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Solicitor's Handbook

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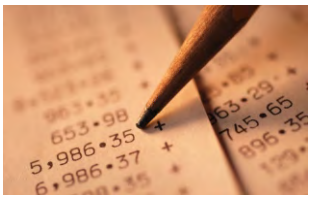

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Solicitor's Handbook

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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.

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In every respect, municipal entities in Pennsylvania are 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 legislature has fulfilled those duties forms the basis for the local government structures with which we are familiar.

Dillon's Rule

Just as the municipalities are creatures of statute, 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 limited power and authority is wholly within the control of the legislature, 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.[4]

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 this century, enacted municipal code provisions with expansive language not easily interpreted using a Dillon-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.[5]

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 Dillon's charge 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,[6] but the Pennsylvania courts have not generally adopted that reasoning.[7]

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.[8] 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 Constitution was finally embodied in legislation with the 1972 passage of the Home Rule Charter and Optional Plans Law,[9] a statute 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 Charter or Optional Plan.[10]

The thirty-plus years since the passage of the Home Rule Charter and Optional Plans Law have not been sufficient to develop a large body of case law concerning Home Rule and Optional Plan Communities. What is apparent, however, is the Courts' ambivalence in deciding whether to impose greater liabilities and responsibilities upon those municipalities who opt to exercise greater power and authority.[11]

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.[12] Although these Codes do not create a hierarchy among the various classes of municipalities,[13] neither do they create any degree of conformity.[14] 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 second class township who, based upon his clear recollection 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 is statutorily empowered to grant such retrospective approvals,[15] a board of supervisors could be surcharged for the very same action.[16]

Other Statutes

Unfortunately, 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 through 11400 and §§ 54101 through 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,[17] establishing procedural due process guidelines,[18] creating municipal claims and liens procedures,[19] impacting roadway activities,[20] regulating land use and development,[21] and requiring recycling of solid waste,[22] 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, three examples come quickly to mind. If one is concerned about a single individual holding two or more offices, which may be incompatible, a perusal of Title 65 is in order.[23] If whistle-blowers are a concern, Title 43 should be considered.[24] Procurement questions can lead one to Title 73 (anti-bidrigging),[25] Title 8 (bonding requirements),[26] Title 43 (Human Relations Act requirements),[27] Title 65 (the Sunshine Law),[28] 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 clients. We have certainly strayed far from the simple pastoral townships envisioned by Thomas Jefferson so long ago, those "wisest inventions" for the governance of humankind.

References

1. Pa. Constitution, Article III, Section 20.
2. Pa. Constitution, Article IX, Section 1.
3. *Shirk v. City of Lancaster*, 313 Pa. 158, 169 A. 557 (1934).
4. *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. Philadelphia*, 301 Pa. 261, 151 A. 883 (1930).
5. Borough Code 53 P.S. § 6202; First Class Township Code 53 P.S. § 6552; Second Class Township Code 53 P.S. § 65762; Third Class City Code 53 P.S. § 37403.
6. Means, John M. "Local Government Use of General Powers," *The Pennsylvanian* (date and publisher unknown).
7. *See, inter alia, Knauer v. Commonwealth*, 332 A.2d 589 (Pa. Comwlth. 1975); *In re Appeal from Settlement and Audit of Auditors*, 460 A.2d 904 (Pa. Comwlth. 1983), but *see, contra, Scottsdale v. National Cable Television Corporation*, 476 Pa. 47, 381 A.2d 859 (1977) in which a divided court, in an opinion written by Justice Packel, authorized municipal regulation of cable television franchising in primary reliance upon the general powers provisions of the Borough Code. This proposition has not been cited by the appellate courts since that time except in the context of communications regulations.
8. Pa. Constitution, Article IX, Section 2.
9. 53 P.S. § 1-101. et seq.
10. 53 P.S. § 1-302.
11. *See inter alia, Appeal of Upper Providence Police, Del. Co.* , 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 may permit home rule municipalities to go beyond the benefits allowed by Act 600, the Police Pension Law. These cases 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 *Broth.of W. 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), which states that a home rule municipality can assume tort duties and liabilities from which other municipalities are statutorily protected.
12. Borough Code, 53 P.S. § 45001, *et seq*., First Class Township Code, 53 P.S. § 55101, *et seq*., Second Class Township Code, 53 P.S. § 565101, *et seq*., Third Class City Code, 53 P.S. § 35101, *et seq*., County Code, 16 P.S. 1, Incorporated Towns Code, 53 P.S. § 53101 *et seq*. (This discussion does not address Cities of the First and Second Class; nor does it address certain statutory limitations on Charter and Optional Plan Communities.)
13. However, the powers of Second Class Townships *were* subordinate to those of other municipalities until a 1987 amendment to the Second Class Township Code, which removed the language causing this difficulty. *See* 53 P.S. § 65762.
14. This lack of uniformity may present a constitutional concern under Article IX, Section 1 of the PA 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.
15. 53 P.S. § 46312.
16. *In re Lilly,* 431 Pa. 171, 19 A.2d 92 (1941).
17. The Local Government Unit Debt Act, 53 P.S. § 6780, *et seq*.

18. The Local Agency Law, 53 P.S. § 11301, et seq.
19. Municipal Claims and Tax Liens, 53 P.S. § 6801.
20. 53 P.S. § 54201, *et seq*., and 53 P.S. § 1671, *et seq*.
21. 53 P.S. § 10101, *et seq*.
22. 53 P.S. § 4000.101, *et seq*.
23. 65 P.S. § 1, *et seq*.
24. 43 P.S. § 1421, *et seq*.
25. 73 P.S. § 1611, *et seq*.
26. 8 P.S. § 191, *et seq*.
27. 43 P.S. § 951, *et seq.* (See also 16 Pa. Code Ch. 49).
28. 65 P.S. § 271, *et seq*.

II. Constitutional Provisions

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The municipal solicitor's contact with constitutional issues falls generally into two categories: (1) the posture of municipal government within the framework of the constitution and (2) the recurring specific municipal issues which are determined by direct reference to constitutional provisions.

The Constitutional Framework

It is axiomatic that municipal government is a child of the legislature. Municipal government has no sovereignty. It has no existence or powers except those given to it by the legislature. This rule is embedded in the case law and embodied in the provision of the state constitution at Article IX, Section 1, which states that the General Assembly shall provide for local government within the Commonwealth. This principle raises a reasonable expectation of clarity in the law: that which is statutorily stated, exists; that which is not, does not. The expectation would be disappointed. As the affairs of municipal government have multiplied and grown more complex, the ability of the legislature to deal with local government issues with specificity has inevitably declined. Consequently, the legislature's statutory directives to municipal government have become more expansive and general in nature. Similarly, this expansion of municipal subject matter and the broader scope of statutes have led courts to find implied powers in the laws affecting local government. See also the discussion on municipal codes relevant to this subject matter in Chapter I.

A second provision of the Pennsylvania Constitution which bears fundamentally upon the general conduct of municipal government is Article II, Section 1, which states that the legislative power of the Commonwealth shall be vested in the General Assembly. This section is interpreted to prohibit the delegation of legislative powers to any other entity.[1] The refinement of the rule is that the legislature may not delegate its power, but it may confer authority upon subordinate entities, such as local governments, to implement policies adequately established by the legislature.[2] In its implementation, as to municipalities, this rule presents varying faces according to the particular subject matter to which it is applied. For example, taxing power is strictly held by the legislature. Municipal discretion as to tax matters operates within a narrow range which has been clearly defined by the state legislature. Conversely, land use control is an area where broad discretion is accorded to municipal government, and where the state has provided only the most general guiding policies. The disparate levels of power accorded to local government, depending upon subject matter, appears to be historically or culturally rooted. Its basis cannot be found in the language of the Constitution. Nevertheless, the distinction is real. Were the state to qualitatively broaden municipalities' taxing authority, the objection of non-delegable power would be raised instantaneously. Conversely, if the legislature tightened its control of land use issues, strong objection would arise to the intrusion upon subject matter historically reserved to local government. In other areas of public concern, such as police and education, there is a blending of legislatively expressed intent and municipal discretionary implementation. Non-delegation of power issues do not frequently arise in day-to-day municipal practice, but the rule is an important element of the superstructure of municipal government and, therefore, needs to be part of the fundamental knowledge of the municipal solicitor.

These two fundamental rules: the prohibition against delegation of legislative powers, modified by the allowance of delegated authority to implement sufficiently expressed legislative intent; and the limitation of municipal powers to those given by the legislature, modified by the growing tendency toward generalized legislative direction and judicially found implied powers, constitute the primary aids for interpreting, testing and applying relevant statutes and municipal ordinances and actions.

Section by Section Review of Article IX

The various sections of the Pennsylvania Constitution on local government, Article IX, are of varying degrees of significance to municipal solicitors. Sections 2 and 3, authorizing home rule and optional plan municipalities, are essentially enabling provisions. The substance of their subject matter is addressed in statutes.

Section 4 on county government is unusually specific. Its application is largely self-explanatory and limited to that particular form of government.

Section 5 on intergovernmental cooperation is an interesting and underutilized provision. It is unusual in that it is a direct constitutional grant of power to municipalities, bypassing the legislature's approval, to combine with any other governmental unit to perform, delegate or transfer any municipal function or responsibility. This section is doubly interesting because municipalities' doubts about their powers to function with other governmental units gave rise to the Intergovernmental Cooperation Act[3] which, although supportive in intent, is largely superfluous in light of the broad constitutional provision.

Section 6 and 7 on area government and area wide powers are enabling provisions of no current utility, to the best of this writer's knowledge.

Section 8 deals with consolidation, merger and boundary change of municipalities. The section was motivated by a need to stem the tendency on the part of some urbanized municipalities in the 1960s to improve their tax bases and growth needs by annexing all or portions of neighboring governmental units. The uniform legislation referred to in this section was not enacted, leaving (apart from some statutory provisions relative to this subject matter) initiative and referendum as the sole means to accomplish boundary change. Uniform legislation for consolidation or merger of entire municipalities was enacted in 1994.[4]

Section 9 prohibits the appropriation of public funds for private purposes. The application of this section has been largely on the basis of the individual factual circumstances rather than clearly discernible legal principles. It is an important provision to the municipal solicitor who is confronted from time to time with questions as to the legality of novel proposed expenditures. It is difficult, however, to provide useful guidance simply because the decisions have been so limited to their particular facts. It may be of some value to recognize that as a proposed expenditure diverges further from conventional governmental expenditures and as a private interest becomes more discernible in the transaction, the doubtfulness of the proposed expenditure increases.

Section 10 circumscribes the subject of local government debt which is specifically addressed elsewhere in Chapter 14.

Section 11 deals with reapportionment. The facial language of the section is clear, and the nuances which have given rise to litigation over various reapportionment plans are beyond the scope of this article.

Section 12 and 13 of Article IX relate only to Philadelphia, and section 14 sets forth definitions.

Recurring Federal Constitutional Issues

In addition to the state constitutional provisions which govern the conduct of local government, the path of the municipal solicitor increasingly crosses federal constitutional issues. No useful line of demarcation can be drawn separating constitutional issues which arise in the field of municipal law from those which do not. Three particular areas of recurring impact, however, can be identified.

Freedom of Speech

The First Amendment bars government from the establishment of religion or the abridgement of free speech. An alarming number of municipal actions fall within the scrutiny of this amendment.

Thus, ordinances which would affect 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 certain age range was challenged.[5] Similarly, ordinances which prohibit or regulate the location or conduct of adult entertainment facilities are susceptible to First Amendment challenge.[6] Any ordinance which directly affects expression, such as an antipicketing ordinance[7] or regulates signs[8] will raise First Amendment questions. Additionally, conditions, regulations, or prohibitions pertaining to adult materials may be subject to First Amendment scrutiny. For example, conditions placed on a change of use application to regulate the display and distribution of adult material to minors were found to be too restrictive by the Third Circuit Court.[9]

The First Amendment may also intrude into the management of municipal employees. 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 government to warrant disciplinary action.[10] The court's decision is so immersed in the particular facts of the case and the balancing of countervailing interests that little can be drawn from the case except an awareness that any action by a municipal employer, affecting or in response to employee expression, must raise a red flag.[11]

Ordinances which 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.[12] Further, ordinances which might otherwise pass constitutional muster may be invalidated by overly stringent or haphazard application.[13]

The conduct, endorsement, association with, or prohibition of any religiously oriented activity or display is susceptible to challenge.[14] Anti-loitering ordinances have been held to unreasonably infringe on free speech.[15]

Equal Protection and Illegal Search

The second category of frequently recurring constitutional issues are those arising out of the unreasonable search provisions of the Fourth Amendment and equal protection requirements of the Fourteenth. Here, of course, many of the issues arise out of police activities, but not all exclusively so. Many of the freedom of expression factual situations bleed into this area. Enforcement of ordinances which affect expression is likely to give rise to Fourth Amendment questions.[16] Brown involved the invalidation of a juvenile curfew, but in another case the ordinance was sustained and survived an equal protection challenge.[17]

Any municipal action which differentiates between classes of people, for example, residents and nonresidents, is likely to give rise to an equal protection challenge.[18] Any classification based on age or sex is similarly vulnerable.

Tax enactments are a fertile seedbed for classification issues. The Commonwealth Court in 1996 struck down a municipal business privilege tax which imposed the tax upon merchants, but exempted professional and

service businesses from the tax.[19] The Court noted its willingness to credit any substantive distinction that would rationalize the separate classifications; but in the absence of any reasonable basis for distinguishing those taxed from those not taxed, the Court had no option but to invalidate the ordinance.

In the area of employer-employee relations, any compulsory testing as a condition of employment may raise equal protection and unlawful search questions.[20] But in another case, a mandatory urinalysis of a municipal firefighter was upheld.[21]

Land use regulations can involve equal protection arguments where the effect of the regulation is to exclude or substantially impair an activity which is otherwise legal. 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, therefore, violated its right to equal protection.[22] The court there upheld the ordinance; but the important point for the watchful solicitor is that virtually every municipal action which expressly or implicitly differentiates or excludes certain activities, uses or groups of people is susceptible to equal protection challenge. The key, always, to sustaining such municipal action is to establish a rational basis for the differentiation in question.

Police activities and policies provide a vast source of Fourth and Fourteenth Amendment issues. Without citing cases, it may be sufficient to note that virtually all search, pursuit, observation and apprehension practices should be examined to determine their adequacy under possible constitutional attack.

Regulatory Taking

The third area of constitutional concern also arises under the Fourteenth Amendment and centers upon the issue of regulatory taking. The context in which this problem occurs is typically a restrictive municipal ordinance, usually, but not necessarily, in the area of land use control.

The purpose of the municipality, in the usual case, is not to take the property affected, but rather to limit a certain activity or use of the property. The property owner's responsive claim is 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.

While regulatory takings claims often occur in conjunction with ordinance validity challenges, they may be sustained under proper circumstances even when the ordinance is held valid.

The special utility of this type of claim in the hands of persons alleging regulatory taking is that even if the municipality reverses its regulatory action, it may be responsible to compensate for the temporary taking which occurred prior to the reversal.

Similarly, where the municipal regulation is found to have been improper and is invalidated, the landowner may raise a claim of temporary taking; that is, a claim that he was deprived of his property during the time the improper regulatory ordinance was in effect.

Normally, to sustain such a claim, it must be shown factually that the landowner was deprived of virtually all economic use. That view was recently affirmed by the Pennsylvania Supreme Court, which rejected a landowner's claim that an illegal exclusionary ordinance constitutes a taking, per se.[23] The concept of "deprivation of all economic use" is a term of art. It was held some years ago that an ordinance prohibiting strip mining of coal constituted a taking because coal was an estate in land; hence, the prohibition was a complete taking of an estate. This concept invited the elevation of various individual materials, minerals and accoutrements of ownership to the status of "complete property" the governmental interference with which would constitute a compensable taking. This unbundling (or segmenting) of ownership rights for the purpose of takings analysis, to the extent it is permitted by the courts, facilitates a finding of compensable taking. It does so because if the particular right being regulated can be defined as an entire property interest the legal standard for compensable taking (i.e., the complete deprivation of the use of one's property) is met. The range of possi-

bility engendered by regulatory takings claims based upon the segmentation of ownership interests, however, was narrowed by the Commonwealth Court when it recently limited the scope of its prior decision, designating coal as a separate estate, and held that a prohibition against gravel mining did not constitute a taking.[23]

An adequate review of the developing law in this area is beyond the scope of this Chapter. However, several recent cases provide guidance and are here briefly described. Miller & Son Paving, Inc. v. Plumstead Township, cited above, held that the invalidity of an ordinance, per se, did not constitute a compensable taking.[24] In Naylor v. Hellam Township, the Pennsylvania Supreme Court invalidated a temporary building moratorium, but did not say whether the invalid moratorium had effected a temporary taking.[25] The U.S. Supreme Court, dealing with a valid temporary moratorium, has refused to find a compensable taking based on a claimed temporal segmentation of ownership rights.[26] Similarly, the Pennsylvania Supreme Court in a case still pending on remand, has refused to segment coal rights from other fee ownership rights for purposes of takings analysis. There are additionally a series of United States Supreme Court decisions which contain both clear statements of the law and demonstrations of the judicial contradictions which make this subject matter extremely sensitive and difficult.

