreme Court further noted that "[t]he provisions of the [Public Utility Code] together with accompanying regulations of the [PUC], have designed and developed the machinery which standardizes the construction, operation and services of public utilities throughout Pennsylvania." Standardizing these rules prevents the problem of utilities having to adjust whenever they cross municipal boundaries such that the rules "become so twisted and knotted as to affect adversely the welfare of the entire state."[18]

The Pennsylvania Supreme Court has attempted to reconcile the statutory authority of municipalities with the authority of the PUC. In *Duquesne Light Co. v. Monroeville*, the Borough of Monroeville created an underground wire district pursuant to express statutory authority in the Borough Code. Duquesne Light and other utilities objected, claiming that the Borough Code provision was preempted by the Public Utility Code. The Supreme Court noted that its "established principle of construing two apparently conflicting statutes to give effect, if possible, to both." It held that the Borough Code provision was not preempted by the Public Utility Code and that the Borough of Monroeville had the statutory power to define reasonable underground wiring districts. At the same time, it stated that the PUC has "exclusive regulatory jurisdiction over the implementation of public utility facilities," including the underground facilities in the municipality.[19]

In recent years, the Commonwealth Court, in particular, has taken a somewhat narrower view of municipal authority as it relates to the authority of the PUC with respect to public utilities. In *Pennsylvania Power Co. v. Township of Pine*, the Commonwealth Court held that Pine Township, a township of the second class, did not have the authority to order the Pennsylvania Power Company to place lines needed to provide service to a residential development underground. In deciding this case, the court agreed that Section 1991 authorizes municipalities to issue permits to determine the manner in which public utilities must place their equipment on, over, or under streets. The court stated that these permit powers are not unlimited, however, by noting that Section 1991 has been "repealed insofar as it is inconsistent with Section 1511 of the Business Corporation Law of 1988." It focused on the Amended Committee Comment to Section 1511, which states:

> Reference in the last sentence of sub-section (e) to 'permits' is a codification of the prior law relating to the time and manner of opening a street, etc., and is not intended to imply a power to decide whether or not, and by whom a type of utility service may be offered by means of the contemplated facilities."

Critically, the court found that Section 1511(e) refers only to "matters of local concern" and that such matters include "the manner in which the street or highway is opened, back-filled, repaved, etc., the length of time that the excavation is open, the length the trench is opened at one time, the hours of excavation, etc." The court held that, because underground installation of a distribution line within the township's rights-of-way is not a matter of local concern, the township has no authority to require Penn Power to proceed in that fashion.[20]

Similarly, in *PECO Energy Co. v. Township of Upper Dublin*, the Commonwealth Court held that a township of the first class did not have the legal authority to regulate the manner in which public utilities trim trees in the ROW. The court reiterated that "the Public Utility Code is intended to be the supreme law of the Commonwealth in the regulation and supervision of public utilities." While it acknowledged that municipalities have certain general powers

over public utilities in the public rights-of-way, specific actions of a municipality must be based on an express grant of power authorized by the State Legislature. The *Upper Dublin* court found no express grant of authority in the First Class Township Code for vegetation management and further found that the Public Utility Code contains such an express grant to public utilities.[21]

Notably, none of the cases referenced herein, nor any recent cases, involve the assessment of right-of-way occupancy or street degradation fees on public utilities. If a township decides to enact a fee assessment-cost recovery program, it is critical that the township's regulatory framework addresses matters of local concern, that it does not interfere with the operations of public utilities, and that it relates directly to public safety and the physical maintenance of the township's streets.

Conclusion

Pursuant to Pennsylvania statutory law and case law, townships of the second class have the right to manage their public rights-of-way and recover fees incurred by the presence of public utilities in those rights-of-way via ordinance. Such an ordinance would be aimed at recovering township costs stemming from the presence and operations of public companies operating within the ROW. Enacting a new ordinance to establish right-of-way management authority would be an appropriate and reasonable exercise of municipal power that would be quite advantageous to any township. Not only would it allow the township to recover the costs it incurred in managing utility facilities, but it would also simultaneously permit the township to retain tax revenues paid by residents which would otherwise been expended on the management of the rights-of-way.

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4. *G.C. Murphy Co. v. Erie Redevelopment Authority,* 458 Pa. 219, 326 A.2d 358 (1974).
5. *Bell Telephone v. Bristol Tp.,* 1971 Pa.D.&C. LEXIS 146 (Bucks C.C.P. 1971).
6. *Bell Telephone, supra.*
7. *Kittanning Borough v. American Natural Gas Co.,* 239 Pa. 210, 86 A. 717 (1913).
8. 53 P.S. § 1671.
9. *See In re Heidelberg Tp. for Footpath, Alleyway and Bridge Purposes,* 58 Pa.Cmwlth. 321, 428 A.2d 282 (1981) (holding that townships have the power to condemn and maintain public streets and roads pursuant to Section 1671 of the general Municipal Code; this decision has been followed by subsequent Commonwealth Court decisions and, to date, has not been challenged).
10. 53 P.S. § 67304.
11. 53 P.S. § 67308.
12. 53 P.S. § 37403(50).
13. *Penelec v. City of Erie,* 23 Pa.D.&C.2d 61 (Erie C.C.P. 1959); *see also Duquesne Light Co. v. Borough of Monroeville,* 449 Pa. 573, 298 A.2d 252 (1972); *Pennsylvania Power Co. v. Township of Pine,* 926 A.2d 1241 (Pa.Cmwlth. 2007).
14. 53 P.S. § 1991.
15. 15 Pa.C.S. § 1511(e).
16. 66 Pa.C.S. § 1501.
17. *See York Water Co. v. City of York,* 250 Pa. 115, 95 A. 396 (1915) (holding that ordinance requiring water company to install meters at the company's expense interfered with the public of the Public Service Commission to regulate the operation of public utilities and stating that "We do not mean to be understood as saying that cities of the third class…may not under their police powers prescribe reasonable regulations as a protection to the health, lives, property and safety of their inhabitants, even as applied to public service corporations).
18. *County of Chester v. Philadelphia Electric Co.,* 420 Pa. 422, 218 A.2d 331 (1966).
19. *Duquesne Light Co. v. Borough of Monroeville,* 449 Pa. 573, 298 A.2d 252 (1972).
20. *Pennsylvania Power Co. v. Township of Pine,* 926 A.2d 1241 (Pa.Cmwlth. 2007) (it is worthy of note that the manner in which Pine Township ordered the electric utility to place its lines underground may have been a factor in the court's decision and was effectuated through the enforcement of a developer's agreement between the township and the owner of the residential development, rather than through the ordinance enacted by the township's governing body; in this case, the court distinguished the facts from those in Monroeville, stating that "here the Township never passed an ordinance or regulation pursuant to its home rule powers that would require a utility to place its lines underground.").
21. *PECO Energy Co. v. Township of Upper Dublin,* 922 A.2d 996 (Pa.Cmwlth. 2007).

XXVIII. Municipal Regulation of Billboards

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The outdoor advertising industry is one of the most heavily regulated industries in Pennsylvania. While billboard regulations can come from either state or federal law, depending on the roadway at issue, roughly 75% of all Pennsylvania roads and their appurtenant structures are regulated at the municipal level. Generally speaking, municipalities have broad police power to regulate the construction of billboards like other structures. Local police power allows a municipality to place restrictions on private land use in order to protect the "public health, safety, morals, or general welfare."[1] This power, however, is not absolute, but must instead comport with individual constitutional rights granted by both the Pennsylvania and United States Constitutions.[2]

Historically, Pennsylvania courts have consistently recognized that the Pennsylvania Constitution protects an individual's right to enjoy one's property, which includes the right to erect structures like buildings or display signs.[3] A similar property right is also protected by the Due Process provisions of the United States Constitution, which prohibit undue government infringement on the right to enjoy one's personal property.[4] Furthermore, billboards or signs enjoy an additional constitutional protection because such messages also constitute "speech," and thus municipal regulation of billboards may also be subject to First Amendment challenges based upon a restriction on the constitutional right of free speech.[5]

Individual property and free speech rights, however, must yield to the interests of the general public at times, namely when there is some need to protect the public health, morals, safety, or general welfare. Such municipal protections are deemed a legitimate exercise of the police power of the municipality. This local power is statutorily derived from the police power inherent in the state government through enabling statutes, namely Pennsylvania's Municipalities Planning Code (MPC).[6] Therefore because local zoning ordinances are the typical means of regulating billboard use on private property, such ordinances must also comply with the MPC.

The Pennsylvania Supreme Court, in the landmark decision of Robinson Tp. v. Commonwealth, affirmed that local governments have a substantial, direct and immediate interest in protecting their environment and quality of life under Article I, Section 27 of the Pennsylvania Constitution. That interest provided the foundation for the Supreme Court's invalidation of portions of Act 13 of 2012.[7] The decision is viewed as providing further support for the local regulation of billboards and outdoor advertising where the municipality can substantiate that the regulation is necessary to protect local environmental, health and safety concerns.

There are three levels of regulation of billboards in Pennsylvania. On the federal level, the Highway Beautification Act of 1965 governs billboards along the federal highways.[8] On the state level, the Pennsylvania Outdoor Advertising Control Act of 1971 regulates billboards located along primary state highways.[9] Finally, at the local level, municipal zoning ordinances govern billboards and other forms of outdoor advertising at all other locations.