References

1. *Holgate Bros. Co. v. Bashore,* 200 A. 672, 331 Pa. 255, 1938.
2. *Williams v. Samuel,* 2 A.2d 834, 332 Pa. 265, 1938.
3. 53 Pa.C.S. 2301 *et seq*.
4. 53 Pa.C.S. 731 *et seq*.
5. *City of Dallas v. Stungling,* 109 S.Ct. 1591, 1989.
6. FW/PBS, *Inc. v. City of Dallas,* 110 S.Ct. 596, 1990.
7. *Town of Barrington v. Blake,* 568 A.2d 1015, R.I. 1990.
8. *City of Ladue v. Gilleo,* 114 S.Ct. 2038, 1994.
9. *U.S. Sound & Service, Inc. v. Township of Brick,* 126 F.3d 555, 1997.
10. *Waters v. Churchill,* 114 S.Ct. 1878, 1994.
11. See also *Wulf v. City of Wichita,* 644 F.Supp. 1211, D.Kans. 1986.
12. *Stokes v. City of Madison,* 930 F.2d 1163, 7th Cir. 1991; People v. Tosch, 501 N.E.2d 1253, Ill. 1986.
13. *Stokes*, supra.
14. *Doe v. Small,* 964 F.2d 611, 7th Cir. 1992; *Lee v. Weisman,* 112 S.Ct. 2649, 1992; *ACLU v. City of St. Charles,* 794 F.2d 265, 7th Cir. 1986.
15. *Loper v. N.Y.P.D.,* 999 F.2d 699, 2nd Cir. 1993.
16. *Qutb v. Strauss,* 11 F.3d 488, 5th Cir. 1993.
17. *Brown v. Ashton,* 611 A.2d 599, Md.App.Ct. 1992.
18. LCM v. *Town of Dartmouth,* 14 F.3d 679, 1st Cir. 1994.
19. *Commonwealth v. Mercadante,* 676 A.2d 1309 Pa.Cmwlth. 1996.
20. *Capua v. Plainfield,* 643 F.Supp. 1507, D.C.N.J. 1986.
21. *Everett v. Napper,* 825 F.2d 341, 11th Cir. 1987.
22. *Cornerstone Bible Church v. City of Hastings,* 948 F.2d 469, 8th Cir. 1991.
23. *Miller & Son Paving, Inc. v. Plumstead Township,* 717 A.2d 483, Pa. 1998.
24. Stabler Development Company v. Board of Supervisors of Lower Mt. Bethel Township, 695 A.2d 882, Pa.Cmwlth. 1997.
25. Naylor v. Hellam Township, 773 A.2d 770 Pa. 2001.
26. Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 216 F.3d 764 (2002).
27. Machipongo Land and Coal, Inc. v. Commonwealth of Pennsylvania, Department of Environmental Protection, 2002 WL 1070113 (Pa. May 30, 2002).
28. The United States Supreme Court decisions which set the law and rationale other cases dealing with the same subject matter are First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 483 US 825 (1987); Lucas v. South Carolina Coastal Council, 112 S.Ct. 2886, 1992; and Dolan v. City of Tigard, 114 S.Ct. 2309, 1994. See also the Pennsylvania Supreme Court decision in United Artists Theatre Circuit, Inc. v. Philadelphia, 635 A.2d 612, Pa. 1993.

III. Intergovernmental Cooperation

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Intergovernmental cooperation has become increasingly necessary as the cost of government has risen in recent years, making it uneconomic to provide many municipal services to smaller units (see chapters on regionalization of police forces and municipal authorities).

Cooperation has been impeded by the lack of sufficient statutory power and the common law based upon the famous "Dillon's Rule" (see Chapter I). As an example, one lower court had earlier held that a school district had no power to join with a municipality in the acquisition of ground for recreation purposes. Soltz v. Yeadon Borough School District, 29 Del. County L.R. 188, 1940 (see below for case reaching contrary result under Intergovernmental Cooperation Act). Cooperation has also been impeded by certain provisions in the Pennsylvania Constitution, notably the prohibition on legislation which delegates "to any special commission, private corporation or association any power...over municipal improvements or property...." *Constitution Article III, Section 31.*

Various provisions in the municipal codes and other statutes do contain various limited provisions authorizing cooperation between municipalities on specific projects. This includes fire protection and police in first class townships. *53 P.S. § 56554*. Also, joint municipal acquisitions of property for recreation purposes is found in several of the codes. *See, e.g., 53 P.S. § 47711 in the Borough Code.*

Cooperation between school districts and municipalities with respect to recreation programs is encouraged by the requirement that recreation boards have members appointed by the school board. *See e.g. Third Class City Code at 53 P.S. § 38705.* One of the more comprehensive provisions is found in the authorization for joint municipal zoning in the Municipal Planning Code. *53 P.S. §§ 10801-A to 10821-A*. Joint planning commissions may also be created. *53 P.S. § 11101*. Environmental Advisory Councils may also be created as joint bodies. *53 Pa.C.S. §§ 2322 to 2324*.

As an effort to overcome constitutional questions, the 1968 Amendments to the Pennsylvania Constitution added three sections, on Intergovernmental Cooperation, Area Government and Area-Wide Powers, respectively, to Article IX of the Constitution. The first of these sections authorized a municipality, by act of its governing body, to agree to the joint exercise of governmental functions or to "delegate or transfer any function...to one or more other governmental units...." *Pennsylvania Constitution, Article IX, Section 5*.

To implement the first of these sections, the legislature enacted the Intergovernmental Cooperation Act of July 12, 1972, P.L. 762, which is now codified. *53 Pa.C.S. §§ 2301 to 2315*. That Act authorizes two or more “local governments" to "...jointly cooperate...in the exercise or in the performance of their respective governmental functions, powers or responsibilities." *53 Pa.C.S. § 2303(a)*. In order to do so the local governments are required to enter into "...any joint agreements as may be deemed appropriate for such purposes." *53 Pa.C.S. § 2303(b); see, 1972 Op. Atty. Gen. No. 157 (regional narcotics task force is lawful)*.

A local government may institute intergovernmental cooperation by an ordinance of its governing body, and also it may be required to take such action if so directed by voter approved initiative or referendum.

53 Pa.C.S. § 2305. Ordinances approving intermunicipal cooperation must specify the conditions of the agreement, the duration, the purposes, the manner and extent of any financing, the organizational structure necessary to implement the agreement and the manner in which any property, real or personal, shall be acquired, managed or disposed of. *Id. § 2307.* Any agreement for intermunicipal cooperation, which involves the state or an entity in another state, is required to be reviewed by the Local Government Commission for the purposes of determining whether it is in proper form and compatible with the laws of the Commonwealth. *53 Pa.C.S. § 2314.*

A local government is defined in the Act as a county, city of the second class, second class A, and third class, borough, incorporated town, township, school district or any other "similar general purpose unit of government which shall hereafter be created by the General Assembly." *53 Pa.C.S. § 2302*. The Act does not indicate what is included within a "general purpose unit of government," nor is there any Pennsylvania case construing this term. Case authority from other states, however, construing term "general purpose unit" indicates that municipal authorities do not qualify. It has generally been considered that municipal authorities may not utilize the provisions of the Intergovernmental Cooperation Act. However, it is not necessary for them to do so, because they have broad powers in the Municipality Authorities Act to contract with each other and with municipalities. *53 P.S. § 306(B)(b), (j), (o) and (p).*

The only case that has been decided under the Intergovernmental Cooperation Act is In re Condemnation of 30.60 Acres, *572 A.2d 242, Pa.Cmwlth. 1990.* In that case, a school district that needed property for a new school building and a township that needed additional park facilities, entered into an agreement whereby they would exercise their respective powers of eminent domain to condemn a tract of land. The district would own 60 percent of the property condemned and the township 40 percent. It would then be developed into a school, together with a park and recreational area. The district and the township filed a single declaration of taking which was met by preliminary objections of the landowner. The trial court dismissed the property owner's objections and granted possession to the condemnors. On appeal, the landowners contended that the condemnation violated the First Class Township Code and the School Code. The Commonwealth Court however, held that the township and the school district could combine their powers to jointly condemn land for a combined purpose under the Intergovernmental Cooperation Act.

From the foregoing, it should be clear that the courts are now more willing to uphold intermunicipal cooperation agreements.

A significant problem with cooperation by means of an agreement is the possibility of joint and several liability of all participating municipalities. Therefore, where a large-scale project is planned, the most common procedure is to create a new municipal authority. Where it is a joint project, a joint authority is often created.

IV. Meetings and Records

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Sunshine Law Revisited

Since the publication of the Second Edition of the Solicitors' Handbook in August 1999, the Sunshine Act, 65 P.S. Section 701, et seq. has not been amended.

The Sunshine Act requires that "official action and deliberations by a quorum of members of an agency shall take place at a meeting open to the public. 65 Pa.C.S.A. Section 704. Section 703 of the Act, 65 Pa.C.S.A. Section 703 provides that an "agency" is:

> *[T]he 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 of 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 board 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 government function and through the joint action of its members exercises governmental authority and takes official action. The term does not include a caucus or a meeting of an ethics committee created under rules of the Senate or House of Representatives.*

Section 703 of the Sunshine Act defines "official action" as any of the following:

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.

"Deliberation," likewise, is defined as "the discussion of agency business held for the purpose of making a decision." *Id*.

The public must be allowed reasonable participation in public meetings. Residents must be provided a reasonable opportunity to speak and comment on matters of concern and matters before the board or the council.

Residents, pursuant to the 1998 amendments to the Act, are entitled to speak prior to official action being taken, as well as during designated public comment periods. Under the Sunshine Act, members of the public are entitled to use recording devices such as a tape recorder, video camera, or camcorder during public meetings. A municipality is entitled to adopt reasonable rules relating to public comment and conduct at meetings, and relating to the use of recording equipment.

The Sunshine Act requires public notice of meetings. "Meetings" are pre-arranged gatherings of a quorum of the agency or of a committee. "Notice" is advertisement in the newspaper in general circulation in the municipality, and posting at the municipal building or place where the meeting will be held. Notice of the first regular meeting is to be published not less than three days in advance of the meeting, together with notice of the schedule of each regular meeting. Notice of special meetings or rescheduled regular meetings must be published at least 24 hours in advance. Emergency meetings are an exception to this general rule of prior public notice, but such meetings require an event presenting imminent danger to life or property.

The Sunshine Act requires that minutes be kept. Minutes must include the date, time, and place of meetings, names of members present, the substance of official acts taken and roll call votes and names of residents who appeared and participated, and subjects on which residents spoke.

Actions taken at a meeting which violates the Sunshine Act may be invalidated by a reviewing Court.

Executive sessions are the most common exception to the usual requirement of open meetings. Reasons allowed under the Sunshine Act for executive sessions are:

- Personnel matters (such as hiring, firing, promoting, demoting, and discipline)
- Information and strategy sessions related to collective bargaining agreement and negotiations
- Consideration of the lease or purchase of real estate
- Consulting with the solicitor regarding pending or threatened litigation
- Discussion of agency business which would violate confidentiality regulations or statutes if it were discussed in public, including certain agency investigations or law enforcement investigations
- Discussion of academic admission or standings by boards or committees of state-owned or state-related colleges and universities.

An executive session must be announced, either at the meeting that one will take place, and the reason; or that one took place since the last public meeting and when, and the reason for it. Minutes are not taken of executive sessions. Other exceptions would be conferences, which are training sessions for local officials and working sessions of the board of auditors – although official action may not be taken in any of these.

It is a summary criminal offense for an official to participate in a meeting or executive session which violates the Sunshine Act. If convicted, an official can be sentenced to pay up to a $100 fine plus costs of prosecution. The court can also award attorneys fees and costs of litigation to the challenger of an agency action in certain cases where a violation of the Sunshine Act has been found. If it is found that a complainant filed a frivolous action under the Sunshine Act, the agency may be able to get its legal fees and costs.

Open Records Act Revisited

Act 100 of 2002, effective December 26, 2002, is the first substantial change to the Open Records Act, 65 Pa.C.S.A. Section 66.1, *et seq*. since its enactment. The amendments do not change the definition of what constitutes a public record, or change who must comply with the Act. The law, however, as amended, requires the provision of public records kept in electronic form (as opposed to just paper documents under the former law), and requires that municipalities establish a procedure for handling and disposition of requests for public records, including written request forms, denial procedures, and appeal procedures in the event of a partial or

total denial of a request. The Act does not require disclosure of non-public information, such as documents or portions of documents containing information which is privileged or confidential by statute or court order, would impair an individual's reputation or personal security, disclose certain law enforcement or agency investigations, or which could cause the agency loss of federal or state funding. Furthermore, the amendments to the Act do not require an agency to compile or create a document which does not exist.

While the amendment allows for verbal or anonymous requests for records, the request must be in writing for an individual to avail himself or herself of remedies under the Act. The municipality must provide a written procedure, prominently posted, for access by Commonwealth residents to public documents, as well as a fee schedule for costs being charged. It is recommended that the municipality prepare a form, available in hard copy and/or on-line, for requests. Under no circumstances can a municipality require an individual to state his or her reason for the document request. Requests for documents must be fulfilled as promptly as possible, and no later than 5 business days from the date received. If the request is not fulfilled within 5 days, and the municipality has not requested an extension (to no more than 30 days), the request is deemed to be denied. Proper reasons for extension are a need to redact non-public information from documents, offsite retrieval, a bona fide staffing shortage or need for legal review of the documents to determine if they are, in fact, public records. The burden is on the municipality to prove that a requested record is not a public record. A municipality may charge fees as set forth in the statute for postage, copying, certification, and conversion of electronic files to paper documents, and may seek pre-payment of costs estimated according to the scope of the request and the fee schedule to be in excess of $100.

If the municipality asserts that the requested document is not a public record, it must issue a written denial, including:

- A description of the record;
- The specific reasons (citing authority) for the denial;
- The name (typed or printed), title, business address, and telephone number of the local official denying the request;
- The date of the denial; and,
- The statutory appeal procedure.

An appeal must be filed no later than 15 days from the date of the denial. The municipality then has 30 days to make a final determination, and may hold a public hearing for that purpose in that time frame. If it is determined that the denial was issued correctly, a written explanation must then be provided. The requester may then appeal to court within 30 days, and if the request is further denied, jurisdiction for appeal lies with the Commonwealth Court.

If a court reverses the municipality's denial of access to a record (e.g., the record is found to be a "public record"), the record is to be provided. If the court also finds that the municipality "willfully or with wanton disregard" denied access, or that the decision was unreasonable and not based on a reasonable interpretation of law, the court may award reasonable court costs and counsel fees. However, as with the Sunshine Act, if a court affirms the municipality's decision and finds that the challenge was frivolous, the court may award the municipality reasonable court costs and attorney's fees. An official who violates the Act with the intent and purpose of doing so has committed a summary criminal offense with a maximum fine upon conviction of $300.00 plus costs of prosecution. A municipality or local official who does not promptly comply with a court order to produce public records will be subject to a maximum civil penalty of $300 per day until the public records are released. Public officials and employees are immune from any other damages or penalties.

V. Enforcing Ordinances

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There are three basic types of ordinances, each of which is enforced differently. Ordinances enacted under the authority of any municipal code other than the Second Class Township Code and ordinances enacted under Section 1601(c.1)(2) of the Second Class Township Code must be enforced through summary criminal proceedings. Ordinances enacted under Section 1601(c.1)(1) of the Second Class Township Code and subdivision and land use ordinances are enforced in civil proceedings. Zoning ordinances must be enforced in accordance with the procedures in Article VI of the Pennsylvania Municipalities Planning Code (MPC), 53 P.S. §10601 et seq., and subdivision and land development ordinances must be enforced in accordance with Article V of the MPC, 53 P.S. §10501 et seq. Municipalities may also seek injunctions to restrain or prevent violations of municipal ordinances.

A municipality cannot be compelled to enforce an ordinance by mandamus. *Germantown Business Association v. City of Philadelphia,* 111 Pa.Cmwlth. 503, 534 A.2d 553, 1987; *Hanson v. Lower Frederick Township Board of Supervisors,* 667 A.2d 1221, Pa.Cmwlth. 1995. There is generally no right of citizens to enforce ordinances. MPC Section 617 does provide such a right, but citizens must strictly follow the requirements to be entitled to maintain a private enforcement action. See *Karpiak v. Russo*, 450 Pa.Super. 471, 676 A.2d 270, 1996. Negligent enforcement of an ordinance will not impose liability upon the municipality under the Political Subdivision Tort Claims Act. *Buffalini by Buffalini v. Shrader,* 112 Pa.Cmwlth. 228, 535 A.2d 684, 1987; *City of Pittsburgh v. Estate of Stahlman,* 677 A.2d 384, Pa.Cmwlth. 1996.

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.

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. *Vernon v. Borough of Darby,* 59 Pa.Cmwlth. 11, 428 A.2d 770, 1981.

General Municipal Code Ordinances

Ordinances enacted under any authority other than the MPC and Section 1601(c.1)(1) of the Second Class Township Code are enforced through summary criminal proceedings. Even though "prosecutions under municipal ordinances are civil, not criminal actions, the Rules of Criminal Procedure govern these summary actions, and defendants in municipal enforcement actions are afforded the same protections as defendants in criminal proceedings." *Commonwealth v. Harchelroad,* 124 Pa.Cmwlth. 259, 623 A.2d 878, 1993. The alleged violator must be afforded the same protections afforded defendants in criminal proceedings. *Slomnicki v. Commonwealth*, 148 Pa.Cmwlth. 213, 610 A.2d 529, 1992. However, the defendant is not entitled to appointment of counsel in summary proceedings. *Borough of Kennett Square v. Lal*, 164 Pa.Cmwlth. 654, 643 A.2d 1172, 1994.

Prosecution is instituted by citation by a "law enforcement officer." *Pa.R.Crim.P. No. 52*. A municipal code enforcement officer is considered a law enforcement officer. *Pa.R.Crim.P. No. 3*; *Commonwealth v. Joki*, 330 Pa.Super. 406, 479 A.2d 616, 1984. Most municipal codes also expressly authorize police officers to enforce ordinances. Pa.R.Crim.P. No. 53 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. *Commonwealth v. DeLoach*, 714 A.2d 483, Pa.Cmwlth. 1998.

For summary criminal prosecution of any ordinance other than an ordinance enacted under the Second Class Township Code, Section 1601(c.1)(2), a solicitor must obtain permission of the district attorney to prosecute the ordinance violation. See *Pa.R.Crim.P. No. 83(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. . . ." Second Class Township Code Section 1601(c.1)(2) expressly provides that the solicitor may assume charge of the prosecution without the consent of the district attorney.

Fourth Amendment issues are relevant to ordinance enforcement. For example, in *Commonwealth v. Feineigle,* 690 A.2d 748, Pa.Cmwlth. 1997, 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.

The municipality has to prove all of the elements of the violation. 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 by 42 Pa.C.S. §6107, it is not required to act on its own to obtain a copy of the ordinance. *Dream Mile Club, Inc. v. Tobyhanna Township Board of Supervisors,* 150 Pa.Cmwlth. 309, 615 A.2d 931, 1992.

Circumstantial evidence can support a conviction. See *Scurfield Coal, Inc. v. Commonwealth*, 136 Pa.Cmwlth. 1, 582 A.2d 694, 1990 (testimony from police officers who observed dirt and mud on road leading into coal company's land which was black and characterized as coal dirt sufficient to convict for violation of ordinance prohibiting tracking or depositing dirt, mud, etc. on public streets). Remember to cross-examine the defendant if he or she testifies.

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. See e.g. *Commonwealth v. Snyder,* 688 A.2d 230, Pa.Cmwlth. 1996. Proof that the condition of the property violates a general prohibition in the ordinance is not sufficient for conviction. *Hunlock Township v. Hunlock Sand & Gravel Corporation*, 144 Pa.Cmwlth. 499, 601 A.2d 1305, 1992 (n.5); *Teal v. Township of Haverford,* 134 Pa.Cmwlth. 157, 578 A.2d 80, 1990. Violation of a zoning regulation is not and of itself a nuisance. See *Klein v. Shadyside Health, Education and Research Corporation,* 643 A.2d 1120, Pa.Cmwlth. 1994.

Once a guilty verdict is rendered on a summary offense charge brought to enforce an ordinance, double jeopardy attaches and the defendant cannot be retried. *Commonwealth v. Hall*, 692 A.2d 283, Pa.Cmwlth. 1997. A municipality may not appeal from an order of a court of common pleas finding a person not guilty of violating an ordinance. *Commonwealth (Dublin Borough) v. Pellegrino,* 712 A.2d 782, Pa.Cmwlth. 1998.

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,* 152 Pa.Cmwlth. 505, 620 A.2d 61, 1993, demonstrates the procedure which should be followed by solicitors.

Proceeding in equity for injunctive relief does not preclude filing of the citations. *Borough of Kennett Square v. Lal*, 665 A.2d 15, Pa.Cmwlth. 1995. The Fifth Amendment double jeopardy clause 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. *Commonwealth v. Keath*, 153 Pa.Cmwlth. 243, 620 A.2d 705, 1993. Even after conviction for ordinance violation and payment of penalties, property owners would still be indebted for refuse collection charges and interest. *Id.*

Second Class Township Code

Section 1601(c.1)(2) of the Second Class Township Code, as amended by Act 172 of 1996, requires that ordinances regulating building, housing, property maintenance, health, fire, public safety, parking, solicitation, curfew, water, air or noise pollution shall be enforced through summary criminal proceedings. The above discussion applies to enforcement of such ordinances. All other ordinances enacted under the Second Class Township Code are to be enforced through civil proceedings. *Section 1601(c.1)(1)*.

Townships are exempt from payment of costs to file the civil enforcement action. *§1601(c.1)(1)*. More importantly, Section 1601(c.1)(1) specifically authorizes a township to administratively impose a civil penalty and file a civil enforcement action if the person fails to voluntarily pay the penalty. The township may also recover its attorneys' fees in a civil enforcement action. See the discussion below on land use ordinance enforcement for general information on civil enforcement actions.

Section 1905 of the Second Class Township Code provides that police officers have the powers granted by "the ordinances of the township for which a fine or penalty is imposed." Section 1601(c.1)(7) of the Section Class Township Code provides that the Board of Supervisors "may 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." Section 1601(c.1)(7) of the Township Code was added by Act 172 of 1996.

Land Use Ordinances

MPC §616.1(a) requires that to enforce a zoning ordinance a municipality "shall initiate enforcement proceedings by sending an enforcement notice." The enforcement notice must meet all of the requirements of MPC §616.1 to be valid. *Township of Maidencreek v. Stutzman*, 164 Pa.Cmwlth. 207, 642 A.2d 600, 1994. The notice is not required to contain any information other than that specified in MPC §616.1. *Township of Penn v. Seymour*, 708 A.2d 861, Pa.Cmwlth. 1998.

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. *Johnston v. Upper Macungie Township*, 162 Pa.Cmwlth. 70, 638 A.2d 408, 1994. The district justice cannot conduct a de novo review of the violation question, and the district justice and the court of common pleas, upon appeal, are limited to the imposition of a fine. *City of Erie v. Freitus*, 681 A.2d 840, Pa.Cmwlth. 1996.

Original jurisdiction of civil enforcement actions is before district justices. *MPC §617.1*. The action is commenced by a civil complaint, not a criminal complaint or citation. *Town of McCandless v. Bellisario,* 551 Pa. 83, 709 A.2d 379, 1998. Commonwealth Court has held that the provisions of MPC §617.2 require that municipalities commence enforcement actions before district justices in order to obtain awards of attorneys' fees or civil penalties, *Township of Maidencreek v. Stutzman, supra*, which weighs in favor of bringing a civil enforcement action instead of proceeding directly with an equity action.

Where property is owned by the entireties, both spouses should be named as defendants. *Glen Rock Borough v. Miller*, 720 A.2d 800, Pa.Cmwlth. 1998. If only one spouse appeals from a district justice judgment, then the other spouse must be joined in the appeal as an indispensable party. *Id.*

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. *MPC §§515.2, 515.3.* MPC §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 subdivision and land development ordinance is explicitly civil, the municipality has certain advantages. Unlike summary criminal proceedings, the burden of proof of violation of 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 district justice 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 district justice refuses to award attorney fees or impose daily penalties.

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." *Township of Little Britain v. Lancaster County Turf Products, Inc.*, 146 Pa.Cmwlth. 211, 604 A.2d 1225, 1992; *Gateway Motels, Inc. v. Municipality of Monroeville*, 106 Pa.Cmwlth. 42, 525 A.2d 478, 1987 (en banc). There is no requirement to exhaust a statutory remedy, such as summary criminal proceedings, to bring an equity action to enforce an ordinance. *Millersville Borough v. Fruitman,* 125 Pa.Cmwlth. 660, 557 A.2d 1176, 1989. 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. *Township of Lower Milford v. Britt*, 695 A.2d 958, Pa.Cmwlth. 1997.

In the zoning context, the failure to appeal the enforcement notice "standing alone constitutes a reasonable basis for the issuance of the preliminary injunction." *Township of Concord v. Concord Ranch, Inc.*, 664 A.2d 640, Pa.Cmwlth. 1995.

Equity actions provide the most complete relief. For example, Commonwealth Court stated, "Where deliberate and substantial violations of a zoning ordinance are found, it is appropriate to order removal of nonconforming structures." *Beiler v. Salisbury Township*, 79 Pa.Cmwlth. 213, 468 A.2d 1189, 1983 (affirming order directing removal of calf barn). An injunction will bind future owners of the land when they have notice of it. *Three Rivers Aluminum Company v. Brodmerkle*, 119 Pa.Cmwlth. 409, 547 A.2d 814, 1988. However, the remedy requested must not "be harsher than the minimum necessary to properly abate the nuisance." *King v. Township of Leacock*, 122 Pa.Cmwlth. 532, 552 A.2d 741, 1989 (rejecting request to demolish building despite finding building constituted nuisance).

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.

Additional Information
Further information may be obtained from:

- Pennsylvania State Association of Township Supervisors.
- Pennsylvania State Association of Boroughs.

VI. Public Official and Employee Ethics Law

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Introduction

The Pennsylvania Public Official and Employee Ethics Law, Act 170-1978, as reenacted and amended by Act 9-1989 and Act 93 of 1998, 65 Pa.C.S. §1101 et seq., was enacted in order to strengthen the faith and confidence of the people of the Commonwealth in their government. In order to accomplish this task, the law provides for restricted activities in which public officials and public employees may not participate. Additionally, the law creates a governmental entity, the State Ethics Commission, which is an independent Commonwealth agency. The Commission, which is vested with the overall responsibility of administering and enforcing the provisions of the State Ethics Act, is composed of seven members. In order to further insure the independence of the agency, its members and its staff, the law provides that individuals serving in positions with the Commission, are prohibited from holding or campaigning for any other public office, holding office in any political campaign, influencing the decision of a governmental body except as a member of the Commission, or being employed by the Commonwealth or a political subdivision in any other capacity.

The Ethics Law vests three main areas of statutory jurisdiction in the State Ethics Commission. The Commission is authorized to administer and enforce the personal financial disclosure requirement. Secondly, the Commission is mandated to provide advice and guidance in the form of written opinions to public officials and employees who have questions regarding their responsibilities and duties under the Ethics Law or to the employers or appointing authority of such individuals. Finally, the commission has the statutory authority to investigate, either through an "own motion" procedure or the receipt of a sworn complaint, alleged violations of the Sate Ethics Law. The Commission's jurisdiction in all of these areas is uniform in its application to local, county, and State-level public officials and employees.

Comment: On October 15, 1998, the Lobbying Disclosure Act, which was included in Act 93 of 1998, was signed into law by Governor Thomas J. Ridge. The Lobbying Disclosure Act vests jurisdiction of lobbyist and principal registration and disclosure with the Pennsylvania State Ethics Commission. The Commission will have administration and enforcement responsibilities for the new registration and reporting requirements. The registration and disclosure provisions of the law take effect on August 1, 1999. The Commission is in the process, along with other state officials, of drafting regulations, establishing registration and disclosure forms and instructions, and preparing to implement the provisions of this law. This article will not deal with the provisions of the Lobbying Disclosure Act.

Purpose

The legislature declares that public office is a public trust and that any effort to realize personal financial gain through public office other than compensation provided by law is a violation of that trust. In order to strengthen the faith and confidence of the people of the state in their government the people have a right to be assured that the financial interests of holders of or nominees or candidates for public office do not conflict with

the public trust. The law is to be liberally construed to promote complete financial disclosure. The law is intended to define as clearly as possible those areas that represent conflicts of interests. *65 Pa.C.S. § 1101*.

The 1989 amendments to the law resulted in several changes to the purpose section. One element existing in the prior law has been eliminated and two additional areas of legislative intent have been delineated. Eliminated from the law is any reference to the "appearance of a conflict." The Act is to be administered in a manner that emphasizes guidance to public officials and public employees regarding the ethical standards it established. The Act is administered by an independent commission whose members have demonstrated an interest in promoting public confidence in government.

Comment: The constitutionality of the State Ethics Act has generally been affirmed in *Pennsylvania State Association of Township Supervisors v. Thornburgh*, 496 Pa. 324, 437 A.2d 1, 1981; *Snider v. Thornburgh*, 469 Pa. 159, 436 A.2d 593, 1981. Ethics Act addresses compelling state interests, *In the Matter of Glancey and Chiovero*, 527 A.2d 997, Pa., 1987. The application of the law has been determined to be unconstitutional as applied to judges, *Fayette County v. Unemployment Compensation Board of Review,* 84 Pa.Cmwlth. 260, 479 A.2d 1153, 1984, affirmed 509 Pa. 438, 502 A.2d 1232. Conflict of Interest Law is to be liberally construed to promote complete disclosure. *Phillips v. State Ethics Commission*, 79 Pa.Cmwlth. 491, 470 A.2d 659, 1984.

Definitions

The State Ethics Law contains a substantial number of definitions that must be reviewed when analyzing the Act. 65 Pa.C.S. § 1102. The State Ethics Law applies generally to public officials and public employees. Candidates and nominees for public office or employment are also subject to certain provisions in the Law. The Law defines each of the affected categories.

"Public Official." Any person elected by the public or elected or appointed by a governmental body, or an appointed official in the Executive, Legislative or Judicial Branch of the state or any political subdivision thereof, provided that it shall not include members of advisory boards that have no authority to expend public funds other than reimbursement for personal expense, or to otherwise exercise the power of the state or any political subdivision.

Officials within the State Ethics Law coverage include school directors, *Jersey Shore Area School District v. Bittner,* 81 Pa.Cmwlth. 30, 472 A.2d 183, 1984, municipal authority members, *Forney v. State Ethics Commission,* 56 Pa.Cmwlth. 539, 425 A.2d 66, 1981, and township supervisors, *Pennsylvania State Association of Township Supervisors v. Thornburgh*, 496 Pa. 324, 437 A.2d 1, 1981.

"Public Employee." Any individual employed by the Commonwealth or a political subdivision who is responsible for taking or recommending official action of a nonministerial nature with regard to:

(1) contracting or procurement;

(2) administering or monitoring grants or subsidies;

(3) planning or zoning;

(4) inspecting, licensing, regulating or auditing any person, or

(5) any other activity where the official action has an economic impact of greater than a de minimis nature on the interests of any person.

"Public employee" does not include individuals who are employed by the State or any political subdivision in teaching as distinguished from administrative duties.

Examples of Application: certified public accountant for specific audit task in municipality is not a public official or employee within purview of the State Ethics Act. *Rogers v. State Ethics Commission*, 80 Pa.Cmwlth. 43, 478 A.2d 1120, 1984. For objective standards to be utilized in determining coverage see *Phillips v. State Ethics Commission*, 70 Pa.Cmwlth. 491, 470 A.2d 659, 1984. See also *51 Pa. Code §1.1*.

"Candidate." Any individual who seeks nomination or election to public office by vote of the electorate, other than a judge of elections, inspector of elections or official of a political party, whether or not such individual is nominated or elected. Any person shall be deemed to be seeking nomination or election to such office if they have:

(1) received a contribution or made an expenditure or given their consent for any other person or committee to receive a contribution or make an expenditure for the purpose of influencing their nomination or election to office, whether or not the individual has announced the specific office to be sought at the time the contribution is received or the expenditure is made; or

(2) taken the action necessary under the laws of the Commonwealth to qualify for nomination or election to such office.

The term shall include individuals nominated or elected as write-in candidates unless they resign such nomination or elected office within 30 days of having been nominated or elected.

"Nominee." Any person whose name has been submitted to a public official or governmental body vested with the power to finally confirm or reject proposed appointments to public office or employment.

Other key definitions include:

"Conflict of Interest." Use by any public official or public employee of the authority of office or employment or any confidential information received through holding public office or employment for their private pecuniary benefit, the benefit of an immediate family member or a business with which they or an immediate family member are associated. "Conflict" or "Conflict of Interest" does not include an action having a de minimis economic impact or which affects to the same degree a class consisting of the general public or a subclass consisting of an industry, occupation or other group which includes any public official or public employee, a member of their immediate family or a business with which they or an immediate family member are associated.