Local Zoning Ordinances Generally

The MPC empowers municipalities to enact zoning ordinances which generally may permit, prohibit, regulate, restrict and determine: (1) uses of land; and (2) size, height, bulk, location, erection, construction, repair, maintenance, alteration, razing, removal and use of structures.[10] Paralleling precisely the constitutional limits under the U.S. and Pennsylvania Constitutions,[11] local ordinance provisions must bear a "reasonable relationship"[12] to purposes of the MPC, namely to promote the health, safety, morals and welfare of the public,[13] which is a legitimate and constitutional exercise of police power. Municipal regulations concerning billboards have been justified under the police power for a number of reasons, because billboards: (1) are temporary structures that are liable to be

blown down injuring pedestrians; (2) can gather refuse naturally and by intentional dumping; (3) may be used as public privies; (4) may serve as hiding places for criminals; and (5) may be put to use by disorderly persons for immoral purposes.[14] Most importantly, billboards placed at certain at corners or curves in the roadway may obstruct the vision of drivers and thereby constitute a traffic hazard, and the safety of public highways is certainty ample justification for a billboard regulation that is "reasonably related" thereto.[15]

Aesthetics

Due to the negative characteristics of billboards, a municipality may be zoned according to districts (i.e. residential, commercial, industrial, etc.) and may prohibit or regulate advertising in areas whose character, such as residential districts, is inconsistent with the use of such advertising.[16] Municipalities should be cautions here because poor "aesthetics" alone "may not furnish the *sole* basis for [billboard] regulation."[17] The Pennsylvania Supreme Court in *Exeter Tp.* noted that "since billboards are not objectionable per se, a blanket prohibition on billboards without justification cannot pass muster.[18] However, "aesthetics *and property values* are legitimate considerations in a township's exercise of its zoning power to promote the general welfare."[19] The interest of local municipalities in the protection of the environment and quality of life within the municipality further strengthens the ability of the municipality to regulate billboards and similar outdoor advertising devices.[20] The Pennsylvania Supreme Court aptly stated "Beauty may not be queen, but she is not an outcast beyond the pale of protection or respect. She [must] at least shelter herself under the wing of safety, morality, or decency." Therefore, it would benefit a municipality to have some evidence of an expected decrease in property values that would result from placing a billboard in some neighborhood.[21]

When a zoning ordinance fails to permit a particular lawful use throughout a municipality, the defending municipality must adduce evidence supporting the ban of the use throughout the municipality and cannot merely rely upon evidence demonstrating only that health, safety and welfare concerns support a prohibition at particular locations. The Pennsylvania Commonwealth Court held that Haverford Township failed to prove a substantial relationship between the total exclusion of billboards under its zoning ordinance and the public health, safety, morality or welfare where the township adduced only evidence as to whether the specific billboards proposed by the applicant were suitable or appropriate and not as to whether a billboard of any configuration would be suitable at any site within the township. Accordingly, the Court found that the Haverford Township Zoning Ordinance violated the applicant's state constitutional right to the enjoyment of its private property.[22]

Size, Height and Physical Restrictions

A municipality may generally regulate the size and heights of billboards.[23] For instance, a local ordinance restricting the size of billboards to 50 feet wide and 25 feet high was not an unreasonable regulation where testimony showed that on such a low-traffic road, the signs could be easily viewed by passing motorists, and thus, were as effective as larger signs.[24] "A zoning authority can establish rigorous objective standards in its ordinance for size, placement, materials or coloration of signs to insure that their offensiveness is minimized as much as possible." Such objective standards are upheld if they are reasonably related to maintaining the aesthetics of an area and fostering public safety through preventing the distraction of passing motorists.[25] A municipality can also prohibit flashing "running lights" on signs if there is sufficient evidence showing these lights as being intrusive on neighboring property owners.[26] What is important is that the municipality make its conclusions based on a sufficient body of evidence that shows how the ordinance promotes the public health, safety, morals or welfare. This is very difficult (if not impossible) to do for an ordinance that completely bans billboards throughout an entire municipality.[27]

Completely Banning Billboards

To be constitutional, complete bans against billboards must show "a more substantial relationship to the public health, safety, morals and general welfare than an ordinance which merely confines that business to a certain area in the municipality."[28] Such bans come in two forms: *de jure* and *de facto* prohibitions. A *de jure* prohibition is where an ordinance facially prohibits all billboards within a municipality. A *de facto* prohibition, while appearing to permit a use on its face, when actually applied, acts to prohibit the use throughout the municipality. To determine whether an ordinance passes constitutional muster, Pennsylvania courts weigh the rights of the advertiser against the interests of the general public welfare. This entails a two-step approach: First, courts consider whether the advertiser has

overcome the presumed constitutionality of an ordinance by showing that it excludes billboards as a use. If it cannot, the ordinance is upheld. Second, if the advertiser meets its initial burden, the court will consider whether the municipality has presented sufficient evidence to show that the exclusionary regulation bears a substantial relationship to the public health, safety, morality, or welfare. Where it cannot make such a showing, the ordinance is unconstitutional.

De jure prohibitions. In *Borough of Dickson City v. Patrick Outdoor Media, Inc.,* the advertiser met its burden of proof by showing that the borough ordinance banned all "off-site" advertising within the borough. In an attempt to meet its burden the borough elicited the testimony of the police chief who stated that in his opinion, "eighty percent of our accidents on Route 6 [are] because of inattentiveness of the driver where they turn their head for one second and you have an accident." However, the police chief admitted that of some three hundred auto accidents which occurred on Route 6 during 1982, not one was ever attributed to the distraction of the driver's attention by a billboard. The borough offered no other evidence to prove its ban on "off-site" billboards bore a substantial relationship to the public health, safety, morality, or welfare. The court thus concluded that the ordinance prohibiting "off-site" advertising throughout the Borough was unreasonable and invalid.[29]

For example, in *Lamar Advertising of Penn., LLC v. ZHB of Borough of Deer Lake,* the Commonwealth Court held that a zoning ordinance which did not allow for any "off-site" advertising operated as a *de jure* exclusion. Because de jure exclusions are unlawful the court required the Borough to allow "off-site" signage. However, the court explained that the now permitted use was still subject to the zoning laws and thus, allowed the ZHB to subject the off-site signage to the same size restrictions already applied to on-site advertising.[30]

As another example, in *Norate Corp. v. Zoning Bd. of Adjustment of Upper Moreland Tp.,* the Supreme Court, after noting that courts now look with more liberality upon a municipality's police power as to regulation of sign advertising, explained that a sign ordinance which purports to ban and prohibit all "off-site" sign advertising throughout the entire township without any regards to districts, size of signs, or other considerations is too general, too broad, and unreasonable. Thus, the court held that the sign ordinance was invalid as an improper exercise of the township's police power.[31]

Another important note stemming from *Norate* is that an otherwise invalid *de jure* exclusionary ordinance may not be saved by providing for special exceptions without sufficient standards. A ZHB's power arises solely from the ordinance and the enabling statute. In *Norate,* the ordinance provided for special exceptions but delineated no standards for granting those exceptions. Thus, the ZHB was constitutionally powerless to grant any exceptions. For this reason, the existence of a special exceptions clause did not save the otherwise invalid ordinance.

De facto prohibitions. In *Exeter Tp.,* the Supreme Court held that an ordinance was *de facto* exclusionary because it restricted the size of commercial outdoor advertising signs to 25 square feet which effectively prohibited billboards throughout the township. The Court based its holding on the fact that the advertising industry standards set billboard size at either 300 or 672 square feet, and on testimony that 25 square foot billboards would be completely inadequate for conveying messages. In a failed challenge to the assertion that the size restriction was *de facto* prohibitory, the township only presented evidence that other conforming signs existed throughout the township. The Court held that this evidence was insufficient to rebut the *de facto* exclusionary finding. [Note that the court left the door open for situations where a municipality can support some size limitations with sufficient evidence—a door that in 2012, the Commonwealth Court in *Interstate Outdoor Advertising* walked through.][32] The township also failed to justify the prohibition because it did not support it with proof that it is substantially related to the public health, safety, morality or welfare. As the court noted, "the Board made no findings as to whether [the ordinance's] exclusionary effect on billboards throughout the Township was justified by the Township's concerns for aesthetics and traffic safety along U.S. Route 422."[33] Again what all these cases show is that a municipality must justify its actions by relying on a sufficient body of evidence that demonstrates how the ordinance promotes the public health, safety, morals or welfare.

The doctrine was furthered in *Smith v. Hanover Zoning Hearing Bd.*, where the court found that the Hanover Zoning Hearing Board's denial of permits for two LED illuminated billboards was not an unconstitutional *de facto* ban of billboards. The court analyzed the municipal restriction of only allowing billboards if: (1) placement in Heavy Industry district; (2) maximum size of 300 feet, and (3) maximum sign height of 25 feet. The court determined none of the restrictions presented a *de facto* ban. First, the restrictions could not be invalidated simply because it may deprive

the owner of most lucrative and profitable uses; so long as the property in question may be reasonably used for the purposes permitted under the ordinance, the owner may not legally complain. Second, the applicant failed to present evidence of why a 300 foot size limitation would effectively bar all billboards from borough, considering the applicant's own zoning application proposed construction of two 242–square foot signs. Finally while the applicant introduced expert testimony of engineer, who stated that 35–foot height limitation for billboards would increase traffic safety by eliminating overlap between lower, on-premises signs and higher, free-standing billboards, the expert's testimony did not establish that 25–foot height limitation had the effect of barring all free-standing billboards from the borough.[34] The court's decision reaffirms the great deference given to municipalities when regulating signs through zoning laws.

Land Development Requirements

In 2007 the Pennsylvania Supreme Court held that the erection of a billboard did not, by law, constitute "land development" under the Pennsylvania Municipalities Planning Code (MPC) or the township subdivision and land development ordinance.[35] Thus, as a result of the Court's decision, municipalities can no longer require advertisers and landowners to go through the cumbersome, costly, and often prohibitive land development process before erecting billboards on their property.

First Amendment Issues

The First Amendment to the United States Constitution states in part that "Congress shall make no law . . . abridging the freedom of speech."[36] On the other hand, municipalities have the power to zone through the police power of the state. When zoning ordinances attempt to limit billboard advertising, these two rights conflict, and the power to zone can sometimes infringe upon a person's freedom of speech. An important factor under First Amendment analysis is whether the speech is commercial speech, and whether the ordinance is content-neutral or content-specific.

In the context of commercial speech, federal courts have consistently held that municipalities have a legitimate interest in the aesthetics of their community and safety of their highways. However, the burden is on the governmental entity to show its restriction is constitutional and will not be satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must "demonstrate that the ordinance serves a "substantial governmental interest" and is no more restrictive "than necessary to advance that interest."[37]

For instance, in *Interstate Outdoor Advertising*, a township ordinance completely banned billboards, and all types of signs immediately adjacent to interstate 295. The ordinance allowed for other types of signs, and further allowed those signs to contain commercial or noncommercial speech. Finally, the ordinance was content-neutral because the restriction was not based on content. The Third Circuit Court of Appeals held that the ordinance was content-neutral, advanced a substantial interest of the township (community aesthetics and traffic safety), and consequently did not violate the advertiser's commercial or non-commercial speech. That holding was despite the fact that the advertiser presented expert testimony which indicated that billboards would not increase road hazards. The court explained that the township had presented sufficient evidence on the fact that the billboards would increase driving hazards, and further that the judgments of a municipality as to the safety and well-being of its own citizens are given substantial deference. Note that courts allow municipalities to rely on evidence from studies carried out by other entities. In other words, municipalities do not have to carry out their own studies if comparable studies have been conducted.[38]

LED/Digital Billboards

The current hot-button issue in billboard law centers on the newest innovation in the billboard industry - LED/ digital billboards.

In the United States, only about 4,000 of the nation's 450,000 billboards are digitized, but industry insiders believe that this number will rapidly grow in the upcoming years. One expert projects that digital billboards will soon represent 15% of all billboards nationwide. Space on digital billboards also allows advertisers to make more money, partly because multiple advertisements can be run on the same board. Digital signs are also being used by businesses, schools, and other community groups to advertise or provide community messages.

Digital billboards have the ability to change messages at intermittent periods ranging from 8 seconds to 30 minutes (or more). Further, digital billboards can be operated at a range of illumination levels. As we move in to the future, municipalities will likely have to enact zoning ordinances which limit changeability rates and illumination levels. Municipalities across the country are now debating whether to allow digital billboards within their borders. Strong advocates argue on both sides of the debate. Pro-digital billboard advocates argue that digital billboards provide technically superior advertising, while at the same time providing public benefits because of their ability to display public safety alerts (amber alert, silver alert, and accident notification) and community messages.

Many digital billboard providers have made agreements with law enforcement agencies to publish information and warnings in specific situations. Specifically, billboard companies have agreed to publish messages in response to AMBER alerts (child abduction alert system), Silver alerts (public notification system in the United States which broadcasts information about missing persons – especially seniors with Alzheimer's Disease, dementia, or other mental disabilities – in order to aid in their return), accident alerts, and other public safety related notifications.

One example of the public safety benefits digital billboards can provide is illustrated by looking at the aftermath of the Boston Marathon bombings. On the day of the Boston Marathon bombings digital billboards around the city of Boston were converted into giant public message boards that warned local citizens of the bombings and the associated dangers (The signs read "Two Explosions At Marathon Finish"). Thus, the billboards helped both law enforcement and the local community to react to a crisis situation.

Opponents argue that digital billboards are even more distracting than traditional billboards to motorists and further, that the digital billboards constitute a nuisance to local residents. Rather than settling the debate, recent studies on digital billboards have fueled the debate on danger.

A 2007 Virginia Tech Transportation Institute study found that digital billboards do not cause different driver behavior as compared to conventional billboards. However, critics note that the study was financed by the billboard industry and that the study was rejected for publication in 2008 by the Transportation Research Board because reviewers found it to be biased.

The Swedish National Road and Transport Research Institute published the results of its digital billboard study in 2013 which showed that drivers looked at digital billboards significantly longer than they did at other signs on the same stretch of road, with the digital signs often taking a driver's eyes off the road for more than two seconds. (Note that a well-regarded 2006 study by Virginia Tech for the National Highway Traffic Safety Administration found that anything that takes a driver's eyes off the road for more than two seconds greatly increases the risk of a crash. The study also found that nearly 80 percent of all crashes involved driver inattention just prior to (within 3 seconds) crash.)

The Federal Highway Administration released the results of its study in December 2013, which showed that drivers look at digital billboards for a fraction of a second longer than static billboards. However, the FHWA concluded that the amount of time the average driver spent looking at digital billboards does not make them more distracting than static billboards.

Opponents also argue that digital billboards constitute a nuisance and detract from area aesthetics

Opponents argue that digital billboards detract from aesthetics in the same way that traditional billboards do. Additionally, opponents argue that digital billboards also emit light pollution which detracts from the aesthetics of an area and, in certain instances, may act as a nuisance to neighboring landowners who have windows facing the digital billboard.

The Courts of jurisdiction outside Pennsylvania have held that restrictions upon digital billboards which are content neutral are supported by aesthetic and safety concerns, and do not effect a total ban on digital billboards in violation of the First Amendment and are constitutional.

In *Summit Media, LLC v. City of Los Angeles*, the Los Angeles Superior Court ordered two prominent sign companies, Clear Channel and CBS Outdoors, to turn off more than 75 digital billboards. The California Supreme Court declined to hear the case in February, and the signs were ordered to be shut down by April 15. In 2002,

Los Angeles city council amended the Los Angeles Municipal Code to establish a permanent, general ban on new off-site signs throughout the city. The 2002 sign ban also applied to "alterations or enlargements of legally existing off-site signs. Following the ban, the City entered into a settlement agreement with numerous advertisers which allowed them to update a certain number of signs per year. In 2008, the City also enacted ordinances specifically prohibiting off-site digital signs.[39]

In *Summit Media,* the court held that permits authorizing the addition of digital displays to existing billboards, issued pursuant to a settlement agreement exempting certain billboard companies from city billboard ordinances, were void, and thus the city was required to revoke each permit. The court ruled that the settlement agreement was an ultra vires action and, therefore, the advertising companies had no right to rely on it.

In *Naser Jewelers, Inc. v. City of Concord,* the First Circuit Court of Appeals held that city ordinance which completely banned signs which displayed electronically changeable messages did not violate advertiser's First Amendment rights. The court reasoned that the ordinance was content neutral, supported by sufficient aesthetic and safety concerns, and left open reasonable alternative forms of communication such as static billboards or manually changeable signs.[40]

The District Court held in *Clear Channel Outdoor, Inc. v. City of New York*, that the New York City zoning regulations which limited the placement of illuminated signs to certain commercial districts within the City did not violate the First Amendment. The court reasoned that this specific regulation of commercial speech directly advanced the city's interest in improving the attractiveness of city buildings and streets, and was no more extensive than necessary. Metro Fuel operated approximately 440 panel signs in New York City. The panel signs were internally illuminated, meaning that they contained posters lit from behind by fluorescent bulbs. This type of illuminated sign was prohibited by zoning regulation in many of the zoning districts where the signs were located. The City had taken steps to enforce the zoning regulations and Metro Fuel turned to the court for relief.[41]

The New Jersey Superior Court in *E&J Equities, LLC v. Board of Adjustment of Twp. of Franklin,* held that a total ban on digital billboards violated the advertiser's First Amendment rights because the municipality had not offered sufficient evidence to support the ban.[42]

What the First Amendment cases highlight is, while Municipalities may enact ordinances which have a very real impact on commercial free speech, if it regulates signage based on content, or completely bans signage, without strong justification, there is a real danger that the ordinance will be found unconstitutional. On the other hand, content-neutral regulations, rather than complete prohibitions, will be more difficult to strike down under the First Amendment because the federal courts give great deference to a municipality's determination that the signage will affect aesthetics and road safety. However, it is always wise to make sure restrictions are carried out in the least intrusive manner and are backed by sufficient evidence justifying their enactment.

REFERENCES

1. *Township of Exeter v. Zoning Hearing Bd. of Exeter Tp.,* 599 Pa. 568, 580, 962 A.2d 653, 660 (2009).
2. There are three main constitutional challenges to billboard regulations in Pennsylvania. Do the regulations violate: (1) due process; (2) the inherent property rights embodied in Article I, Section 1 of the Pennsylvania Constitution; or (3) free speech challenges under the First Amendment? However, as discussed below, the tests for each challenge is similar.
3. *See e.g., In re Realen Valley Forge Greenes Associates,* 838 A.2d 718, 727 (Pa. 2003) (citing Pa. Const. art. I, § 1) (striking down local ordinance designed to prevent erecting structures on a private golf course to preserve its undeveloped "green space" in the public interest).
4. *Hopewell Tp. Bd. of Supervisors v. Golla,* 499 Pa. 246, 452 A.2d 1337, 1341 (1982) (citing U.S. Const. amends. V, XIV).
5. *Interstate Outdoor Adver., L.P. v. Zoning Bd. of Tp. of Mt. Laurel,* 706 F.3d 527, 529 (3d Cir. 2013).
6. 53 P.S. § 10601.
7. *Robinson Tp. v. Commonwealth,* 83 A.3d 901 (Pa. 2013).
8. 23 U.S.C. § 131, *et seq.*
9. 36 P.S. § 2718.101, *et seq.*
10. 53 P.S. § 10603(b).
11. *Hopewell Tp. Bd. of Supervisors v. Golla,* 499 Pa. 246, 452 A.2d 1337, 1341 (1982) ("[Under Article I, § 1 of the Pennsylvania

Constitution] [i]n reviewing zoning ordinances, this Court has stated that an ordinance must bear an substantial relationship to the health, safety, morals, or general welfare of the community.").