"Authority of Office or Employment." The actual power provided by law, the exercise of which is necessary to the performance of duties and responsibilities unique to a particular public office or position of public employment.

"Immediate Family." A parent, spouse, child, brother or sister.

"Income." Any money or thing of value received, or to be received as a claim on future services or in recognition of services rendered in the past, whether in the form of a payment, fee, salary, expense, allowance, forbearance, forgiveness, interest, dividend, royalty, rent, capital gain, reward, severance payment, proceeds from the sale of a financial interest in a corporation, professional corporation, partnership or other entity resulting from termination or withdrawal therefrom upon assumption of public office or employment or any other form of recompense or any combination thereof. "Income" refers to gross income and includes prize winnings and tax exempt income. The term does not include gifts, governmentally mandated payments or benefits, retirement, pension or annuity payments funded totally by contributions of the public official or employee, or miscellaneous, incidental income of minor dependent children.

"Solicitor." A person elected or appointed to the office of solicitor for the political subdivision.

Comment: In *Ballou v. State Ethics Commission*, 496 Pa. 127, 438 A.2d 186, 1981, it was held that part-time municipal solicitors were not public officials or employees as defined in State Ethics Act. Act 9 of 1989 specifically includes such individuals as within the parameters of the financial disclosure requirements of the Ethics Law. See *65 Pa.C.S. §1104(a)*. Such solicitors are however NOT considered public officials/employees for purposes of the conflict of interest provisions of the law. *C.P.C. v. State Ethics Commission*, 698 A.2d 155, Pa.Cmwlth., 1997, appeal denied, 704 A.2d 640, 550 PA 686, 1997. A full-time municipal solicitor is however, subject to the conflict of interest provisions of the law. *P.J.S. v. State Ethics Commission,* 723 A.2d 174, Pa. 1999.

"Person." A business, governmental body, individual, corporation, union, association, firm, partnership, committee, club or other organization or group of persons.

"Represent." To act on behalf of any other person in any activity which includes, but is not limited to, the following: personal appearances, negotiations, lobbying and submitting bid or contract proposals which are signed by or contain the name of a former public official or public employee.

"Governmental body with which a public official or public employee is or has been associated." The governmental body within State government or a political subdivision by which the public official or employee is or has been employed or to which the public official or employee is or has been appointed or elected and subdivisions and offices within that governmental body.

Comment: Prior Commission precedent had determined that a former employee's governmental body could be limited to an office, bureau, or division. This definitional change broadens the application of coverage.

Restricted Activities

The Public Official and Employees Ethics Law provides certain restricted activities in which public officials and employees may not engage. *65 Pa.C.S. §1103*. These restrictions provide the basis upon which Commission rulings are issued.

(a) Conflict of Interest. No public official or public employee shall engage in conduct that constitutes a conflict of interest. A "conflict of interest" is defined as use by any pubic official or public employee of the authority of office or employment or any confidential information received through holding public office or employment for the private pecuniary benefit of themselves, a member of their immediate family or a business with which they or a member of his immediate family is associated. "Conflict" or "conflict of interest" does not include an action having a de minimis economic impact or which affects to the same degree a class consisting of the general public or a subclass consisting of an industry, occupation or other group which includes the public official or public employee, a member or his immediate family or a business with which he or a member of his immediate family is associated. *65 Pa.C.S. §1103(a)*.

Comment: This provision is similar in substance to the prior law that prohibited a use of office to obtain a financial gain. These examples applied that section. An official commits a violation of this section even if compensation or financial gain to which he was not entitled was received in good faith. *Yacobet v. State Ethics Commission*, 109 Pa.Cmwlth. 432, 531 A.2d 536, 1987; *McCutcheon v. State Ethics Commission*, 77 Pa.Cmwlth. 529, 466 A.2d 283, 1983. An official casting deciding vote to appoint himself to another compensated position is in violation of this section. *Koslow v. State Ethics Commission*, 116 Pa.Cmwlth. 19, 540 A.2d 1371.

These examples were decided under Act 9 of 1989. A public employee violated Section 3(a) when he used the authority of his position to direct government purchases to his wife's companies. Zangrilli, Order No. 946, affirmed by Commonwealth Court in a 1996 Memorandum Opinion, *Zangrilli v. SEC*, No. 2689 C.D. 1994. Township supervisors violated Section 3(a) when they received compensation not authorized in law and used

the township solicitor to represent them at township expense in a lawsuit involving their pay as working township employees. *R.H., T.W. v. SEC*, Nos. 1732-1733 C.D. 1994, Pa.Cmwlth., March 18, 1996. A township supervisor violated the Ethics Law when he participated in township actions to approve a shopping center development at the same time that he was actively attempting to perform work at the development. *Snyder v. State Ethics Commission*, 686 A.2d 843, Pa.Cmwlth., 1996, appeal denied. An authority board chairman violated Section 3(a) when he offered an authority employee a raise to cover the cost of purchasing insurance from him. Yezzi, Order No. 825, aff'd by Commonwealth Court in a 1992 Memorandum Opinion, *Yezzi v. SEC*, No. 693 C.D. 1992. A school director violated Section 3(a) when he supported and/or voted for vendors for school district contracts in return for gifts or gratuities. Helsel, Order No. 801. An attorney employed by Commonwealth agency violated Section 3(a) when he used Commonwealth time and in some instances, bogus sick leave to sit as a paid Court arbitrator. *Cohen, Order No. 610-R*.

In *Commonwealth ex rel Corbett v. Desiderio*, 698 A.2d 134, Pa.Cmwlth., 1997, the Commonwealth Court of Pennsylvania determined that conviction for a violation of Section 403 of the Ethics Law by a public official was sufficient cause under the Pennsylvania State Constitution for removal of the official from office through quo warranto proceedings. It should be noted that actions of a de minimis nature will not constitute a conflict of interest. "De minimis" is defined as an economic consequence having an insignificant effect.

(b) Offering Bribes. No person shall offer or give to any public official, public employee or nominee or candidate for public office or a member of their immediate family or a business with which they are associated, anything of monetary value, including a gift, loan, political contribution, reward or promise of future employment based on the offerer's or donor's understanding that the vote, official action or judgment of the public official or public employee or nominee or candidate for public office would be influenced thereby. *65 Pa.C.S. §1103(b).*

Comment: Pursuant to this provision a private citizen may be charged with a criminal violation of the Ethics Law. *Commonwealth v. Heistand*, 685 A.2d 1026, Pa.Super., 1996.

(c) Soliciting Bribes. No public official, public employee or nominee or candidate for public office shall solicit or accept anything of monetary value, including a gift, loan, political contribution, reward, or promise of future employment based on any understanding of that public official, public employee or nominee that the vote, official action, or judgment of the public official or public employee or nominee or candidate for public office would be influenced thereby. *65 Pa.C.S. §1103(c)*.

Comment: Under the prior law these sections were combined as one section. Evidence that a township commissioner solicited a developer's insurance business and obtained a substantial premium from developer and thereafter voted in favor of zoning ordinance necessary for the developer's project was sufficient to sustain conviction of violation of this section. *Commonwealth v. Cherpes,* 360 Pa.Super. 246, 520 A.2d 439, 1987, appeal denied 530 A.2d 866. See also *Commonwealth v. Heistand*, 685 A.2d 1026, Pa.Super., 1996. *Commonwealth v. Parmar*, 448 Pa.Super. 470, 672 A.2d 314, 1996. The Superior Court of Pennsylvania originally determined that in contrast to bribery under the Crimes Code, no showing of culpability was required to establish a violation of Section 3(c) of the Ethics Law. On appeal, however, the Supreme Court of Pennsylvania, while affirming the lower court decision disagreed with its rationale. The Supreme Court determined that the Ethics Law, as well as the State Adverse Interests Act does not impose absolute criminal liability and are subject to the culpability requirements of the Crimes Code. *Commonwealth v. Parmar,* 710 A.2d 1083, Pa., 1998.

(d) Honoraria. No public official or public employee shall accept an honorarium. *65 Pa.C.S. §1103(d)*.

Comment: This is a provision prohibiting payments made in recognition of public works, appearances, speeches and presentations. Payments for activities that are nonpublic professional or occupational in nature

are not considered honoraria. Tokens of a de minimis economic impact are also not considered honoraria. For the Commission interpretation of this provision, see *Baker, Opinion No. 91-004; Richardson, Opinion No. 93-006.*

(e)(1) Severance Payments. No person shall solicit or accept a severance payment or anything of monetary value contingent upon the assumption or acceptance of public office or employment.

(2) This subsection shall not prohibit:

(i) Payments received pursuant to an employment agreement in existence prior to the time a person becomes a candidate or is notified by a member of a transition team, a search committee or a person with appointive power that they are under consideration for public office or makes application for public employment.

(ii) Receipt of a salary, fees, severance payment or proceeds resulting from the sale of a person's interest in a corporation, professional corporation, partnership or other entity resulting from termination or withdrawal therefrom upon the assumption or acceptance of public office or employment.

(3) Payments made or received pursuant to paragraph 2(i) and (ii) shall not be based on the agreement, written or otherwise, that the vote or official action of the prospective public official or employee would be influenced thereby. *65 Pa.C.S. §1103(e)*.

(f) Contracting. No public official or public employee or their spouse or child or any business in which they or their spouse or child are associated shall enter into any contract valued at $500 or more with the governmental body with which the public official or public employee is associated or any subcontract valued at $500 or more with any person who has been awarded a contract with the governmental body with which the public official or public employee is associated, unless the contract has been awarded through an open and public process, including prior public notice and subsequent public disclosure of all proposals considered and contracts awarded. In such a case, the public official or public employee shall not have any supervisory or overall responsibility for the implementation or administration of the contract. Any contract or subcontract made in violation of this subsection shall be voidable by a court of competent jurisdiction if the suit is commenced within 90 days of the making of the contract or subcontract. *65 Pa.C.S. §1103(f).*

Comment: This section is a recodification of section 3(c) of Act 1978-170. The amended section revised prior law in several respects including the application of this provision to subcontracts. This provision has not been construed as allowing an interest in contracts by public officials or employees where such might otherwise be prohibited by law. The provision has been applied as a procedural mechanism to be employed where such interest is permissible.

(g) Representation. No former public official or public employee shall represent a person, with promised or actual compensation, on any matter before the governmental body with which they have been associated for one year after they leave that body. *65 Pa.C.S. §1103(g)*.

Comment: This section is a recodification of prior law. The section has been amended in two key areas. Under prior law the prohibited representation included both compensated and uncompensated activities. Pursuant to the above provision the representation must be for promised or actual compensation before the restriction is applicable. Secondly, the law now defines governmental body with which one has been associated as the governmental body within state government or a political subdivision by which the public official or employee is or has been employed or to which the public official or employee is or has been appointed or elected and subdivisions and offices within that governmental body.

The word "person" is broadly defined to include businesses, governmental bodies, individuals, corporations, unions, associations, firms, partnerships, committees, clubs or other organizations or groups or persons.

The Commission has interpreted the term "representation" as used in Section 3(g) of the Ethics Law to prohibit: (1) Personal appearances before the former governmental body or bodies, including, but not limited to, negotiations or renegotiations in general or as to contracts; (2) Attempts to influence; (3) Submission of bid or contract proposals which are signed by or contain the name of the former public official/public employee; (4) Participating in any matters before the former governmental body as to acting on behalf of a person; (5) Lobbying. *Popovich, Opinion 89-005.* In *Confidential Opinion, 93-005,* the Commission held that the prohibition against representing a person includes former public officials/public employees representing themselves; and also may apply when a person transfers to another governmental body. See *Ledebur, Opinion No. 95-007.*

Note: One-year representation restrictions are unconstitutional as applied to former judges, *Wajert v. State Ethics Commission*, 491 Pa. 255, 420 A.2d 439, 1980 and former governmental attorneys where the conduct constitutes the private practice of law, *Pennsylvania Public Utility Commission Bar Association v. Thornburgh,* 62 Pa.Cmwlth. 88, 434 A.2d 589, affirmed 498 Pa. 589, 450 A.2d 613, 1981. See also*, Stephens v. State Ethics Commission*, 108 Pa.Cmwlth. 210, 529 A.2d 594, 1987, (further clarifying what constitutes representation).

Comment: In January of 1999 the Supreme Court of Pennsylvania issued its decision in *P.J.S. v. State Ethics Commission*, 723 A.2d 174, Pa. 1999, a case involving the application of the Ethics Law to a full-time municipal solicitor. In this case the Supreme Court drew a distinction between the regulation of attorneys specifically which intrudes upon the court's jurisdiction as opposed to the regulation of groups which happen to include attorneys. The Supreme Court determined that a statutory enactment that regulates the conduct of a larger group of people, some of whom may be attorneys does not intrude upon the court's jurisdiction to regulate the practice of law under the Pennsylvania Constitution. Based upon the P.J.S. decision the Pennsylvania State Ethics Commission in March of 1999 revisited the application of the one-year revolving door principle, Section 1103(g) of the Public Official and Employee Ethics Law as applies to attorneys who leave governmental service. The Commission in that opinion, *Shaulis, Opinion 99-003*, determined that based upon the P.J.S. ruling, the Commission could apply the one-year prohibition upon representing a new employer before a former employee's prior governmental body is applicable to attorneys who leave public sector employment. The Shaulis Opinion however, has been appealed to the Commonwealth Court of Pennsylvania. *Shaulis v. State Ethics Commission,* 991 CD 1999, Pa.Cmwlth. On April 27, 1999, the Commonwealth Court issued a Stay of the Application of the Commission's Opinion pending a review of the merits of the case.

(h) Commercial Use. No person shall use for any commercial purpose information copied from statements of financial interests required by this act or from lists compiled from such statements. *65 Pa.C.S. §1103(h)*

(i) Economic Development. No former executive-level State employee may for a period of two years from the time that he terminates his State employment be employed by, receive compensation from, assist or act in a representative capacity for a business or corporation that they actively participates in recruiting to the Commonwealth of Pennsylvania or that they actively participated in inducing to open a new plant, facility or branch in the Commonwealth or that they actively participated in inducing to expand an existent plant or facility within the Commonwealth, provided that the above prohibition shall be invoked only when the recruitment or inducement is accomplished by a grant or loan of money or a promise of a grant or loan of money from the Commonwealth to the business or corporation recruited or induced to expand. *65 Pa.C.S. §1103(i)*.

(j) Voting Conflicts. Where voting conflicts are not otherwise addressed by the Constitution of Pennsylvania or by any law, rule, regulation, order or ordinance, the following procedure shall be employed. Any public official or public employee who in the discharge of their official duties would be required to vote on a matter that would result in a conflict of interest shall abstain from voting and, prior to the vote being taken, publicly announce and disclose the nature of their interest, as a public record in a written memorandum filed with the person responsible for recording the minutes of the meeting at which the vote is taken, provided that whenever a governing body would be unable to take any action on a matter before it because the number of members of

the body required to abstain from voting under the provisions of this section makes the majority or other legally required vote of approval unattainable, then such members shall be permitted to vote if the required disclosures are made. In the case of a three-member governing body of a political subdivision, where one member has abstained from voting as a result of a conflict of interest, and the remaining two members of the governing body have cast opposing votes, the member who has abstained shall be permitted to vote to break the tie vote if the required disclosure is made. *65 Pa.C.S. §1103(j)*.

Statements Of Financial Interests Filing Requirements

Incumbents. A Statement of Financial Interests is required to be filed by all state and local "public officials," elected or appointed, and "public employees" employed by the Commonwealth or by a political subdivision, who are responsible for taking or recommending official nonministerial (requiring judgment and discretion) action concerning contracting or procurement; administering or monitoring grants or subsidies; planning or zoning; inspecting, licensing, regulating or auditing any person; or any other activity where the official action has an economic impact that is greater than de minimis. *65 Pa.C.S. §1104*.

Disclosure requirements were found unconstitutional as applied to judges. *Kremer v. State Ethics Commission*, 503 Pa. 358, 409 A.2d 593, 1983. Full-time publicly employed attorneys must comply with the disclosure requirements. *Maunus v. State Ethics Commission,* 518 Pa. 592, 544 A.2d 1324, 1988. See also, *P.J.S. v. State Ethics Commission*, 669 A.2d 1105, Pa.Cmwlth., 1997, affirmed 723 A.2d 174, 1999. (Third class city solicitor is public employee/official within Ethics Law coverage.) As discussed above, persons who serve as full or part-time solicitors are not required to file a Statement of Financial Interests. This provision substantially negates prior judicial precedent.

The filing requirements met the test of constitutionality when challenged on various bases including right of privacy, vagueness, right of suffrage and relevancy to legitimate state interest. *Snider v. Shapp*, 45 Pa.Cmwlth. 337, 1105 A.2d 602, 1979. But filing requirements as applied to spousal and minor dependent children information is unconstitutional in that it violates a state constitutional based right of privacy. *Denoncourt v. State Ethics Commission*, 504 Pa. 191, 470 A.2d 945, 1983.