12. *Norate Corp. v. Zoning Bd. of Adjustment of Upper Moreland Tp.,* 417 Pa. 397, 405, 207 A.2d 890, 895 (1965).
13. 53 P.S. § 10604.
14. *Norate Corp., supra.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Township of Exeter v. Zoning Hearing Bd. of Exeter Tp.,* 599 Pa. 568, 962 A.2d 653, 660 (2009).
19. *Mont-Bux, Inc. v. Cheltenham Tp.,* 388 A.2d 1106, 1107, 36 Pa.Cmwlth. 397, 401 (1978).
20. *Robinson Tp. v. Commonwealth,* 83 A.3d 901 (Pa. 2013).
21. *Mont-Bux, Inc.,* 388 A.2d 1106, 1108 (finding a report from the Public Works Committee that forecasted decreased property values from the erection of billboards in a neighborhood sufficient to protect the "general welfare" of residents); *see also In re Appeal of Authaus Lancaster Inc.,* 4 Pa.D.&C. 4th 69, 84-85 (1989), *aff'd sub nom.,* 130 Pa.Cmwlth. 31 (1989) ("[A]esthetics and property values are legitimate considerations in a municipality's exercise of its zoning power to promote the general welfare.").
22. *In re Bartkowski Investment Group, Inc.,* 106 A.3d 230 (Pa.Cmwlth. 2014).
23. *Interstate Outdoor Adver., L.P. v. Zoning Hearing Bd. of Warrington Tp.,* 39 A.3d 1019, 1027 (Pa.Cmwlth. 2012).
24. *Id.* (holding that restricting size of billboards to 50 feet wide and 25 feet high was not a de facto prohibition on billboards because on such a low-volume road, the signs could be easily viewed by passing motorists).
25. *Id.* (citing *Atlantic Refining and Marketing Corp. v. Board of Comm'rs of York Tp.,* 147 Pa.Cmwlth. 418, 608 A.2d 592, 594 (1992)).
26. *Id.*
27. *Norate Corp. v. Zoning Bd. of Adjustment of Upper Moreland Tp.,* 207 A.2d 890, 894 (1965); *Lamar Advertising of Pennsylvania, LLC v. Zoning Hearing Bd. of Borough of Deer Lake,* 915 A.2d 705 (Pa.Cmwlth. 2007).
28. *Honey Brook Tp. v. Alenovitz,* 430 Pa. 614, 620, 243 A.2d 330, 333 (1968).
29. *Borough of Dickson City v. Patrick Outdoor Media, Inc.,* 496 A.2d 427 (Pa.Cmwlth. 1985).
30. *Lamar Advertising of Pennsylvania, LLC v. Zoning Hearing Bd. of Borough of Deer Lake,* 915 A.2d 705 (Pa.Cmwlth. 2007).
31. *Norate Corp. v. Zoning Bd. of Adjustment of Upper Moreland Tp.,* 207 A.2d 890, 894 (1965).
32. *See* note 9, *supra,* and accompanying text.
33. *Township of Exeter v. Zoning Hearing Bd. of Exeter Tp.,* 599 Pa. 568, 585, 962 A.2d 653, 663 (2009).
34. *Smith v. Hanover Zoning Hearing Bd.,* 78 A.2d 1212 (Pa.Cmwlth. 2013).
35. *Upper Southampton Tp. v. Upper Southampton Tp. Zoning Hearing Bd.,* 594 Pa. 58, 934 A.2d 1162 (2007).
36. U.S. Const. amend. I.
37. *Interstate Outdoor Adver., L.P. v. Zoning Bd. of Tp. of Mt. Laurel,* 706 F.3d 527, 530 (3d Cir. 2013).
38. *Id.*
39. *Summit Media, LLC v. City of Los Angeles,* 211 Cal.App.4th 921 (Cal.Super. 2013).
40. *Naser Jewelers, Inc. v. City of Concord,* 513 F.3d 27 (1st Cir. 2008).
41. *Clear Channel Outdoor, Inc. v. City of New York,* 608 F.Supp.2d 477 (S.D.N.Y. 2009).
42. *E&J Equities, LLC v. Board of Adjustment of Tp. of Franklin,* SOM-L-1526-10 (Law Div. Jan. 4, 2013).

XXIX. Stormwater Management

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The federal Clean Water Act[1] seeks to improve the quality of rivers, streams, lakes and their associated surface waters by requiring "point source" discharges of "pollutants" into such waters to have a discharge permit restricting the amounts of pollutants discharged by imposing limits, and by funding various programs to deal with "nonpoint sources", which are uncollected natural flows of water carrying pollutants. Pollutants picked up by stormwater and then discharged into surface water were considered a low environmental priority in the 70's and early 80's. Stormwater pollutant discharge is now the subject of specific point source permitting requirements. The extent of stormwater conveyance systems constructed or maintained and operated by municipalities makes this permit program an enormous potential expense, and noncompliance may expose municipalities to liability for fines and costly remedial sanctions through government enforcement at the state or federal level or citizen lawsuits by private groups. This chapter examines the federal law and program, state implementation and legal liabilities.

What is a Point Source?

Under federal law and state regulations, a point source is "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container . . . from which pollutants are or may be discharged."[2] In the context of community development actions even water channels resulting from landscaping or earth moving, such as stormwater swales or dikes, are considered point sources.

What is a Pollutant?

A pollutant is a "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical waste, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt, and industrial municipal and agricultural waste discharged into water."[3] Almost anything but pure water may qualify.

Basic Prohibitions/Source of Liability

No person may discharge a pollutant from a point source into waters of the United States or the Commonwealth unless that person has a permit and complies with the permit.[4] State law (the Clean Streams Law) requires permits for discharges of sewage or industrial waste, and authorizes the Pennsylvania Department of Environmental Protection to require permits for any other activity presenting a danger or pollution to waters of the Commonwealth.[5]

Municipalities Covered

Both federal law and state law include municipalities and municipal authorities within the definition of persons covered by those laws.[6] State law includes "any county, city, borough, town, township, school district, institution or any authority created by one or more of the foregoing."

Stormwater as a "Discharge of Pollutants"

EPA initially attempted to exclude stormwater from regulation under the Clean Water Act and its National Pollutant Discharge Elimination System (NPDES) permit program. A citizen group sued, and the D.C. Circuit Court of Appeals held that point source discharges of stormwater must be regulated.[7] In 1987, Congress specifically legislated

requirements for a permit program for stormwater discharges, setting deadlines and priorities for regulation.[8] Since that time, several studies have documented the increasing significance of stormwater runoff as a source of pollution.[9] Increasing pollution controls on discharges of industrial and other wastewaters and sewage have decreased their relative environmental impact, increasing the significance of stormwater pollution control for the attainment and maintenance of water quality standards.

Relationship of Federal/State Law

Pennsylvania has an established regulatory program for permitting discharges to state waters under the Clean Streams Law.[10] This statute and its implementing regulations have been approved by EPA as equivalent to federal law. Therefore, the state NPDES permit program administered by the Pennsylvania Department of Environmental Protection (DEP) is the appropriate body for issuing permits. This authority is not delegated to the local level.

Pennsylvania DEP has entered into binding agreements with EPA to implement federal program requirements such as stormwater permitting within the Commonwealth, pursuant to its laws. However, the federal EPA retains the right to veto permits not conforming to federal requirements, to issue federal permits in limited instances and to enforce federal prohibitions against unpermitted discharges. Therefore, while EPA may not enforce its own permit rules directly, it may veto DEP permits which do not conform to those requirements, it may issue a federal permit if DEP refuses to correct a deficient permit, and it may assess penalties and enforce compliance with permit requirements directly against municipal stormwater point source discharge if DEP fails to issue an EPA-approved permit.

In practice, DEP is committed under its own laws to regulating point sources, and has phased in its program in accordance with federal schedules to assure consistency with other states. However, DEP reserves the right to regulate specific problem discharges, when identified, as necessary to assure compliance with state standards and laws. DEP is also committed to assisting municipalities to integrate their planning obligations under the Pennsylvania Storm Water Management Act[11] within permit requirements.

The Federal Program: Municipal Separate Storm Sewer Systems

Section 402(p) of the Clean Water Act[12] authorizes EPA to issue permits for a "discharge from a municipal separate storm sewer system (an "MS4") serving a population of 250,000 or more" (subsection 402(p)(2)(c)), and "a discharge from an MS4 serving a population of 100,000 or more but less than 250,000" (subsection 402(p)(2)(d)). Permits for municipal systems may be on a systemwide or jurisdictionwide basis.

The two basic control requirements for such discharges are: (1) effective prohibition of non-stormwater discharges into the storm sewers and (2) controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods and any other provisions the EPA or the state determines appropriate for the control of these pollutants.[13] The "effective prohibition" requirement does not prohibit permitted discharges. Specific controls are developed by each permittee subject to government approval.

In December of 1999, EPA issued rules for a Phase II program[14] regulating many municipal separate storm sewer systems in smaller municipalities located within "urbanized areas." These rules are being implemented by the DEP in Pennsylvania. *See the DEP Comprehensive Stormwater Program*, below. Litigation is proceeding in federal court to require EPA to expedite its regulation of smaller MS4s.

Current Applicability

EPA regulations currently define an (MS4) as a "conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains) owned or operated by municipalities, and designed or used for collecting or conveying stormwater."[15]

Large MS4s are those located in an incorporated place with a population of 250,000 or more, or in a county with urbanized, unincorporated area with a population of 250,000 or more. For Pennsylvania, 40 CFR Part 122 Appendix F lists two cities subject to these rules – Philadelphia and Pittsburgh. No Pennsylvania counties are listed as large MS4s.

Medium MS4s are those located in incorporated places with a population between 100,000 and 250,000, or unincorporated urbanized areas with such populations. 40 CFR Part 122 Appendix G lists Allentown and Erie as cities with medium MS4s. No unincorporated areas in Pennsylvania are listed in Appendix 1.

Small MS4s are located within municipalities with populations of fewer than 100,000 persons but which are situated in "urbanized areas, or designated for regulation based on water quality plans or significant water quality impacts." See 40 CFR §122.32. "Urbanized Areas" are defined by the 2000 census. There are approximately 700 such municipalities in Pennsylvania.

Smalls MS4s must either obtain an individual NPDES permit, DEP Doc. 3800-PM-BPNPSM 0200 (available at www.elibrary.dep.state.pa.us/dsweb/View/Collection-10926), or apply for coverage under the general permit, PAG-13 DEP Doc. 3800-PM-BPNPSM 0100, (available at www.elibrary.dep.state.pa.us/dsweb/View/Collection-9457), or file for a waiver demonstrating that they meet the federal EPA waiver criteria in 40 CFR §122.32(d) or (e).

Other Stormwater Sources

Municipalities may want to monitor the state regulation of stormwater discharges for industrial sites and from construction sites within their borders. Such discharges may affect water quality and trigger additional controls on MS4s.

Industrial sites should have an individual NPDES permit that includes stormwater requirements. See 40 CFR §122.26 and DEP permit regulations. The General NPDES Permit may also be applicable to some industrial point sources of stormwater. See PAG 03 (Doc. No. 3800-PM-WSFR0083).

Construction sites usually file for coverage under the stormwater general NPDES permit, PAG-02, Doc. No. 3150-PM-BWEW0280. Note that this general permit is issued and administered by the DEP Bureau of Waterways Engineering and Wetlands under the Rules at 25 Pa. Code Ch. 102 (rather than the Bureau of Point and Nonpoint Source Management which oversees municipal stormwater permits).

Current Requirements – The DEP Comprehensive Stormwater Program

Large and medium MS4s have individualized permit program requirements. These may be of interest to municipalities with small MS4s if there are problems using the basic DEP programs for small systems, but that situation will not apply generally.

The DEP Comprehensive Stormwater Management Policy (Doc. 392-0300-002), adopted and effective September 28, 2002 implements the EPA mandates by using Act 167 plans, general permits and individual permits to require covered small MS4s to develop and implement the following EPA-mandated programs:

- public education
- public involvement
- eliminating discharges not composed entirely of stormwater
- erosion and sediment controls for construction activities
- use of best management practices (BMPs) to manage post construction stormwater from new development and redevelopment[16], and
- pollution prevention through good housekeeping practices for municipally operated systems.[17]

The key objectives of the policy are to comply with federal programs, protect water quality, minimize paving, and preserve infiltration and runoff characteristics during development.

Deadlines

Municipalities covered by the Phase II program for small MS4s were required to file a permit application, or a notice of intent to be covered by a general permit, by March 10, 2003.[18] This deadline has not been extended, although states have not yet issued permits for many small M4s. These municipalities may have stormwater ordinances that already require Best Management Practices to be incorporated in local project designs.

Enforcement

Both federal and state law provide substantial penalties, both civil and criminal, for failure to comply with the law. Fines of $27,500 per day may apply. More importantly, private citizens may enforce noncompliance directly after notice to EPA and DEP. If the law applies to a system, EPA and DEP may not excuse compliance to protect against citizen action. They must commence and prosecute any action seeking compliance with the law or citizen enforcement may proceed.

Exclusions

Combined (storm and sanitary) sewer systems connected to a sewage treatment plant are not subject to these rules. Dischargers of stormwater runoff combined with municipal sewage are point sources that must obtain NPDES permits requiring secondary treatment unless special policies apply. For example, in some cases treatment may not be required for combined sewer overflows (CSOs) where a program is in place under an agreement or court decree to implement major compliance projects over time in connection with alternatives that do not require secondary treatment under certain conditions. In the absence of such commitments, permit requirements are also subject to federal, state or citizen enforcement. Some waters of the United States used to carry stormwater may not have been regarded as discharges in the past, but these exceptions may be reviewed under new federal rules adopted in 2015. Federal courts have already ruled that stormwater channels in Los Angeles are regulated as waters of the United States.

Pennsylvania Stormwater Management Plans

Stormwater drainage over land is also closely regulated to prevent erosion and reduce subsequent quality impacts from discharges. DEP provides technical guidance to municipalities, and may compel municipalities to develop stormwater management plan ordinances. But the implementation is done through local ordinances as part of the municipal planning process.[19] These plans may be revised in conjunction with meeting the EPA-mandated stormwater permit requirements.

Finding Resources for Developing Municipal Stormwater Infrastructure and Best Practices Controls

The Pennsylvania Infrastructure Investment Authority Act, Act 16-1988, 35 P.S. §751.1 *et seq.*, created Pennvest. Pennvest issues grants or loans for eligible costs of covered wastewater infrastructure projects. The guidelines are in the Pennsylvania Code at 25 Pa. Code Ch. 961. Grants are available where loans cannot be repaid, but loan assistance is the preferred process.

DEP also issues grants to municipalities to assist in the development of Best Management Practices for stormwater management. Funds must be available for award.

EPA also provides informational assistance at its Water Infrastructure and Resiliency Finance Center, at www2.epa.gov/waterfinancecenter.

Appropriate Actions

1. Determine whether your municipality is located within or owns a system within the census-identified "urbanized areas." The DEP stormwater program website listed below contains lists of the identified areas, maps, and an EPA fact sheet defining these areas. You may also want to check with DEP to make sure your receiving waters have not been specifically designated.
2. If you are subject to permitting by the March 10, 2003 deadline, make sure you have filed a permit application or notice of intent to be covered by the general permit (PAG-13). Instructions and forms are available on the DEP website.
3. If you have not filed, you should do so immediately. If you do not qualify for a general permit, file an application for an individual permit.
4. As part of the compliance program under the general or individual permit, you should designate a technical or administrative person to review the guidance, particularly the policy and the technical protocol. Both are available at DEP's website, along with a model ordinance.
5. Make sure your code enforcement, land use planning and zoning boards update their procedures as you implement stormwater management program requirements as they are adopted.
6. There may be special requirements for certain receiving streams designated as special protection waters, and there are waivers for very small systems and for stormwater with no exposure to pollutants prior to discharge. Case-by-case analysis under the rules and policies will be needed in these situations.
7. Watershed management programs for waterways which have impaired water quality may be subject to watershed plan requirements or a total maximum daily load (TMDL). Such requirements may add to the level of control required for MS4s.

Relevant Documents

- Clean Water Act, as amended, 33 U.S.C. 1251, *et seq.*, especially §402(p), 33 U.S.C. 1342(p).
- Clean Streams Law, 35 P.S. 691.1, *et seq*.
- Stormwater Management Act (Act 167), 32 P.S. §680.1, *et seq.*
- 40 CFR Part 11, especially Sections 122.26, 122.30-122.
- 25 Pa. Code Chapters 91, 92, 93, 95 and 102.
- Federal Register, volume 55, pages 47990-48091 (11/16/90).
- Federal Register, volume 57, pages 41344-41356 (9/9/92).
- Federal Register, volume 64, pages 68722-68851 (12/8/99).
- Municipal Permit Application Manual, Summaries, Fact Sheets and Work Shop materials.
- EPA Stormwater Sampling Guidance.
- EPA Pollution Prevention Plan Guidance.
- EPA Guidance on Best Management Practices.
- DEP Comprehensive Stormwater Management Policy (September 28, 2002).
- DEP permit forms, instructions and guidance.

Contacts

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Web Sites

Statutes and rules are available under Law and Regulations at EPA's home page: www.epa.gov.
The NPDES website is located at http://cfpub.epa.gov/npdes/home.cfm?program_id=45 (alternate epa website address: water.epa.gov/polwaste/npdes/basics/index.cfm). For MS4s see: water.epa.gov/polwaste/npdes/stormwater/Municipal-Separate-Storm-Sewer-System-MS4-Main-Page.cfm.

DEP's homepage has many essential forms – notice of intent, application, waiver request, model ordinances, maps and lists of affected MS4s, policies and guidance documents. To access these go to DEP's home page at www.dep.pa.gov, and find the Direct Link search box, type in stormwater and click on go, or on the left side of the DEP home page, proceed down the menu to "Water" and click. This drops down the bureau list. For municipal stormwater, click on "Bureau of Point and Non-point Source Management." On that Bureau page look at the Topics menu list on the right side of the page. Click on Stormwater Management, and follow the subject pages and highlighted links to the topics or forms of interest.

REFERENCES

1. 33 U.S.C. § 1251, *et seq*.
2. 33 U.S.C. § 1362(14) and 25 Pa. Code 92.1.
3. 33 U.S.C. § 1362(6) and 25 Pa. Code 92.1.
4. 33 U.S.C. § 1311.
5. 33 P.S. §§ 691.201, .202, .301, .307, .401 and .402.
6. *See* 33 U.S.C. § 1362(4) and (5); 35 P.S. § 691.1.
7. *Natural Resources Defense Council v. Costle,* 568 F.2d 1369 (D.C. Cir. 1977).
8. *See* Federal Water Quality Act, P.L. 100-4 (Feb. 4, 1987), adding Section 402(p) to the Federal Clean Water Act, 33 U.S.C. § 1342(p).
9. *See* Section I.A.1 of EPA's proposed Phase II Stormwater Discharge Rule, 63 Fed. Reg. at pp. 1538-1542 (Jan. 9, 1998).
10. 1937 P.L. 1987, No. 394, as amended, 35 P.S. § 691.1, *et seq.*
11. 32 P.S. §§ 680.1 to 680.17
12. 33 U.S.C. § 1342(p).
13. 33 U.S.C. § 1342(p)(3)(B).
14. *See* Federal Register, vol. 64, pp. 68721-68851 (Dec. 8, 1999). The rules were issued pursuant to 33 U.S.C. § 1342(p)(6). The U.S. Circuit Court of Appeals for the Ninth Circuit recently upheld the EPA Phase II rules generally, but remanded the general permits to require more public review and participation. *Environmental Defense Center, Inc., et al. v. United States EPA,* 2003 U.S. App. LEXIS 497 (9th Cir. Jan. 14, 2003).
15. Title 40, Code of Federal Regulations, Part 122, Section 122.26(b)(8); 40 C.F.R. § 122.26(b)(8).
16. DEP published a Manual for BMPs in December 2006. DEP Doc. No. 363-0300-002 is available at www.elibrary.dep.state.pa.us/dsweb/Get/Document-68851/363-0300-002.pdf.
17. *See* also 40 C.F.R. § 122.34, and DEP protocol (mentioned in Relevant Documents and Web Sites).
18. 40 C.F.R. § 122.33(c).
19. *See* 32 P.S. §§ 680.1 to 680.17.