Note: Public officials shall not include members of advisory boards having no authority to expend public funds or to otherwise exercise the power of the state or a political subdivision.

Nominees. Gubernatorial nominees who need Senate confirmation and state, county and local level nominees must file Statements of Financial Interests.

Candidates. Candidates for state, county and local public office must also file. Candidates running unopposed in both primary and general elections are not exempt from filing requirements. *State Ethics Commission v. Landauer,* 91 Pa.Cmwlth. 70, 496 A.2d 862, 1985.

Location For Filing Statement Of Financial Interests

- Employees of county and local political subdivisions file ONLY with the governing authority of their political subdivision.
- Incumbent county and local public officials (who are NOT candidates) including authority members file ONLY with their political subdivision.
- County and local-level nominees file with the governing authority of the political subdivision and, if different, with the official or body vested with the power of confirmation.
- Candidates for county or local-level public office file with the governing authority of the political subdivision in which they are candidates AND append a copy to the petition to appear on the ballot.

- Write-in candidates for county and local-level office (including winners) not seeking office through the nomination petition process shall file ONLY with the governing authority of the political subdivision.

Comment: The location of filings for candidates has been substantially modified from the prior law. Presenting Statements of Financial Interests to individual members of a governmental body rather than to clerical staff on duty during regular business hours at governmental office does not constitute a valid filing. *In Re Olshefski,* 692 A.2d 1168, Pa.Cmwlth., 1997.

Deadline for Filing Statement of Financial Interests

Public employees and public officials, who are not candidates, file NO later than May 1st of each year a position is held and of the year after leaving a position. Officials appointed between January 1st and May 1st file NO later than May 1st. Candidates file on or before the last day for filing a petition to appear on the ballot for election. Write-in winners of nominations or elections shall file within 30 days of having been nominated or elected unless such person resigns such nomination or elected office within that period of time. The date of certification of the appropriate election official shall be the time for which the 30-day period is calculated.

Note: Only one financial statement is required for each year. If multiple positions are held, the original form must be filed at one of the locations but copies may be filed at the others.

Comment: Under prior law, failure of candidate to file a statement of financial interests prior to filing the nomination petition to appear on ballot did not fatally taint the filing process so as to invalidate petition as long as the information is in fact received during the selection process. *State Ethics Commission v. Baldwin,* 498 Pa. 255, 445 A.2d 120, 1982. Statements received less than two weeks before primary election were not filed within a sufficient time to allow meaningful public review. *State Ethics Commission v. Landauer,* 91 Pa.Cmwlth. 70, 496 A.2d 862, 1985. See also, *In Re Jones*, 102 Pa.Cmwlth. 103, 516 A.2d 778, 1984. The amended Law, however, provides that in addition to any other penalties provided in the law, failure by a candidate to file shall be a fatal defect to a petition to appear on the ballot. See *Petition of Cioppa*, 533 Pa. 564, 626 A.2d 146, 1993 upholding this provision. Such actions to have a petition declared invalid must be initiated within seven days after the last day for filing the petition as set forth in the Election Code. *State Ethics Commission v. Cresson,* 528 Pa. 339, 597 A.2d 1146, 1991. Also, no public official shall be allowed to take the oath of office, continue upon the duties of office or be compensated from public funds unless such statement has been filed. Any public official or employee who is required to file a statement and does not do so or files a deficient statement may be subject to a civil penalty of $25 per day for each day the statement is delinquent or deficient up to $250.

Statements of Financial Interests Contents

Filers are required to disclose financial information concerning the prior calendar year. No dollar amounts are required for any of these items except for gifts and certain reportable expense reimbursements. The information pertains only to the filer and includes the following. *65 Pa.C.S. §1105*.

1. The name, address, public position, or the office sought of the person filing.
2. The occupation or profession of the filer.
3. Real estate interests in which the Commonwealth or a political subdivision is involved.
4. Creditors owed in excess of $6,500 and the interest rate thereon except those relating to the principal or secondary residence of the filer.

5. Sources of income totaling $1,300 or more. Filers must include their public employers. Note: Income is defined in the Act as any money or thing of value received, or to be received as a claim on future services or in recognition of services rendered in the past, whether in the form of a payment, fee, salary, expense, allowance, forbearance, forgiveness, interest, dividend, royalty, rent, capital gain, reward, severance payment, proceeds from the sale of a financial interest in a corporation, professional corporation, partnership or other entity resulting from termination or withdrawal there from upon assumption of public office or employment or any other form of recompense or any combination thereof. "Income" refers to gross income and includes prize winnings and tax-exempt income. The term does not include gifts, governmentally mandated payments or benefits, retirement, pension or annuity payments funded totally by contributions of the public official or employee, or miscellaneous, incidental income of minor dependent children.

6. Sources and value of gifts of $250 or more and the circumstances thereof. Gifts from family members and certain friends are exempt.

7. The source and amount of payments for transportation, lodging or hospitality expenses exceeding $650 in the course of a single occurrence made in connection with the public office or employment. Such payments from a governmental body or associations of public officials/employees in which such officials/employees officially serve are exempt.

8. Any office, directorship or employment of any nature whatsoever in any business.

9. Financial interest in any legal entity engaged in business for profit. (5 percent or more interest in a business entity is considered a financial interest).

10. Identity of any financial interest in a business which has been transferred to a member of the filer's immediate family (parent, spouse, child, brother, sister) during the prior calendar year.

Note: The State Ethics Commission reviews the dollar amounts outlined above on a biennial basis and may increase the amounts as deemed reasonable. On February 21, 1997 the Commission reviewed the threshold reporting amounts and adjusted the amounts effective for filings after January 1, 1998 to those shown above.

State Ethics Commission Composition

The Ethics Law provides that the State Ethics Commission shall be comprised of seven members who are cognizant of the responsibilities and burdens of public service. Three Commission members are appointed by the Governor, only two of whom may be of the same political party. One member each is appointed by the President Pro Tempore of the Senate, the Minority Leader of the Senate, the Speaker of the House, and the Minority Leader of the House. All are appointed without confirmation. Commission members are eligible to serve two full three-year terms. *65 Pa.C.S. §1106*.

Comment: The section under which four members of the Ethics Commission are appointed by leaders of the General Assembly and three members are appointed by the Governor does not unlawfully discriminate against local offices by not providing for their participation in appointment. See, *Pennsylvania State Association of Township Supervisors v. Thornburgh,* 490 Pa. 324, 437 A.2d 1, 1981.

Commission Member and Employee Restrictions. Commission members and employees may not hold or campaign for any other public office, hold office in any political party or political committee, actively participate or contribute to any political campaign, influence any decision by a governmental body other than a court of law or as a representative of the Commission, or be employed by the Commonwealth or a political subdivision in any other capacity. Additionally, members of the Commission may not have served as an officer in a political party for one year prior to appointment.

Commission Powers and Duties

The general powers and duties of the State Ethics Commission include the following. *65 Pa.C.S. §1107.*

1. Render prospective advisory opinions and advice of counsel to present or former public officials and public employees, their appointing authority or employer regarding such individual's duties and responsibilities under the Ethics Law.
2. Receive and review Financial Interest Statements of persons required to file; inspect statements to ascertain whether any reporting person has failed to file or has filed a deficient statement.
3. Prescribe forms for filing.
4. Accept and file information voluntarily supplied that exceeds the requirements of the law.
5. Preserve statements and reports filed with the Commission for a period of 5 years.
6. Make statements available for public inspection and copying.
7. Maintain a master index of statements filed with the Commission.
8. Instruct other state and local agencies in the maintenance of systems to facilitate public access to statements.
9. Investigate alleged violations of the Ethics Law and issue decisions. Commission decisions may impose restitution of any financial gain obtained in violation of the Act and may be enforced in the Commonwealth Court of Pennsylvania.
10. Prepare and publish an annual report, prepare and publish special reports, educational materials, and technical studies to further the purposes of the law.
11. Hold hearings, take testimony, issue subpoenas and compel the attendance of witnesses.
12. Prescribe rules and regulations to implement the provisions of the Ethics Law. (See *51 PA Code §1.1 et seq*. for regulations effective under Act 170-1978 and *51 PA Code §11.1 et seq*. for regulations effective under Act 9-1989).
13. Hold at least two public hearings each year to seek input from persons and organizations that represent individuals subject to the Ethics Law.

Opinions and Advice

The State Ethics Commission is authorized to issue prospective advisory opinions regarding the duties and responsibilities of public officials and public employees subject to the Ethics Law. *65 Pa.C.S. §1107.* Any person subject to the act may request an opinion about their obligations. An opinion may also be requested by the authorized representatives of such person or by the appointing authority or employer of such person. A request for an advisory opinion must be in writing and must include:

a. Name, address, and phone number of the person who is the subject of the request and if different, the name, address and phone number of the person initiating the request.

b. The name of the governmental body with which the subject serves and the name or title of the person's public office or position.

c. If the requestor is the appointing authority, employer or representative of the subject of the request, the nature of the relationship between the subject and the requestor.

d. The nature and duties of the subject's office or job. Include an organization chart, bylaws of the organization and a job description.

e. List the relevant facts and circumstances surrounding the request.

Upon receipt of a request for an advisory opinion the Commission will advise within 14 days whether an advice or opinion can be issued. An advice is issued by the Commission's Chief Counsel where Commission precedent, court cases, the Act or regulations provide a basis upon which to render such advice. An advice can usually be issued to a person within 21 working days of their request. In some cases, however, the Commission may extend the time. An advice may be appealed to the full Commission.

In cases where there is no precedent, the Commission members will issue an opinion. Upon receipt of the request, the requestor and the subject, if different, will be notified of the date, time, and place of the Commission meeting. These individuals may attend this meeting and make a presentation.

The final advice or opinion will be available to the public as an official Commission ruling. The person requesting the advice or opinion may, however, require that the ruling contain such deletions and changes as shall be necessary to protect the identity of the person involved. A person who has requested an opinion and acted in good faith on the opinion that was issued may not be subjected to criminal or civil penalties, provided the material facts are as stated in the request.

An advice of the Commission is a complete defense in any enforcement proceeding initiated by the Commission and evidence of good faith conduct in any other civil or criminal proceeding if the advice was requested at least 21 working days prior to taking the action described in the request and the material facts are as stated in the request.

Final opinions of the State Ethics Commission were held subject to judicial review. *Pennsylvania State Association of Township Supervisors v. State Ethics Commission,* 92 Pa.Cmwlth. 544, 499 A.2d 735, 1985. But administrative remedies must first be exhausted. *Mazziotti v. State Ethics Commission,* 108 Pa.Cmwlth. 210, 529 A.2d 594, 1987. More recent judicial decisions have, however, cast doubt upon the appealability of Commission opinions. See *Suehr v. State Ethics Commission*, Pa.Cmwlth., No. 1450 C.D. 1994, holding that opinions do not present actual controversies for review, appeal denied.

Commission Investigations

General. The State Ethics Commission is authorized to investigate alleged violations of the State Ethics Law either upon the filing of a sworn complaint or through an "own motion" procedure. *65 Pa.C.S. §1108.* Complaint forms are available upon request from the Commission. The complaint must state the name and job or office held by the alleged violator and a description of the facts that are alleged to constitute a violation. All complaints must be sworn. An activity that is "Restricted" by Section 3 of the Act, or by the Commission's regulations may constitute a violation.

Procedure. The Commission will initially acknowledge receipt of a complaint. If the matter is not within the Commission's jurisdiction or if the complaint lacks sufficient information, it will not be processed and the complainant will be so notified. After determining the complaint is within the Commission's jurisdiction, the Investigative Division initiates a preliminary inquiry. A preliminary inquiry is considered initiated at the time that it is officially docketed. *51 Pa. Code §21.3(a)*. A preliminary inquiry must be completed within 60 days, and is either terminated or opened as a full investigation. By statute, the subject of an investigation must be notified prior to the initiation of any investigation of the allegations. *65 Pa.C.S. §1108(c)*. By regulation, an investigation is considered commenced when the respondent is provided the requisite notice of the allegations. *51 Pa. Code §21.3(c)*. The complainant will be notified within 72 hours of the commencement of a full investigation and both the complainant and subject of the investigation will be notified every 90 days thereafter of the status of the matter, until the investigation is terminated.

If after a preliminary inquiry the matter is terminated, both the complainant and subject will be notified. If the Commission determines that a complaint is frivolous, the Commission shall so state.

If a full investigation has been conducted, upon the conclusion of the investigation the subject of the complaint will be issued a findings report containing the relevant findings of fact. Such reports must be issued within 360 days of the initiation of the full investigation. The subject of the investigation must respond to the findings within 30 days after their issuance unless an extension is granted.

Comment: Under the prior version of law, no investigation time limits were in effect. Laches would not bar action that took five years to investigate, absent prejudice being shown as a result of delay. *Rebottini v. State Ethics Commission,* 634 A. 2d 743, Pa.Cmwlth., 1993. See also *Snyder v. State Ethics Commission*, 686 A.2d 843, Pa.Cmwlth., 1996, for additional analysis of the investigative time limitations.

Upon completion of the investigation and the issuance of and response to the findings report, the subject will be afforded a full and fair opportunity to challenge the findings and allegations. This can include evidentiary hearings and arguments of law. Upon conclusion of the investigation and all other proceedings, the Commission will issue a final order containing findings of fact and conclusions of law. Final orders issued by the Commission may be appealed to the Commonwealth Court of Pennsylvania. Either the State Ethics Commission or the Attorney General of the Commonwealth of Pennsylvania may enforce any order requiring restitution.

Note: In order for the Commission to find a violation of Act 9 of 1989, at least four members of the Commission must so find by clear and convincing proof. A violation of Act 170 of 1978 requires substantial evidence.

Confidentiality

All Commission information, proceedings and records relating to an investigation are confidential until the Commission makes a final determination. *65 Pa.C.S. §§1108(a),(k).* The final order is a public record. All other file material remains confidential. The Commission, however, may release the identity of a complainant, if it is determined that there has been a wrongful use of the Act.

A person may disclose or acknowledge to another matters that are otherwise confidential when the matter pertains to the following.

a. Final Orders.

b. Commission public hearings.

c. Seeking advice of legal counsel.

d. Appealing a commission order.

e. Communicating with the commission or its staff in the course of a preliminary inquiry, investigation, hearing or petition for reconsideration by the Commission.

f. Consulting with a law enforcement official or agency for the purpose of initiating, participating in or responding to an investigation or prosecution by the law enforcement official or agency.

g. Testifying under oath before a governmental body or a similar body of the United States of America.

h. A case in which the person making the disclosure is the Respondent.

i. Such other exceptions as the Commission, by regulation, may direct.

Complainant Protections

No public official or public employee shall discharge any official or employee or change their official rank, grade or compensation, or deny a promotion, or threaten to do so, for filing a complaint with or providing information to the Commission or testifying in any commission proceeding. *65 Pa.C.S. §§1108(j), 1109(e).*

Any person who engages in such retaliatory activity is guilty of a misdemeanor and, in addition to any other penalty provided by law, shall be fined not more than $1,000 or imprisoned for not more than one year, or be both fined and imprisoned.

Wrongful Use Of Act

A complainant may be civilly liable for a wrongful use of act if the complaint was frivolous (filed in a grossly negligent manner without a basis in law or fact) or without probable cause and made primarily for a purpose other than that of reporting a violation of the Act. *65 Pa.C.S. §1110.* Wrongful use also includes publicly disclosing or causing to be disclosed that a complaint against a person had been filed with the Commission.

Any person who signs a complaint alleging a violation of the Act has probable cause for doing so if they reasonably believe in the existence of the facts upon which the claim is based and either reasonably believe that under those facts the complaint may be valid under this act; or believe this in reliance upon the advice of counsel, sought in good faith and given after full disclosure of all relevant facts within their knowledge and information.

If a public official or public employee has reason to believe a complaint was frivolous or publicly disclosed (a wrongful use of act) they may request the Commission to investigate the matter. If the Commission determines that there has been a wrongful use of the Act, the identity of the complainant may, upon request of the subject, be released. If the Commission determines that there has been no wrongful use of act, the subject may appeal the decision to the Commission at which time the subject may show cause why the complainant violated such provisions.

If it has been determined that there has been a wrongful use of act, subjects may recover for the following in a civil case.

a. The harm to their reputations by a defamatory matter alleged as the basis of the proceeding.

b. The expenses, including any reasonable attorney fees, reasonably incurred in proceedings before the Commission.

c. Any specific pecuniary loss resulting from the proceedings.

d. Any emotional distress caused by the proceedings.

e. Any punitive damages according to law in appropriate cases.