XXX. Land Recycling – Pennsylvania's Voluntary Cleanup Statute

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In 1995, Pennsylvania established a land recycling program designed to encourage the voluntary remediation of contaminated industrial and commercial properties (brownfields), and to curb the development of farmland and other uncontaminated open space (greenfields) by promoting brownfields redevelopment as an alternative. The cornerstone of Pennsylvania's land recycling program is the Land Recycling and Environmental Remediation Standards Act, commonly known as "Act 2."[1] Act 2 is administered by the Environmental Cleanup Program (ECP) staff in the six regional offices of the Department of Environmental Protection (DEP). Act 2 established soil and groundwater cleanup standards and standardized remediation review procedures. The statute also offers significant relief from liability for further remediation and financial assistance. In August 1997, DEP finalized regulations implementing the provisions of Act 2.[2] The regulations were amended in November of 2001 and in January of 2011[3] In January 1998 (the latest revision June 8, 2002), DEP issued its Land Recycling Technical Guidance Manual which provides technical guidance, a detailed explanation of procedures for determining and achieving an appropriate cleanup standard, and a description of how Act 2 affects remediations required under other environmental statutes. Act 2 does not affect the authority of municipal governments to regulate local land development under the Municipalities Planning Code.[4]

You may encounter Act 2 when:

- A public notice of site remediation prompts a comment or other action by the municipality.
- The municipality is involved in promoting the site redevelopment or in funding redevelopment.
- Land use restrictions imposed by the owner require municipal approvals.

Cleanup Standards

Act 2 and its implementing regulations establish three sets of cleanup standards: background, statewide health and site-specific standards. The background standard requires cleanup to naturally occurring or historical concentrations of contaminants and is the most stringent of the three cleanup standards.[5] Statewide health standards are those medium-specific concentrations (MSCs) of pollutants which DEP has determined eliminate any substantial present or future risk to human health and the environment.[6] The applicable MSC for a regulated pollutant depends on whether an affected aquifer is used for drinking water or agricultural purposes and whether the property is residential. To date, most of the sites that have been remediated pursuant to Act 2 have been cleaned up to statewide health standards.

Site-specific cleanup standards are unique to a particular site and are based on an analysis of the risk posed by the contamination.[7] Site-specific cleanup standards are the most relaxed of the three cleanup standards and often include the use of institutional controls and engineered barriers (e.g. land use restrictions, fences, paving) to prevent exposure to pollutants and monitoring of any groundwater contamination.

Limited, risk-based remediation is also available for sites which qualify as Special Industrial Areas (SIAs) under Act 2.[8] To qualify as an SIA, the former industrial site must have no viable owner or be located in an enterprise zone designated by the Department of Community and Economic Development (DCED). The party conducting the cleanup cannot have contributed to the contamination at the site. Cleanup actions in SIAs need only address

immediate or imminent threats posed by contamination at the site, such as the presence of drummed waste, which would prevent the property from being occupied for its intended use. A party undertaking the reuse of an SIA must conduct a baseline environmental assessment of the property and enter into a consent order and agreement with DEP delineating the party's limited cleanup responsibilities.

Site Characterization and Notice Requirements

The first step in the Act 2 process is the performance of a site assessment to determine conditions on the property which may require remediation and an appropriate cleanup standard or combination of cleanup standards. A party proposing to remediate a site must then submit a Notice of Intent to Remediate (NIR) to DEP and the local municipality and publish a summary of the NIR in a newspaper of general circulation in the area of the site.[9] The NIR must contain a brief description of the site, ownership information, a listing of contaminants, the proposed remediation and future use of the site. An NIR is not required for proposed remediation to background or statewide health standards if the final report demonstrating attainment of the standards is submitted to DEP within 90 days of a release of contaminants which occurred after July 18, 1995.

Required Reports

Prior DEP approval is not required to begin a remediation to background levels or statewide health standards, although it is advisable to review a proposed cleanup plan with DEP before undertaking any remedial action. Following the completion of remedial activity to background or statewide health standards, the remediator must submit two copies of a final report demonstrating attainment with cleanup standards to the regional DEP ECP in which the site is located together with the applicable fee. Notice that a final report has been submitted to the Department must be provided to the local municipality and published in a newspaper of general circulation in the area of the site. DEP must review the final report within 60 days or it is deemed approved.

Parties proposing to remediate a site using site-specific standards must provide DEP with a remedial investigation report. If the results of the remedial investigation show that pathways of exposure to contaminants exist, the remediator must also submit to DEP a risk assessment report and cleanup plan. The cleanup plan must include remediation alternatives and recommend a final remedy. The remediator must submit a final report demonstrating attainment with the approved remedy in accordance with the cleanup plan. The remedial investigation report, risk assessment report and cleanup plan may be submitted to DEP for review at the same time. DEP's review period is 90 days. If no exposure pathways exist, a risk assessment report and cleanup plan are not required and no remedy is required to be proposed or implemented.

The remediation of an SIA requires the submission to DEP of a work plan defining the scope of the required baseline remedial investigation followed by a baseline environmental report that describes the results of the investigation. DEP's review period is 90 days.

Public Participation

If the proposed remediation involves an SIA or use of a site-specific cleanup standard, the local municipality has 30 days following submission of an NIR to request to be involved in the development of remediation and reuse plans for the site.[10] If the municipality requests involvement in the remediation, the party seeking remediation must implement a "public involvement plan" proposing measures to involve the public in the development and review of the various required reports and plans. Public involvement measures may include public meetings, public access to pertinent documents, the designation of a contact person to address questions from the community and where needed, the retention of a qualified independent party to facilitate discussions and to perform mediation services. The reports and plans relating to site specific and SIA remediation must include comments received from the public and municipality as well as responses to those comments.

Cleanup Liability Protection

All persons participating in the remediation of a site in compliance with Act 2 requirements are relieved of further liability for the remediation of the site under any state environmental statute and protected against citizen suits and contribution actions.[11] The liability protection extends to current and future owners and occupiers of the property. Liability protection against further remedial obligations extends only to contamination identified in the site characterization and reports submitted to DEP. The Act 2 release from liability does not provide any protection against civil penalty actions, liability under federal environmental statutes and common law actions, such as claims for personal injury or property damage. Act 2 also contains certain "reopeners" which would allow DEP to require additional remediation under specified circumstances.

One Cleanup Program

On April 21, 2004, the Commonwealth of Pennsylvania DEP and the United State EPA signed a Memorandum of Agreement for the One Cleanup Program[12]. the agreement establishes a framework for coordinated review of Act 2 cleanups to ensure that the cleanup satisfies protective standards under the federal Superfund (CERCLA)[13], RCRA[14], and TSCA[15] programs. Note that the One Cleanup program does not delegate EPA's corrective action authority under RCRA, or restrict EPA's authority to take other actions.

The Uniform Environment Covenants Act (UECA)[16]

On December 18, 2007, the UECA was adopted into law in the Commonwealth. This law sets uniform procedures and required terms for covenants restricting the uses and activities which may be conducted in areas where contamination has been enclosed in engineered structures or left in place where no exposure pathway exists to people or the environment. All such covenants must conform to UECA's requirements, and must be entered into a registry of Use and Activity Limitations (UALs) maintained by DEP. The act is available through the UECA link which can be reached through the Land Recycling webpage. The rules for the administration of UECA are found at 25 Pa. Code Ch. 253. Municipalities should consider procedures for persons applying for permits to do construction involving excavation to check the registry, and also title records which may contain similar restrictive use covenants pre-dating UECA and not converted to UECA covenants.

Financial Assistance

Act 2[17] and its companion statute, the Industrial Sites Environmental Assessment Act, "Act 4,"[18] provide financial assistance to eligible applicants who did not cause or contribute to contamination on property used for industrial activity before July 18, 1995. The financial assistance provisions of Acts 2 and 4 have been combined into the Industrial Sites Reuse Program that is administered by DCED. Eligibility requirements and application procedures are explained in the Industrial Sites Reuse Program guidelines available from DCED and included in the Act 2 Technical Guidance Manual.[19]

Counties, municipalities and municipal authorities may apply for grants or low-interest loans, on their own behalf, or on behalf of private companies, investors or developers, to fund inventorying and site assessments of properties located in distressed communities designated by the Secretary of Community and Economic Development and in cities of the first class, second class, second class A and third class. These political subdivisions and their instrumentalities are also eligible for grants or loans to conduct site assessments or remediation if they own the site and will oversee its cleanup. Private entities are eligible for low-cost loans to fund site assessments and remediation of properties they propose to cleanup. Financial assistance may not exceed 75 percent of the cost of a site assessment, or $200,000 in a single fiscal year, whichever is less. The maximum amount of assistance which may be awarded for any remediation project is limited to 75 percent of the total cost of remediation, or $1,000,000, in a single fiscal year, whichever is less. The DCED website should be checked for updates to these requirements whenever a project seeks financial assistance.