Note: For an understanding of the Commission's application of the wrongful use of act provisions of the Ethics Law, as well as the restrictions on public disclosure of Commission proceedings, please see the following Commission rulings: *Yakin, Order No. 999*; *Mr. A, Order Nos. 1029, 1055, 1056*.

Penalties

Violations of Section 3(a), (b), and (c) are felonies and can result in a fine of $10,000 and/or imprisonment for not more than five years. Violations of section 3(d) through (j), section 4 or 5(a) are misdemeanors and can result in a fine of $1,000 and/or imprisonment of not more than one year. Any person who obtains financial gain from violating any provisions of the act can be ordered to pay three times the financial gain into the State Treasury or the treasury of the political subdivision. *65 Pa.C.S. §1109*.

In addition any person who obtains a financial gain in violation of the Act may be required to make restitution plus interest to the appropriate governmental body.

Any person who violates the confidentially of a Commission proceeding (investigation) is guilty of a misdemeanor and may be fined not more than $1,000 and/or imprisoned for not more than a year.

Any person who willfully affirms or swears falsely in regard to any material matter before the Commission investigative proceeding is guilty of a felony and shall be fined not more than $5,000 and/or imprisoned for not more than 5 years.

Note: In *Commonwealth ex rel Corbett v. Large,* 715 A.2d 1226, Pa.Cmwlth., 1998, affirmed 1999, the Commonwealth Court of Pennsylvania determined that a conviction for violations of Section 9(e) (False swearing in regard to any material matter before a State Ethics Commission proceeding) was an infamous crime within the parameters of Article 2, Section 7 of the Pennsylvania Constitution which would prohibit an individual convicted of perjury or other infamous crime from holding any office of trust or profit in the Commonwealth of Pennsylvania. As such, a township supervisor so convicted was removed from office.

In addition to any other civil or criminal penalty provided for in the Act, failure to timely file a Statement of Financial Interest or filing of a deficient statement may result in a fine of $25 per diem up to $250.

Note: A public official of a political subdivision who acts in good faith reliance on a written, nonconfidential opinion of the political subdivision's solicitor shall not be subject to the criminal or treble damage penalties of the Law. A conviction for violations of the Ethics Law may be sufficient to institute quo warranto for ouster of public official as a conviction of infamous crime. *Com. ex rel Corbett v. Desiderio,* 698 A.2d 134, Pa.Cmwlth., 1997.

Supplemental Provisions

Any governmental body may adopt requirements to supplement this Act provided that no such requirement shall in any way be less restrictive than the Act.

Conflict Of Law

If the provisions of this Act conflict with any other statute, ordinance or regulation or rule, the provisions of the Ethics Act shall control.

Public Inspection Of Financial Interest Statements

All statements must be made available for public inspection. Financial Interest Statements on file with the State Ethics Commission will be available for public inspection and copying between the hours of 8:00 a.m. and 5:00 p.m. Monday through Friday, excluding legal holidays. There is a charge of $.25 per page.

Commission Decisions

The complete text of Commission decisions (Opinions, Advices of Counsel, Orders) are forwarded to a law library and public library in each county, as well as to the State Library.

State Ethics Commission Web Page

The State Ethics Commission now has a comprehensive web page that provides information through the internet on various areas of interest. The Commission's web page contains that Ethics Law, the Lobbying Disclosure Law, the Commission's Regulations, as well as a key word index rulings digest from the years 1992 that provides summaries of the Commission's Opinion and Orders. The Commission's web page can be found at www.ethics.state.pa.us.

VII. Ethical Considerations for the Solicitor

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Status of Solicitors under Pennsylvania Ethics Act

The status of the municipal solicitor under the Ethics Act depends in large part upon whether the solicitor is deemed to be a full-time employee or a part-time retained consultant. In one of the earlier decisions, the Pennsylvania Supreme Court held that a solicitor for an industrial development authority was neither a "public employee" nor a "public official" within the meaning of the Act. *Ballou v. State Ethics Commission,* 496 Pa. 127, 436 A.2d 186, 1981. A borough solicitor was held to have the same status under a much more recent case. *C.P.C., Esquire v. State Ethics Commission*, 698 A.2d 155, Pa.Cmwlth. 1997. However, in another early case the Pennsylvania Supreme Court held that salaried attorneys employed by the state were subject to the Act as "public employees." *Maunus v. Pennsylvania State Ethics Commission*, 518 Pa. 592, 544 A.2d 1324, 1988. A city solicitor, as a salaried employee, was held subject to the conflict of interest provisions as a "public employee" in a much more recent case. *P.J.S. v. Pennsylvania State Ethics Commission,* 697 A.2d 286, Pa.Cmwlth. 1997. The result was not affected by the fact that the lawyer also performed outside work for a private law firm.

Most of the provisions of the Act apply only to public officials and public employees. However, in 1989 the Ethics Act was amended specifically to require that full-time and part-time solicitors for political subdivisions (defined in the Act to include authorities) are required to file financial disclosure forms under the Act. *65 Pa.C.S. § 1104(a).*

Status under the Pennsylvania Rules of Professional Conduct

All licensed attorneys in Pennsylvania are subject to regulation by the Pennsylvania Supreme Court and the Rules of Professional Conduct (the "Rules") established by it. *204 Pa. Code Part V*. This chapter does not cover all of those Rules. It will merely indicate some of the ways in which the Rules apply differently to the lawyer who is engaged in municipal practice.

The Rules themselves do not contain provisions specifically related to solicitors, but government attorneys are discussed in several of the comments. Initially, the preambles 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. The source of the solicitor's responsibilities and their limitations may be found in the applicable City Code, Township Codes, and Borough Code. 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. 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. See *Perry v. Tioga County*, 694 A.2d 1176, Pa.Cmwlth. 1997.

Retention of Solicitor: Potential for Future Conflicts of Interest

One important consideration in determining whether to accept appointment as a solicitor is the possibility of future conflicts of interest arising in the representation of other clients. The Rules recognize that municipalities have broader series of adverse interests than many other types of entities. *Comment to Rule 1.10*. 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. *Rule 1.11*.

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. *Rule 1.7(a), (b)*. 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 and their partners' other practice. However, the mere possibility of a conflict does not itself preclude multiple representation. See comment to *Rule 1.7*. 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.

Conflicts can also arise in representing more than one governmental entity. However, the Ethics Committee of the Pennsylvania Bar Association has determined that it is not a conflict of interest to represent both a township and a municipal authority created by it. See *Pennsylvania Bar Association, Ethics Inquiry 98-06*, January 26, 1998. Similarly, it may be permissible for attorneys in the same firm to act as county solicitor and solicitor to the county planning commission. See *Pennsylvania Bar Association Ethics Inquiry 96-142,* October 16, 1996.

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." *Comment to Rule 1.7*. Thus, an attorney should be able to represent more than one party in a group of municipalities working to develop a regional police force.

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 probably 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. See *comment to Rule 1.2.* 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..." *Rule 1.5(b)*. 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." *16 P.S. § 1605, County Code; 53 P.S. § 36601, Third Class City Code.* A retention letter may provide for additional compensation when services outside the scope of the appointment are requested, unless the applicable Code prohibits it. See *Snyder v. Naef,* 389 A.2d 212, Pa.Cmwlth. 1978 (extra compensation denied to county solicitor).

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. *Horn v. Township of Hilltown,* 461 Pa. 745, 337 A.2d 858, 1975.

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. *Sultanik v. Worcester Township,* 488 A.2d 1197, Pa.Cmwlth. 1985.

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. *Rule 1.13(d)*. 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. *Rule 1.13(e); Rule 1.7(b)*. 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. *Comment to Rule 1.7*. See *In Re: Birmingham Township, Delaware County*, 597 A.2d 253, Pa.Cmwlth. 1991. 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. See also *Pennsylvania Bar Association Ethics Inquiry No. 96-01*, January 10, 1996. That inquiry dealt with a case similar to the Birmingham Township case, but the defense was against a claim under the Ethics Act. The Committee advised about the importance of obtaining authorization from the governing body after full disclosure.

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. *Rule 1.13(b)*. 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. *Comment to Rule 1.13.* 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.

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 nonlegal services to a client. Applicability of the Rules to nonlegal services depends upon whether they are combined with, or separated from, the legal services. If the nonlegal services are not carefully segregated, the providing of such services will be subject to regulation by the Rules. *Rule 5.7(a)*. This would include applicability of the conflict rule (*Rule 1.7)*, and all the other duties described in the Rules. Nonlegal 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. See *In Re: Appeal from Audit of Buckingham Township*, 460 A.2d 904, Pa.Cmwlth. 1983.

In giving advice to the municipality, however, the solicitor may refer to other considerations in addition to the law itself in giving advice. See Rule 2.1. 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. *Comment to Rule 2.1*.

References

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.

VIII. Municipal Tort Liability

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The Political Subdivision Tort Claims Act

42 Pa.C.S.A. Section 8541 et seq. is known as the Political Subdivision Tort Claims Act. The effective date of this Act was January 25, 1975 and it applies to causes of action accruing after that date. *Saft v. Upper Dublin Township*, 636 A.2d 284 (Pa. Cmwlth. 1993). 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*, 633 A.2d 1090 (Pa. 1993), and this decision is retroactive to the effective date of the Tort Claims Act. *Davis v. City of Philadelphia,* 650 A.2d 1127, (Pa. Cmwlth. 1994); *Johnson v. City of Philadelphia,* 657 A.2d 87 (Pa. Cmwlth. 1995).

The Act affords immunity to local agencies, including municipalities, with certain enumerated exceptions. The defense of governmental immunity is an absolute unwaivable defense, not subject to any procedural device that could render the governmental agency liable beyond the exceptions granted by the legislature. *Lyons v. City of Philadelphia* 632 A.2d 1006, (Pa. Cmwlth. 1993).

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. *Sweeney v. Merrymead Farm, Inc*., 799 A.2d 972 (Pa. Cmwlth. 2002); compare *Jacobs v. Merrymead Farm, Inc.*, 799 A.2d 980 (Pa. Cmwlth. 2002).

Coverage of the Act

The Political Subdivision Tort Claims Act provides that no local agency shall be liable for any damages on account of any injury to a person or property caused by an act of the local agency or an employee thereof or any other person. *42 Pa. C.S.A. Section 8541.*

The Act applies to tort actions, not contracts. Thus, the Act 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 U.C.C. *McKeesport Municipal Water Authority v. McCloskey*, 690 A.2d 766 (Pa. Cmwlth. 1997).

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. *Section 8542(a)(1)*. 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. *Lindstrom v. City of Corry*, 763 A.2d 394 (Pa. 2000).

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 devise.

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. *Starr v. Veneziano*, 747 A.2d 867 (Pa. 2000).

For *Starr* 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. *Griffith v. Snader*, 795 A.2d 502 (Pa. Cmwlth. 2002). Further, with respect to the third element of *Starr, supra*, 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. *Griffith, supra*.

The Act 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. *Potter v. Springfield Township*, 681 A.2d 241 (Pa. Cmwlth. 1996).

The Act applies to "local agencies" as defined by 42 Pa. C.S.A. Section 8501. The Courts will look to legislation creating the entity to determine if it is a local agency. *Burcik v. Caplen*, 805 A.2d 21 (Pa. Cmwlth. 2002). (Board of Directors of City Trust is a local agency). *Sweeney v. Merrymead Farm, Inc.,* 799 A.2d 972 (Pa. Cmwlth. 2002) (County Health Department is local agency).

Volunteer fire companies have been the subject of much litigation in this regard. The most recent case is *Regester v. Longwood Ambulance Company, Inc.*, 751 A.2d 694 (Pa. Cmwlth. 2000), aff'd. 797 A.2d 898 (Pa. 2002). Under the test of *Eger v. Lynch*, 714 A.2d 1149 (Pa. Cmwlth. 1998), 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 volunteer fire company was a "local agency" under the Act.

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". *Sphere Drake Ins. Co. v. Philadelphia Gas Works,* 782 A.2d 510 (Pa. 2001), overruling *Modern Shopper's World - Mt. Airy Corp. v. Philadelphia Gas Works,* 643 A.2d 136 (Pa. Cmwlth. 1994). Independent contractors performing services under contract to a local agency are not local agencies. *Helsel v. Complete Care Services, L.P.*, 797 A.2d 1051 (Pa. Cmwlth. 2002), and courts will continue to analyze independent contractor cases under the criteria of *Hammermill Paper Co. v. Rust Engineering Co.*, 243 A.2d 389 (Pa. 1968).

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.

Motor Vehicle Exception. The first question here is what is a motor vehicle. In *Harding v. City of Philadelphia*, 777 A.2d 1249 (Pa. Cmwlth. 2001), the Court held that bicycles are not motor vehicles.

The next question is whether the vehicle is in operation. The Supreme Court recently determined that a dispatcher's directions do not constitute "operation" under the vehicle exception. *Regester, supra* at 797 A.2d 898 (Pa. 2002). In *North Sewickley Twp. v. Lavalle¸* 786 A.2d 325 (Pa. Cmwlth. 2001), 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, see, *White by Pearsall v. The School District of Philadelphia*, 718 A.2d 778 (Pa. 1998): motor vehicle exception inapplicable because there is no operation where school bus driver stops his bus and waves exiting student across the street in front of the bus, and the student thereafter is struck by another motorist.

42 Pa.C.S.A. 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. *Forgione v. Heck*, 736 A.2d 759 (Pa. Cmwlth. 1999). 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. *Jones v. Chieffo*, 700 A.2d 417 (Pa. 1997); *Aiken v. Borough of Blawnox*, 747 A.2d 1282 (Pa. Cmwlth. 2000).

Personal Property Exception. This exception extends to the care, custody or control of personal property of others in the possession or control of the local agency. 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. *Borough of West Fairview v. Hess,* 568 A.2d 709 (Pa. Cmwlth. 1989). See also *Potter, supra:* no liability attaches for a failure to detect theft of funds.

Claims for personal injury are not recognized under this exception. *Kearney v. City of Philadelphia,* 616 A.2d 72 (Pa. Cmwlth. 1992).

Real Property Exception. This exception applies to the care, custody or control of real estate in the possession of the local agency.

The first question here is whether the property at issue is real property vs. personalty. In *Cureton ex. rel. Cannon v. Philadelphia School District*, 798 A.2d 279 (Pa. Cmwlth. 2002), 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. In *Rieger v. Altoona Area School District*, 768 A.2d 912 (Pa. Cmwlth. 2001), 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 Act. In *Blocker v. City of Philadelphia,* 763 A.2d 373, (Pa. 2000), the Supreme Court held that an unattached bleacher could not be a fixture of real property. In *Mellon v. City of Pittsburgh Zoo*, 760 A.2d 921 (Pa. Cmwlth. 2000), the Court found that the old mechanical walkway at the Pittsburgh Zoo, permanently affixed to the ground, was realty.

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. *City of Pittsburgh v. Estate of Stahlman,* 677 A.2d 384 (Pa. Cmwlth. 1996), *Sweeney, supra*.

The third question is what or who caused Plaintiff's injuries. The real estate exception can only be applied where the Plaintiff alleges and 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. *Grieff v. Reisinger*, 693 A.2d 195 (Pa. 1997); *Hanna v. West Shore School District*, 717 A.2d 626 (Pa. Cmwlth. 1998). Acts that constitute negligent supervision of people on land do not come within the exception. *Tackett v. Pine Richland School District,* 793 A.2d 1022 (Pa. Cmwlth. 2002); *Wilson v. Norristown Area School District*, 783 A.2d 871 (Pa. Cmwlth. 2001); *Moles v. Borough of Norristown,* 780 A.2d 787 (Pa. Cmwlth. 2001); *Tiedeman v. City of Philadelphia*, 732 A.2d 696 (Pa. Cmwlth. 1999).

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

within the real property exception. The Courts now recognize the language in this exception is different than in the other exceptions and the proper focus should be on the care, custody and control of the real estate. *Grieff, supra; Snyder v. North Allegheny School District,* 722 A.2d 239 (Pa. Cmwlth. 1998); *Kilgore v. City of Philadelphia,* 717 A.2d 514 (Pa. 1998).

Second, the language specifically provides that intentional trespassers are not entitled to recover. *Longbottom v. Sim-Kar Lighting Fixture Company*, 651 A.2d 621 (Pa. Cmwlth. 1994).

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.

One issue in this regard is what constitutes a traffic control. In *Glenn v. Horan*, 765 A.2d 426 (Pa. Cmwlth. 2001), 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. Crosswalks serve the dual purpose of guiding pedestrians and warning motorists of the presence of pedestrians at the crossing points. See also, *Pettineo v. City of Philadelphia Law Dept.-Claims Div.*, 721 A.2d 65 (Pa. Cmwlth. 1998): a rope tied around trees to prevent pedestrians and automobiles from crossing a street during a parade is a traffic control device.

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. *Kennedy v. City of Philadelphia*, 635 A.2d 1105 (Pa. Cmwlth. 1993).