The enactment of Act 6 in 2000[20] expanded the availability of funds and eligibility for use of funds to inventory, assess and remediate sites under Act 4. DCED administers these grant programs. Funding sources change regularly,

and each project should be assessed for possible funding (grant or loan) applications to PIDA, Pennvest, DCED, DEP, and federal sources.

Municipal financing may be provided with little or no environmental liability concerns, as long as the municipality does nothing by its own acts or omissions to create an additional environmental burden, or to refuse reasonable cooperation.[21]

NOTE: In previous editions we referred to changes in the Federal Internal Revenue Code section 198 allowing certain qualified remedial costs incurred in brownfields development to be deducted as expenses rather than capitalized. This change, which facilitated financing for private development of brownfields, expired in 2011 and has not been renewed by Congress. Other financing initiatives are discussed in the EPA website at www2.epa.gov/brownfields. Additional financial information relevant to brownfield reuse is provided at the DEP's "Land Recycling" web page, and in the fact sheets listed in the "Introduction" section of that web page and the section on "Financial Incentives."[22]

Contacts

Go to the DEP website at www.dep.pa.gov and type "Land Recycling" in the Direct Links box, or call 717-783-1566. Questions and comments may be directed to Troy Conrad, Program Manager, at landrecycling@pa.gov.

DEP Regional Environmental Cleanup Program Managers:

Southeast Region, Steve Sinding – (484) 250-5960. Email: ssinding@pa.gov

Northeast Region, Eric Supey – (520) 820-4902. Email: esupey@pa.gov

Southcentral Region, John Krueger – (717) 705-4705. Email: jkrueger@pa.gov

Northcentral Region, Ted Loy – (570) 321-6525. Email: tloy@pa.gov

Southwest Region, Dave Eberle – (412) 442-4091. Email: deberle@pa.gov

Northwest Region, Anita Stainbrook – (814) 332-6648. Email: astainbroo@pa.gov

For information on grants from the DCED Industrial Sites Reuse Program, contact the DCED customer service office at (800) 379-7448, or go to the DCED website at dced.pa.gov/isrp.

REFERENCES

1. 35 P.S. § 6026. 101 *et seq.*
2. 25 Pa. Code Chapter 250.
3. amended November 23, 2001, effective November 24, 2001, 31 Pa.B. 6395; amended January 7, 2011, effective January 8, 2011, 41 Pa.B. 230.
4. 35 P.S. § 6026.306.
5. 35 P.S. § 6026.302.
6. 35 P.S. § 6026.303.
7. 35 P.S. § 6026.304.
8. 35 P.S. § 6026.305.
9. 35 P.S. §§ 6026.302(e), 303(h), 304(n), 305(c).
10. 35 P.S. §§ 304(o), 305(c)(2).
11. 35 P.S. § 6026.501.
12. The agreement is available under the One Cleanup link on the DEP webpage for the Land Recycling Program. The address is: http://www.depweb.state.pa.us/portal/server.pt/community/one_cleanup_program/21550
13. *See* Comprehensive Environmental Response, Compensation, and Liability Act, as amended, 42 U.S.C. § 9601, *et seq.*
14. *See* Resource Conservation and Recovery Act, 42 U.S.C. § 6901, *et seq.*, in particular the corrective action authorities under RCRA §§ 3004(u) and 3008(h), 42 U.S.C. §§ 6924(u) and 6928(h).

15. *See* section 6(e) of the Toxic Substances Control Act, 15 U.S.C. § 2605(e).
16. Act 2007-68, 27 Pa.C.S. §§ 6501-6517.
17. 35 P.S. § 6026.702.
18. 35 P.S. § 6028.1, *et seq.*
19. The Technical Guidance Manual was last revised on June 8, 2002. It is available through the DEP website at www.dep.pa.gov. Type in the words "Land Recycling" in the directLINK box, and the home page for that program has a direct link to an electronic version of the Guidance Manual. Or you may scroll down the menu on the left side of the home page to "Environmental Cleanup and Brownfields" and click. On the next page you will see a page beneath the page you clicked labelled Land Recycling. Click on that, and on the next page you will see a menu on the right. Scroll down to: Standards, Guidance and Procedures" and click. On the page click on Guidance and Technical Tools, and the next page will show a link to the Technical Guidance Manual. There are other links to useful technical information about the program. As another alternative, the address for the manual webpage is: https://www.portal.state.pa.us/portal/server.pt/community/guidance___technical_tools/20583/technical_guidance_manual/1047635
20. P.L. 20, No. 6 (March 17, 2000).
21. *See* Economic Development Agency, Fiduciary (Act 3) and Lender Environmental Liability Protection Act, 35 P.S. § 6027.1, *et seq.*
22. If you have trouble with the directLINK description in footnote 14, use theinternet address: http://www.depweb.state.pa.us/portal/server.pt/community/brownfield_incentives_and_funding/215.

XXXI. Municipal Solid Waste/Recycling

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Authority and Responsibility

The planning for locations and facilities used for disposal of municipal waste, and for waste handling, processing, and separation for recycling prior to disposal, are now primarily determined by the county; the physical handling and contracting may be done by county agencies, local municipal agencies or municipal authorities formed by either level of government. Recycling and resource recovery are primarily local government concerns, unless responsibility is delegated to (and accepted by) the county. Issuance of permits and enforcement of technical standards remain duties of the Pennsylvania Department of Environmental Protection (DEP).

The Municipal Waste Planning, Recycling and Waste Reduction Act (Act 101)[1] requires counties and municipalities to conduct municipal waste planning to ensure adequate municipal waste disposal capacity and to encourage the reduction of the amount of municipal waste generated through recycling and other waste reduction methods. Regulations implementing the statute are incorporated within the municipal waste regulations.[2] Under Act 101, each county is required to submit to DEP an officially adopted municipal waste management plan designed to ensure that each county has sufficient processing and disposal capacity for its municipal waste for at least ten years.

The legal interaction of municipal waste management plans with local contractual arrangements or with facilities owned and operated by local governments or municipal authorities can be complex and contentious. At the same time, state law (1) provides for levies on waste disposal which generate payments to the local municipality hosting a disposal facility, (2) requires financial assurance for proper landfill closure at the end of the landfill's useful life, (3) promotes cooperation between DEP and local governments in regulating disposal facilities and (4) offers grant assistance to municipalities in meeting their obligations to reduce municipal waste volumes generated by each business or household (called waste minimization) and to reclaim or recycle glass, paper, metal and yard wastes instead of using up landfill space for disposal of these materials.

Local Rights/Involvement in the Planning Process

Counties may delegate their planning duties. Some municipalities may want to develop and manage their own plan to avoid disputes over waste contracting and management. This is particularly true where a municipally owned facility exists. On the other hand, a county plan may direct waste flows to municipal facilities in the volumes needed for timely and complete amortization.

Another issue of concern is the relationship of the plan to local land use controls and measures to protect health and safety. Act 101 preserves local zoning power over new landfills and, with limits, over existing permitted landfills. However, zoning actions may not interfere with reasonable expansions requested prior to September 26, 1988.

Act 101 also provides a battery of local rights. Municipalities with waste facilities must receive copies of numerous reports submitted to DEP, or prepared by the Department. DEP must train local inspectors, who may inspect facilities and even enforce the law (with DEP's oversight). And there are provisions for the adjoining neighbors of landfills to have their wells tested at landfill expense.

Another significant provision prohibits DEP from issuing a permit to facilities within 300 yards of public or parochial school property in use for instruction or recreation. However, neighbors may execute written waivers to siting prohibitions.

Contracting for Waste Collection and Disposal

Act 101 specifically preserves all existing waste disposal agreements of municipalities, even if the county plan does not provide for such disposal in the future. However, contract renewals or term extensions, unless automatic under the pre-Act agreement, must conform to the plan and applicable law.

Yard Waste/Composting

DEP is also responsible for permitting such processing facilities. This is largely done by general permits or permits-by-rule. Exemptions exist, mainly for agricultural waste recycling. Farming-related operations may still be subject to recently updated requirements for certain discharges of nutrients from farming wastes to the Susquehanna River Basin and other major river systems under the Pennsylvania Clean Streams Law[3] and the federal Clean Water Act.[4]

Recycling

Municipalities (other than counties) with 10,000 or more residents, and those with between 5,000 and 10,000 residents having a density of more than 300 persons per square mile, must develop and implement plans to separate recyclables from municipal waste, and collect and recycle the material. DEP reports currently that 440 of Pennsylvania's 2,700 municipalities are required to have recycling programs and over 1,900 municipalities have access to such programs.

The program must require residents to separate leaf waste and at least three of the following: clear glass, colored glass, aluminum, steel and bimetallic cans, high-grade office paper, newsprint, corrugated paper and plastic. Commercial, institutional and government offices must separate leaf waste, office paper, aluminum and corrugated paper. The municipality must collect recyclables at least once per month, and must recycle the material or enter into contracts or agreements for recycling. Use of existing recycling operations is preferred by law. Pennsylvania's municipalities now recycle about 1/3 of the municipal waste stream. DEP is focusing on composting yard waste, on newly covered municipalities and on restoring the program in Philadelphia.

Act 101 provides for landfills and resource recovery facilities to pay fees of $2/ton for certain solid waste delivered to those facilities.[5] The fees are paid to the Commonwealth. Facilities may surcharge customers for those costs, and surcharges may be collected back to the generators. Municipalities may not collect recycling fees.[6]

Electronics Recycling Management Program

The recycling of computers, monitors, televisions and peripheral devices is primarily the responsibility of manufacturers under the Covered Device Recycling Act, Act 108 of 2010.[7] Municipalities may arrange with manufacturers for the collection and recycling of such devices through approved recycling firms, but registration is required for such program.

Flow Control

Municipal waste management plans may include waste flow restrictions directing various local waste streams to specific facilities or identifying available disposal facilities.[8] However, "flow control" provisions that prohibit the importation of waste or discriminate against out-of-state waste facilities are unconstitutional under the Commerce Clause of the United States Constitution. As a result of a number of court decisions prohibiting states from limiting the flow of waste across state lines without congressional authority, numerous pieces of federal legislation have been introduced (but not enacted) during the past few years which would give the states the authority to freeze and then reduce municipal waste imports. Pennsylvania is among a number of states which have proposed legislation designed to survive a Commerce Clause challenge but which would indirectly discourage the importation of waste by imposing a moratorium on landfill permits and a cap on landfill capacity.

Municipal Waste Facilities Review Program

In 1996, by Executive Order, Pennsylvania established a Municipal Waste Facilities Review Program that included a commercial municipal waste vehicle safety program administered by DEP and PENNDOT. The program also requires DEP to develop policies: (1) for the environmental assessment of municipal waste facilities, (2) for determining appropriate daily volume limits for municipal waste facilities and (3) in consultation with PENNDOT, governing traffic safety. DEP is required to review applications for municipal waste facility permits in light of these policies and to consult with host county and host local municipalities affected by a permit application that would result in additional waste volume or capacity. DEP must also review any host agreements entered into by the permit applicant to address the potential impact of the proposal on the public's health, safety and welfare.[9]

The waste vehicle safety program has been largely replaced by the provisions of the Waste Transportation Safety Act, Act 90-2002. 27 Pa.C.S. §§6201-6209 under which DEP sets and enforces standards.

Funds and Grants

State law provides a fee of $1 per ton to be paid by a resident landfill or resource recovery facility to its host municipality. If a facility is in multiple municipalities, fees are apportioned in proportion to the permitted area in each municipality. The fee supersedes local taxes enacted after December 31, 1987, but not before. It is a credit toward host payments under any other agreement, but does not limit higher payments by private agreement. Fees may be waived for the receipt of debris from a disaster cleanup with the filing of proper waiver forms.

Under court decisions, counties may assess fees against waste management facilities for the costs of implementing and administering the county municipal waste plan.[10]

DEP also provides numerous grants for inspector training, for municipal waste plan development, for local recycling coordinator costs and for certain recycling projects. These grants are specified in Act 101, and paid for by a $2 per ton municipal waste fee on each landfill or recovery facility. Some of the grant programs have deadlines which are published periodically in the Pennsylvania Bulletin. Act 90-2002, Act 68 of 1999, and the benefits testing required for landfill permits all provide additional sources of funding.

Quarterly reports of host fee payments are required by law.

Waste Hauling Authorizations and Enforcement

Act 90, signed into law on June 29, 2002, has two principal provisions. First, the law requires waste haulers to obtain authorizations for disposal at specific locations, and prohibits landfills from accepting waste from unauthorized haulers. The DEP is still allowing landfills to accept waste from haulers with pending applications filed by December 27, 2002, but waste may not be accepted from unauthorized haulers who do not have timely applications pending.

The law also establishes a new $4 per ton disposal fee, which is available for environmental projects. The fees are paid into the Environmental Stewardship Fund, created under the "Growing Greener" law, officially the Environmental Stewardship and Watershed Protection Act. (Act 68 of 1999, effective in December of that year). The new fee is in addition to the $0.25 per ton fee under Act 68. These fees must be reported and paid by the facilities.

Environmental Assessment and Landfill Development/Expansion

As mentioned above, Executive Order 1996-5 added an environmental assessment process to landfill permitting. Environmental, social and economic benefits are required to be balanced against the impacts of such facilities. *25 Pa. Code 271.127*. The rule and the assessment process have been upheld on appeal.[11]

Household Hazardous Waste

Act 190 of 1996, amended by Act 111 of 2002[12] provides for grant support to municipal programs collecting household hazardous wastes (electronics, pesticides, other hazardous materials). Care should be taken to assure proper review of the contractors retained for the collection, handling, processing, transportation and disposal of household hazardous waste to ensure the receipt of the contracted benefits and protection of the environment. DEP will assist with such reviews to assure proper permitting and program management.

Construction and Demolition Waste

C&D waste is classified as municipal waste and is a large percent of waste volume. Municipalities with C&D processing facilities may seek grants for host inspectors to assure proper separation and management of hazardous materials from C&D waste before processing, in order to prevent releases of contamination and assure continuing facility operations. *See 25 Pa. Code §§262.361-.364.* Grants for local review of facility permits are also available. *25 Pa. Code §§272.371-.373.*

Regulation of Medical and Chemotherapeutic Waste

Medical waste, waste pharmaceuticals and chemotherapeutic agents, are largely regulated by the Commonwealth (DEP)[13], with some coordination with the U.S. EPA. There is little room for municipal involvement unless these wastes are being processed at facilities which may qualify for host inspector programs. Check with DEP for the scope of grants and allowed regulatory activities.

Waste Tires

Act 111 of 2002 extensively amended the Waste Tire Act to create a new program requiring specific authorization to transport and process waste tires. The program should strengthen DEP and municipal authority to manage waste tire storage as part of a beneficial use plan. The manifesting and authorization procedures will raise a barrier to entering or continuing this business without current customer needs to pay for regulatory requirements. Funding may be available for qualified collection program sponsors.

Trash Collection Exclusions

In reviewing the claim of the Ramsgate Court Townhome Association against West Chester Borough for refusing to provide free trash collection to high density developments, Judge Bartle said "Providing free trash collection costs money." Judge Bartle's decision that the township's exclusion was constitutional was upheld by the Third Circuit.[14] A few weeks later, the Third Circuit Court of Appeals quoted the same language in reversing a federal court decision hold the City of Philadelphia's similar exclusion unconstitutional.[15]

Enforcement

Municipalities may be fined for conducting waste disposal activities in violation of a county plan, for failure to develop or implement mandatory recycling or for other violations of the applicable laws and rules. In addition to issuance of orders, actions for contempt and use of judicial process, DEP may seek civil fines of $10,000 per day per offense and criminal fines up to $10,000 per day per offense and/or imprisonment. Repeat violators are subject to fines up to $25,000 per day per offense.

Guidance Documents

For the most current, up-to-date versions of DEP guidance regarding the subjects discussed in this chapter, go to DEP's Waste Management webpages. Beginning at the DEP Home Page:
www.depweb.state.pa.us/portal/server.pt/community/dep_home/5968

Read down the menu on the left and click on "waste." On the next page click on either the "Recycling" or "Waste Management" tabs on the left, and on the next pages review the menu items on the right, and select the relevant topics.

Web Resources

DEP's website contains extensive resources. The best way to access them is through the home page: www.dep.pa.gov. You may use direct link and type in either municipal waste or recycling. For laws or regulations, refer to the links with those titles on the home page. Forms, instructions, policies, guidance and grant information are all available.

DEP Municipal Waste Contacts

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Regional Office:

See: www.portal.state.pa.us./portal/server.pt/community/municipal_waste/14087/mw-contacts/589670

Grants

Waste planning and other grants: DEP Bureau of Waste Management, Harrisburg.

Recycling grants: DEP Bureau of Waste Management, Division of Waste Minimization and Planning, Harrisburg. There are grants under both Act 174 and Act 101, §902.

REFERENCES

1. 53 P.S. § 4000.101, *et seq*., as amended by Sections 13 and 15(b) of 1997 P.L. 530, No. 57 (amendments to the Administrative Code. Waste management is also regulated by the Solid Waste Management Act, 35 Pa. §6018.101, *et seq.* and accompanying regulations, 25 Pa. Code Chapters 271-285.
2. 25 Pa. Code Chapters 271, 272, 273, 275, 277, 279, 281, 283, 284, and 285.
3. Act of June 22, 1937, No. 394, 35 P.S. § 691.1 et seq.
4. 33 U.S.C. § 1251, *et seq.*
5. 53 P.S. § 701.
6. *City of Reading v. Iezzi,* 78 A.3d 1257 (Pa.Cmwlth 2013).
7. 35 P.S. §§6031.101-.702
8. *See Harvey & Harvey, Inc. v. County of Chester,* 68 F.3d 788 (3d Cir. 1995), *cert. denied; Tri-County Industries, Inc. v. Mercer County.,* 116 S.Ct. 1265 (1996), overruled in part and cited in *Lebanon Farms Disposal v. County of Lebanon,* 538 F. 3d 241, 249 (3d Cir. 2008).
9. 4 Pa. Code §5.901.
10. *Pa. Waste Industries Association v. Monroe Co. Municipal Waste Management Authority,* 80 A.3d 546 (Cmwlth 2013); *Waste Management of Pa, Inc. v. DEP*, 107 A.3d 273 (Cmwlth 2015).

11. *Giordano v. DEP and Browning-Ferris Industries, New Morgan Landfill Co., Inc. and Conestoga Landfill,* EHB Docket No. 99-204-1 (8/22/2001). The EHB decision on this and other landfill "benefits test" cases were affirmed by a 3-2 decision of the Commonwealth Court. T*ri-County Industries, Inc. v. DEP,* 818 A.2d 574 (2003). The Pennsylvania Supreme Court affirmed the Environmental Quality Board (EQB) harms/benefits test rules in *Eagle Environmental II, L.P. v. DEP,* 884 A.2d 867, 584 Pa. 494 (2005).
12. The Waste Tire Recycling Act/Small Business and Household Pollution Prevention Program Act, 35 P.S. §§6029.101-.209.
13. 25 Pa. Code Ch. 284.
14. *Ramsgate Court Townhome Ass'n v. West Chester Borough,* 313 F.3d 157, 2002 U.S. App LEXIS 25847 (3d Cir. 2002).
15. *Philadelphian Owners Ass'n. v. City of Philadelphia,* 57 Fed. App. 961, 2003 U.S. App LEXIS 2014 (3d Cir. Feb. 4, 2003).

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