The Plaintiff has the burden to prove the local agency had actual or constructive notice of the dangerous condition. *Kennedy, supra; Carpenter v. Pleasant,* 759 A.2d 411 (Pa. Cmwlth. 2000).

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. *Young v. Cmwlth. Department of Transportation*, 744 A.2d 1276 (Pa. 2000).

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. Thus, a city was not held to be liable for injuries caused when 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, but rather was on private property. *Leone v. Cmwlth. Department of Transportation*, 780 A.2d 754 (Pa. Cmwlth. 2001). The Plaintiff has the burden of proving ownership on the part of the local agency. See *Jackson v. City of Philadelphia,* 782 A.2d 1115 (Pa. Cmwlth. 2001): pedestrian must show that curb-stop box (used to shut off water supply to adjacent property) would be owned by local agency before it can come within exception. The utility exception was found to be applicable, however, in *Primiano v. City of Philadelphia*, 739 A.2d 1172 (Pa. Cmwlth. 1999), where water meter, which failed, was located on a "strip of land", even if that strip of land was in the Plaintiff's basement.

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. *Miller v. Lykens Borough Authority*, 712 A.2d 800 (Pa. Cmwlth. 1998).

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. *Kennedy v. City of Philadelphia,* 635 A.2d 1105 (Pa. Cmwlth. 1993). See also, *Leone, supra:* no liability under streets exception where Plaintiff does not present evidence of a written contract between the local agency and the Commonwealth for the local agency to maintain the Commonwealth road.

Contrary to the real estate exception, the "of-on" distinction remains in this area, and there will not be any liability for dangerous conditions on the streets. See *Granchi v. Borough of North Braddock*, 810 A.2d 747 (Pa. Cmwlth. 2002); *Osborne v. Cambridge Township,* 736 A.2d 715 (Pa. Cmwlth. 1999); *Walinsky v. St. Nicholas Ukrainian Catholic Church*, 740 A.2d 318 (Pa. Cmwlth. 1999). 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. *Lockwood v. City of Pittsburgh*, 751 A.2d 1136 (Pa. 2000). See also *Smith v. Manson*, 806 A.2d 518 (Pa. Cmwlth. 2002): where vehicle partly goes off road and undercarriage scrapes wedge curb, streets exception is inapplicable, as wedge curb is not a dangerous condition of the street that is intended for travel.

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, *Granchi, supra*.

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. *Jackson v. City of Philadelphia, supra,* citing *White v. City of Philadelphia,* 712 A.2d 345 (Pa. Cmwlth. 1998). A sidewalk adjacent to a school district driveway is not abutting a public right of way. *Snyder, supra.*

The "of-on" distinction still is relevant to the sidewalks exception. *Finn v. City of Philadelphia*, 664 A.2d 1342 (Pa. 1995). Thus, there will be no liability on the part of a local agency for dangerous conditions on a sidewalk.

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. *Burns v. Crossman*, 740 A.2d 773 (Pa. Cmwlth. 1999).

Animal Exception. This exception covers the care, custody and control of animals, but it only applies to domesticated animals, not wild animals. Thus, a zoo's dolphin, which inflicts an injury, is a wild animal and does not bring the exception into play. *Sakach v. City of Pittsburgh*, 687 A.2d 34 (Pa. Cmwlth. 1996). 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, at its owner's premises, the dog attacked her guests. *Lerro ex. rel. Lerro v. Upper Darby Tp*., 798 A.2d 817 (Pa. Cmwlth. 2002). Likewise, the authority to inspect, isolate, segregate and quarantine animals is not be equated with actual possession or control of the animals. *Sweeney, supra*.

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. *Mench v. Lower Saucon Tp*., 632 A.2d 1011 (Pa. Cmwlth. 1993); *Dunaj v. Selective Ins. Co. of America*, 647 A.2d 633 (Pa. Cmwlth. 1994). 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 $1500. In *Gloffke v. Robinson*, 812 A.2d 728 (Pa. Cmwlth. 2002) 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. 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. *Laich v. Bracey*, 776 A.2d 1022 (Pa. Cmwlth. 2001). In

Alexander v. Benson, 812 A.2d 785 (Pa. Cmwlth. 2002) 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."

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

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

Damages must be offset by insurance benefits received or to which Plaintiff is entitled. Disability retirement benefits are not deducted. *Giosa v. School District of Philadelphia*, 630 A.2d 511 (Pa. Cmwlth. 1993). These deductions are to be made from the jury verdict, not from the statutory limits. *Fernandez v. City of Pittsburgh,* 643 A.2d 1176 (Pa. Cmwlth. 1994), overruling Giosa on this point.

Kmonk-Sullivan v. State Farm Mut. Auto. Ins. Co., 788 A.2d 955 (Pa. 2001), held that a government vehicle exclusion for UIM benefits in an automobile insurance policy is unenforceable, since it violates the Motor Vehicle Financial Responsibility Law.

Issues Related to Claims Against Employees of Local Agencies

The Act 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.

c. The act giving rise to the claim was within policy-making discretion of the employee.

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. 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. *Dixon v. Cameron County School District,* 802 A.2d 696 (Pa. Cmwlth. 2002).

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. The employee's claim for indemnity is not subject to the limitation of damages provisions discussed above. See *Renk v. City of Pittsburgh*, 641 A.2d 289 (Pa. 1994). 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. *Retenauer v. Flaherty,* 642 A.2d 587 (Pa. Cmwlth. 1994). For purposes of applying this provision, the definition of "employee," as set forth in 42 Pa.C.S.A. Section 8501, is construed broadly. Foster parents thus are employees of CYS, for purpose of CYS indemnifying foster parents in wrongful death action. *Patterson v. Lycoming County*, 815A.2d 659 (Pa. Cmwlth. 2002).

Because the statute is to protect the public employee from financial loss, the statute does not require the local agency's insurance company to indemnify the personal insurance company of the employee. *Indemnity Insurance Company of North America v. Motorist Mutual Insurance Company*, 710 A.2d 20 (Pa. 1998).

Section 8550 states that employees of a local agency are not immune for acts of willful misconduct. *Robbins v. Cumberland County Children and Youth Services*, 802 A.2d 1239 (Pa. Cmwlth. 2002). In such cases, willful misconduct is not synonymous with intentional tort. See *Robbins, Renk, supra*. 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. *Lory v. City of Philadelphia*, 674 A.2d 673 (Pa. 1996); *Wilkinson v. Conoy Tp*., 677 A.2d 876 (Pa. Cmwlth. 1996). Where the employee's misconduct is willful misconduct, there is no duty to indemnify. *Ferber v. City of Philadelphia*, 661 A.2d 470 (Pa. Cmwlth. 1995). The damage limitations (above) are inapplicable.

Recreation Use of Land and Water Act

The Recreation Use of Land and Water Act, 68 P.S. Sections 477-1 et. seq. provides an additional basis for immunity of the local agency. The Act provides (with certain exceptions) that an owner of land who directly or indirectly invites or permits without charge any person to use such property for recreational use does not extend any assurances that the premises are safe for any purpose, owes no duty of care to those users, and does not incur any liability to them caused by an act or an emotion.

The immunity applies to both publicly and privately owned land, but only owners of unimproved lands are protected by this Act. *Rivera v. Philadelphia Theological Seminary of St. Charles Borromeo, Inc*., 507 A.2d 1 (Pa. 1986); *Walsh v. City of Philadelphia*, 585 A.2d 445 (Pa. 1991).

Immunity is denied for injuries occurring on improved property. *Mills v. Commonwealth*, 633 A.2d 1115 (Pa. 1993); *Brown v. Tunkhannock Twp*, 665 A.2d 1318 (Pa. Cmwlth. 1995). However, where there is a giant sliding board in a county park, Recreation Use of Land and Water Act is inapplicable, even though the entirety of the park is largely unimproved land. *Bashioum v. County of Westmoreland,* 747 A.2d 441 (Pa. Cmwlth. 2000). The Court continues to focus in particular on the area where the incident occurred. In *Pagnotti v. Lancaster Twp,* 751 A.2d 1226 (Pa. Cmwlth. 2000), 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.

Immunity is abrogated if the landowner willfully or maliciously fails to guard or warn against a dangerous condition, use, structure or activity. Section 477-6. *Lory v. City of Philadelphia*, 674 A.2d 673 (Pa. 1996). However, the Political Subdivision Tort Claims Act may still result in a finding of immunity. See *Wilkinson, supra*.

IX. Insurance and Risk Manangement

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What insurance should we have?

The basics are general liability and professional liability insurance.

General Liability

Coverage should be considered for the following.

- all government buildings;
- all government properties;
- all government motor vehicles (defined as any vehicle which is self?propelled and any attachment thereto; including vehicles operated by rail, through water or in the air);
- personal property of others in the possession or control of the local agency;
- traffic signs, lights and other traffic controls (even though it may be a PENNDOT roadway, the local agency may have responsibility for these);
- trees under the care, custody and control of the local agency;
- utility service facilities, including steam, sewer, water, gas or electric systems owned by the local agency or in its right-of-way;
- streets owned by the local agency;
- PENNDOT roadway, if the local agency has a written contract for maintenance and repair;
- sidewalks within the rights-of-way of streets owned by the local agency;
- local agency also may be held secondarily liable for other sidewalks within its community;
- animals in the local agency's possession or control, such as police dogs or horses.[1]

Recent Developments

When selecting general liability insurance, keep in mind certain recent decisions.

Plaintiffs were boating on "Lake Frederick" which was created on the Susquehanna River by damming the river. They drowned in a boating accident. Defendant filed for summary judgment, arguing immunity under the Recreational Use of Land Act and Water Act, (RULAWA).[2] The defendant argued that the public had use of the lake area for limited recreational purposes, without a fee, thus triggering the RULAWA and the immunity.

The Superior Court disagreed. It found that because the lake was created by the damming of the river, the lake represented a substantial improvement of the land and the RULAWA did not apply. The majority's opinion implies that any artificial alteration of a natural landscape makes the RULAWA, and its immunity provisions, inapplicable.[3]

Delay damages are payable to the plaintiff over and above the statutory cap. The Act places a cap of $500,000 in the aggregate that may be paid out by a local agency. Delay damages are payable in the full award and are not limited to the statutory cap. So, if the award came in at $1 million, delay damages could be collected on the full $1 million, as opposed to the $500,000 cap.[4]

Defective condition of real property has changed. The Supreme Court extended the interpretation of the Tort Claims Act and the real property exception. Plaintiff was burned when paint thinner that was being used to a clean a floor ignited. The Pennsylvania Supreme Court held that it was the negligent maintenance of the floor that caused the accident. Thus, this was an exception to the immunity under the Tort Claims Act.[5, 6]

A local agency's employee's personal automobile coverage is primary when the employee causes an accident while driving his own automobile while acting on behalf of a local agency. INA insured the local agency and argued that its policy stated that it was excess for any accident involving an automobile not owned by the local agency but operated by an employee. The Supreme Court agreed, holding that the policy language governed over statutory language that required indemnification.[7]

Professional Liability

Consider coverage for the following categories.

- police officers or other law enforcement personnel;
- local agency personnel;
- local agency officers, supervisors or other elected officials.

There has been a change in terms of the police chase scenario. The Supreme Court overruled its earlier decision that which held that the local agency was immune from any injuries caused by a fleeing driver's acts.8 But, in 1997, they reversed themselves. The Supreme Court has now held that it is a question of fact whether the police officer negligently failed to follow police pursuit procedures, which fact was a substantial factor in causing a plaintiff's injuries.9

Additional Information

For further information on insurance for local governments, see Insurance Primer for Municipal Secretaries, 4th Edition, 2003, available from Governor’s Center for Local Government Services, DCED, 888-223-6837, or www.inventpa.com.

References

1. 42 Pa.C.S. § 8542.
2. 68. P.S. § 477-1 et seq.
3. *Stone v. York Haven Power Company*, 715 A.2d 1164, Pa.Super. 1998.
4. Woods v. PennDOT, 641 A.2d 633, PaCmwlth. 1994.
5. 42 Pa.C.S. § 8542 (b)(3).
6. *Grieff v. Reisinger*, 693 A.2d 195, Pa. 1997.
7. *INA v. Motorists Mutual Insurance Co.*, 701 A.2d 20, Pa. 1998.
8. *Dickens v. Horner,* 611 A.2d 693, Pa. 1992.
9. *Jones v. Chieffo*, 700 A.2d 417, Pa. 1997.

X. Introduction to Labor Law

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Act 195 – Public Employees Other Than Police Officers and Firefighters

The Public Employee Relations Act ("PERA"),[1] also known as "Act 195," covers the vast majority of public employees in Pennsylvania, with the most notable exceptions being police officers and firefighters. The Pennsylvania Labor Relations Board ("PLRB") administers Act 195,[2] which requires public employers and representatives of public employees "to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment . . ."[3]

Enacted in 1970, Act 195 in many ways is based on the National Labor Relations Act ("NLRA").[4] For example, Act 195 grants to public employees the rights to organize and to bargain collectively[5] and defines both employer and union unfair labor practices.[6] If the representatives of either or both the public employees and the public employer refuse to submit to the procedures set forth regarding mediation and fact-finding, such refusal may be deemed a refusal to bargain in good faith, and the submitting party or the PLRB may file unfair labor practice charges.[7]

The Commonwealth Court of Pennsylvania recently heard a case requiring it to determine whether an employer's actions constituted an unfair labor practice.[8] In *Uniontown Area School District v. PLRB*, the aggrieved employee was an acting principal and union member. When the current principal resigned, she applied for the position. During her interview, a school district representative asked her if she would be able to "change hats" from union advocate to principal, a management position. Another applicant for the position, whom the school ultimately hired, was not asked the same question. The PLRB determined that the school district committed an unfair labor practice and ordered, as a remedy, that the employee be appointed to the principal position.[9] On appeal, the Pennsylvania Supreme Court affirmed the Court of Common Pleas' affirmation of the PLRB's finding and remedy,[10] finding that the PLRB properly inferred anti-union animus based on the questions posed to the employee combined with the fact that the district representative did not pose the same questions to the person ultimately hired.[11] The school district argued that the evidence of the hired applicant's superior credentials overcame the inference; however, the court rejected this argument, deferring to the PLRB's weighing of the credibility of this fact evidence.[12] The school district also unsuccessfully argued that the remedy was improper because the school district had exclusive authority to rescind the principal's contract. The court found the order to appoint the aggrieved employee to be within the PLRB's remedial authority.[13]

Act 195 declares certain employee conduct to be lawful. Specifically, it is "lawful for public employees to organize, form, join or assist in employee organizations or to engage in lawful concerted activities for the purpose of . . . collective bargaining." The Act also grants such employees "the right to refrain from any and all such activities, except as may be required pursuant to the maintenance of membership provision in a collective bargaining agreement."[14] However, Pennsylvania's Public Employee Fair Share Law[15] provides that nonmembers represented by an employee organization may be compelled to pay a fair share fee to cover the costs of representation, if the public employer and bargaining representative agree to such a provision in the collective bargaining agreement. [16]

In addition to defining particular activities as being unfair labor practices, 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 . . ."[17] However, this obligation does not compel either party to agree to a proposal or require the making of a concession.

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." [18]

If a public employer and the representative of its employees reach an impasse after a reasonable period of negotiation, the parties may voluntarily request mediation. If the parties do not voluntarily request mediation, and the dispute is not resolved within twenty-one days after the parties began negotiation "but in no event later than 150 days prior to the 'budget submission date,' . . . both parties must immediately, in writing, call in the service of the Pennsylvania Bureau of Mediation."[19]

Mediation must continue until the parties reach an agreement. However, if the parties do not reach an agreement within twenty days "or in no event later than one hundred thirty days prior to the 'budget submission date,' the Bureau of Mediation shall notify the [PLRB] of this fact." The Board may then appoint a fact-finding panel, of one or three members, that will hold hearings and take testimony. The panel also has subpoena power. If the parties still do not reach an agreement, then the panel will make findings of fact and recommendations. [20]

At arbitration, it is the arbitrator's responsibility to determine the scope of parties' collective bargaining agreement. For example, in *Davis v. Chester Upland School District*, furloughed employees filed an action in which they argued that the school district should have recalled them when the school district created new positions for which they were qualified. [22] The school district argued that arbitration was first required under the collective bargaining agreement.[23] The Pennsylvania Supreme Court accepted the district's argument as accurate, unless the recall dispute exceeded the terms of the collective bargaining agreement.[24] The issue then became whether the agreement's definition of grievance encompassed the dispute. The court held that the determination of the issue was reserved for the arbitrator because it involved the scope of a grievance arbitration procedure.[25]

Similarly, in *Lackawanna County Deputy Sheriff's Association v. Lackawanna County*,[26] a PLRB Hearing Examiner held in abeyance an unfair labor practice charge filed against the County, pending notification by the parties that the matter had been resolved at grievance arbitration. The union filed the charge after the County changed its health insurance coverage from a traditional indemnity plan to a plan allowing the employees to choose between three health maintenance organizations ("HMOs"). The basis of the charge was that the insurance change violated the collective bargaining agreement. The Examiner declined to decide the case, pending a grievance arbitration decision, explaining that deferral was proper because (1) a grievance had been filed; (2) the charge filed was rooted in the contract; and (3) the conduct forming the basis of the grievance did not allege discrimination toward the exercise of employee rights.

The courts have the power to determine whether an arbitration decision is correct.[27] To determine whether an arbitration decision is correct, the courts apply the "essence test."[28] For example, in *City of Easton v. American Federation of State, County and Municipal Employees Local 447,* the City terminated an employee for receiving pay for hours that he did not work, falsifying records and neglecting his duties. The basis for termination was "willful misconduct."[29] A three-member board of arbitrators awarded the employee with reinstatement and backpay after finding that the City had not established "just cause" for terminating the

employee.[30] The Commonwealth Court upheld the award, finding that the award "was reasonable and drew its essence from the terms of the collective bargaining agreement because it rested on the board's unfettered interpretation of the term 'willful misconduct."[31] On appeal, the Pennsylvania Supreme Court criticized the Commonwealth Court's holding, characterizing it as essentially stating that the court "lacked the authority to overturn the arbitration award because the board's interpretation of the term 'willful conduct' [as used in the parties'] collective bargaining agreement was beyond the purview of judicial review under the essence test."[32] The court then reversed the board's award, characterizing the award as invalid under the essence test.[33]

According to the essence test, which the Easton court applied, courts reviewing arbitration awards must answer two questions: (1) whether the issue presented is a proper subject for arbitration under the relevant agreement; and (2) whether the arbitrator's interpretation was rationally derived from the agreement.[34] In *Cheyney University v. State College and University Professional Association,* a probational employee was reassigned to administrative duties then terminated after being arrested for speeding in a University-owed vehicle, at which time he failed to produce his driver's license. The union filed a grievance, which proceeded to arbitration because the parties could not resolve the matter.[35] The University argued that probational employees' grievances were not arbitrable under the terms of the parties' collective bargaining agreement; therefore, the University contended that the arbitrator lacked jurisdiction. The arbitrator found that although the bargaining agreement did not protect probational employees from terminations not based on just cause, probational employees were entitled to progressive discipline for some serious infractions.[36] Therefore, the arbitrator found that the grievance was arbitrable and sustained the grievance, finding that the employee was at least entitled to an investigation and an explanation of why he was terminated.[37] On appeal, the Pennsylvania Supreme Court held that the arbitration award, which ordered reinstatement with backpay,[38] was proper under the essence test.[39]

Act 111 – Police Officers and Firefighters

Act 111 covers police officers and firefighters.[40] The Act provides that police officers and firefighters whom the Commonwealth or its subdivisions employ have the right to bargain collectively, through labor organizations or other representatives designated by 50 percent or more of the police or firefighters, with their public employers concerning the terms and conditions of their employment. Act 111 defines "terms and conditions" as "including compensation, hours, working conditions, retirement, pensions and other benefits . . ."[41]

In *City of Philadelphia v. Fraternal Order of Police Lodge No. 5*, the Pennsylvania Supreme Court held that a city's decision to eliminate a rank of police officer is a subject over which the City must bargain with the applicable union before implementing the decision.[42] The court rejected the City's argument that the decisions to assign staff inspector work to personnel other than staff inspectors and to eliminate the staff inspector position were "within its managerial prerogative," consistent with the management rights clause in the parties' collective bargaining agreement. Instead, the court affirmed the arbitrator's holding that the decisions were mandatory subjects, reasoning that they concerned the terms and conditions of employment because they addressed the work that classes of employees would perform.[43]

The collective bargaining procedure that Act 111 establishes must begin at least six months before the start of the political unit's fiscal year. [44] If the union and government unit cannot reach an agreement, causing the parties to be at an impasse, written notice must be directed from one party to the other specifying the issues in dispute and requesting appointment of a board of arbitration.[45] The board is composed of three individuals, one appointed by the public employer, one appointed by the union, and a third member to be agreed upon by both parties. [46] A request for arbitration must come at least 110 days before the start of the fiscal year. [47]

Determining when impasse is reached is sometimes difficult. Act 111 provides that if settlement is not reached within thirty days after collective bargaining has begun, impasse will be presumed to have occurred.[48] It may also happen that the parties reach an agreement, but that the legislative body will not ratify and make effective

the agreement by legislative actions. Act 111 provides for these contingencies by providing that when political subdivisions other than the Commonwealth do not approve the agreement within one month after the agreement has been reached, impasse exists. [49]

Act 111 establishes a system of compulsory 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.[50] 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. [51]

The PLRB recently addressed the issue of when a union's claim based on an employer's refusal to comply with an arbitration award ripens. In *Fraternal Order of Police Local No. 5 v. City of Philadelphia* (PLRB),[52] the union filed, with the Court of Common Pleas, a petition to vacate the arbitrator's award, then appealed the denial of that petition to the Commonwealth Court, arguing that the arbitrator had exceeded his authority by allowing the City to either reinstate the aggrieved employee without back pay or provide the employee with back pay without reinstating her. The union argued that the arbitrator had to order the aggrieved employee's reinstatement after finding that she had been discharged without just cause. After the Commonwealth Court resolved this claim in the arbitrator's favor, the union filed a charge with the PLRB, asserting that the City failed to comply with the arbitration award. The PLRB found that the union's charge was untimely because it had not appealed the arbitration award within thirty days from the date of issuance.[53] Specifically, the Board found that the union's subsequent appeal to the Commonwealth Court did not delay the ripening of the cause of action. When a union is the unsuccessful party in the prior proceeding, as the union was in this case, the union is not automatically granted a stay pending appeal of an arbitration award. In contrast, when an employer is the unsuccessful party below, the employer may delay compliance with an arbitration award while it seeks redress through normal appeal procedures; the order is binding upon the expiration of the appeal period. The Board then declared that "[t]o the extent that there may be any post-1987 Board final orders that withhold enforcement of affirmed arbitration awards pending a second level of appellate review . . . , the Board will no longer adhere to them as precedent."

Another issue that pertains to grievance arbitrations is whether Act 111 compels arbitration or whether the grievance process provided in the parties' collective bargaining agreement governs the determination of whether a dispute must be submitted to arbitration. In *Upper Makefield Township v. PLRB*,[54] the Pennsylvania Supreme Court left this issue unresolved. Specifically, the issue in *Upper Makefield* was "whether Act 111 mandates the binding arbitration of grievances where the grievance procedure set forth in the parties' collective bargaining agreement (CBA) does not require arbitration." [55] In that case, the Township refused to arbitrate an officer's grievance claim based on his termination. The union then filed an unfair labor practice charge. Agreeing that the Township's refusal to arbitrate constituted an unfair labor practice, the Board ordered arbitration, finding that "Act 111 mandates binding arbitration of all grievances arising under collective bargaining agreements negotiated pursuant to Act 111." On appeal, the Commonwealth Court, finding that Act 111 does not compel arbitration, reversed the arbitration order.[56] The Pennsylvania Supreme Court affirmed the reversal, but declined to resolve the issue of compulsory arbitration by reaching its holding on an alternate ground.[57]

Despite the apparent statutory prohibition against review of an Act 111 arbitration award, the Pennsylvania Supreme Court has established parties' ability to challenge the validity of an award. The scope of appellate review of arbitration decisions, however, is narrow.[58] In *Pennsylvania State Police v. Pennsylvania State Trooper's Association*, the Pennsylvania Supreme Court declined an invitation to broaden the scope of review by allowing courts to overturn arbitrators' decisions based on a public policy argument.[59] It explained that broadening the scope of review "would markedly increase the judiciary's role in Act 111 arbitration awards[, which] would undercut the legislature's intent of preventing protracted litigation in this arena."[60]

There are four bases upon which a party may challenge an Act 111 arbitration award: (1) whether the board of arbitration had jurisdiction to decide the issue or issues in dispute; (2) whether the arbitrators properly conducted the proceedings; (3) whether the arbitrators exceeded their authority; and (4) whether the award involves constitutional questions properly decided by a court.[61]

With regard to the first ground for appeal, the Pennsylvania Supreme Court, in *Township of Sugarloaf v. Bowling*,[62] held that an arbitrator, not a court, has initial jurisdiction to determine whether a claim is subject to arbitration.[63] In so holding, the court explained that the holding comports with the spirit of Act 111, which is to limit judicial involvement with labor relations.[64] The state supreme court also has held that an arbitrator does not have jurisdiction to resolve an issue when a demand for arbitration is insufficient to state the claim at issue. For example, in *City of Philadelphia v. Fraternal Order of Police (Pa. Ct.)*,[65] the union demanded arbitration, stating that the number of staff inspectors had declined. The court held that this demand was insufficient to state an allegation that employees who were not staff inspectors but were performing staff inspector work were underpaid because the demand's allegation that the number of staff inspectors had declined did not necessarily imply the allegation that the employees performing staff inspector work were underpaid.[66]

Another ground for appealing an arbitration award that has been a recent subject of litigation is the claim that the arbitrator exceeded his or her authority.[67] The basis on which such a claim is made often is the remedy that the arbitrator ordered.[68] The Pennsylvania Supreme Court has stated that what the court defines as exceeding an arbitrator's power is "far from expansive."[69] Elaborating on its definition, the court has explained, "[e]ssentially, if the acts the arbitrator mandates the employer to perform are legal and relate to the terms and conditions of employment, then the arbitrator did not exceed her authority."[70]

In *City of Philadelphia v. Fraternal Order of Police Lodge No. 5 (Pa. Ct.)*,[71] discussed above, the union claimed that certain employees were entitled to receive out-of-class pay for performing functions of the higher-paying rank of staff inspector and that the City improperly eliminated the rank of staff inspector. The arbitrator (1) ordered the City to assign future staff inspector work to staff inspectors; and (2) directed the City to bargain, upon the union's request, over its de facto elimination of the staff inspector rank.[72] The Pennsylvania Supreme Court upheld the portions of the arbitrator's order requiring these two remedies as being within the arbitrator's authority.[73]

Similarly, in *Pennsylvania State Police v. Pennsylvania State Troopers' Association*,[74] the state Supreme Court upheld an arbitrator's reinstatement of officers, which the arbitrator ordered after finding that each officer had an exemplary record and that other officers had not been terminated on the basis of more severe criminal activity than that with which the aggrieved officers had been involved.[75] The court found that the reinstatement was consistent with the arbitrator's authority because (1) it did not order the employer to undertake an illegal act, and (2) the award encompassed only terms and conditions of employment.[76] In *Fraternal Order of Police v. City of Philadelphia (PLRB)*,[77] the PLRB rejected a union's claim that an arbitrator exceeded his power. There, the basis of the claim was the arbitrator's failure to order reinstatement. Instead of ordering reinstatement, the arbitrator gave the City the option of reinstating the employee without backpay or giving the employee backpay, but not reinstating the employee. The court held that the arbitrator did not exceed his authority by allowing the employer to choose between the two remedies.

The traditional procedural device for obtaining review of an arbitration award under Act 111 is a petition to confirm, vacate, or modify the award. However, the Pennsylvania Supreme Court has made clear that a writ of mandamus is also available to a party who seeks to enforce the terms of an arbitration award that has not otherwise been challenged by petition.

Act 111 does not contain provisions concerning unfair labor practices. Accordingly, the PLRB and the courts have applied the unfair labor practice provisions of the Pennsylvania Labor Relations Act ("PLRA")[78] to Act 111. The PLRA was enacted to protect private employees in Pennsylvania who the NLRA does not cover.

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."[79] 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[80]).[81]

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.[82]

References

1. PA. STAT. ANN. tit. 43, §§ 1101.101–1101.2301 (West 1991).
2. Id. § 1101.501.
3. Id. § 1101.701.
4. 43 U.S.C.A. §§ 151–169 (1998).
5. PA. STAT. ANN. tit. 43, § 1101.401 (West 1991).
6. See id. § 1101.1201.
7. Id. §§ 1101.1201(a)(5), 1101.1201(b)(5).
8. *See Uniontown Area Sch. Dist. v. PLRB,* 747 A.2d 1271 (Pa. Commw. Ct. 2000).
9. Id. at 1273.

10. The first time the case was presented to the Commonwealth Court, however, the court reversed the Court of Common Pleas' decision and held that the aggrieved employee was not protected under the PERA. On appeal, the Pennsylvania Supreme Court reversed and remanded, holding that the plaintiff was covered under the Act. Id. at 1273. The second time that the Commonwealth Court heard the case, which is discussed here, the court affirmed the Court of Common Pleas' holding. Id. at 1275.
11. Id. at 1274.
12. Id.
13. Id. at 1275 (stating that "[t]he order is remedial and not punitive. The order is reasonable, and promotes the PLRB's objective of remedying an unfair labor practice charge of discrimination.").
14. PA. STAT. ANN. tit. 43, § 1101.401 (West 1991).
15. PA. STAT. ANN. tit. 43, §§ 1102.1–1102.9 (West 2002).
16. Id. § 1102.3 (West 2002).
17. PA. STAT. ANN. tit. 43, § 1101.701 (West 1991).
18. Id. § 1101.702.
19. Id. § 1101.801.
20. Id. § 1101.802.
21. 786 A.2d 186 (Pa. 2001).
22. Id. at 187.
23. Id. at 188.
24. Id.
25. Id. at 189 (instructing that "all questions of whether a matter is arbitrable must be decided in the first instance by an arbitrator, not a trial court.").
26. 32 Pa. Pub. Empl. Rep. (LRP) 32, 120 (H. Ex. May 30, 2001).
27. See, e.g.*, City of Easton v. Am. Fed'n of State, County and Mun. Employees Local 447*, 756 A.2d 1107 (Pa. 2000).
28. See *Cheyney Univ. v. State College and University Prof'l Ass'n*, 743 A.2d 405 (Pa. 1999).
29. Easton, 756 A.2d at 440-41.
30. Id. at 442.
31. Id. at 443.
32. Id. at 446.
33. Id. at 447 (explaining that because the Board did not consider that the city could not relinquish its power to terminate employees who steal, the award was not rationally derived from the bargaining agreement).
34. *See Cheyney Univ*., 743 A.2d at 413.
35. Id. at 407.
36. Id. at 408.
37. Id. at 409.
38. Id.
39. Id. at 416 (explaining that "deference is the touchstone of the appropriate standard of review.").
40. See PA. STAT. ANN. tit. 43, §§ 217.1–217.10 (West 1992).
41. Id. § 217.1.
42. *See City of Philadelphia v. Fraternal Order of Police Lodge No. 5*, 768 A.2d. 291, 300-01 (Pa. 2001) [hereinafter, in text, *City of Philadelphia v. Fraternal Order of Police Lodge No. 5* (Pa. Ct.)] (holding that the City's de facto elimination of the staff inspector rank was a mandatory bargaining subject).
43. Id. at 300.
44. PA. STAT. ANN. tit. 43, § 217.3 (West 1992).
45. Id. § 217.4(a).
46. Id. § 217.4(b).
47. *Borough of Geistown v. PLRB*, 679 A.2d 1330, 1334 (Pa. Commw. Ct. 1996).
48. PA. STAT. ANN. tit. 43, § 217.4(a) (West 1992).
49. Id.
50. *Borough of New Cumberland v. Police Employees of Borough of New Cumberland,* 439 A.2d 849 (Pa. Commw. Ct. 1982), rev'd, 467 A.2d 1294 (Pa. 1983).
51. *See, e.g., Fraternal Order of Police Local No. 5 v. City of Philadelphia*, 32 Pa. Pub. Empl. Rep. (LRP) 32,102 (PLRB Apr. 17, 2001) [hereinafter, in text, *Fraternal Order of Police Local No. 5 v. City of Philadelphia (PLRB)*].
52. Id.
53. However, the Board remanded the matter, directing the Secretary to issue the requested complaint, but explaining that the Secretary had not necessarily erred in determining in the previous proceeding that the charge was filed after the appeal period expired. The Board decided to remand the matter based on the union's argument that because it was in the unusual position of appealing an

award that it technically won (because of the unique nature of the arbitrator's award, which gave the employer the option of reinstating the employee without backpay or providing the employee with backpay, but no reinstatement), a charge filed within six weeks of the Court of Common Pleas' decision would have rendered it in the position of insisting on compliance with a remedy that it was simultaneously arguing (in the Commonwealth Court) was flawed.

54. 753 A.2d 803 (Pa. 2000).
55. Id. at 804-05.
56. Id. at 805.
57. Id. at 806. The court held that probationary officers are not entitled to appeal dismissal because they are at-will employees, unless the terms of the probationary period change the employment status. The officer offered no evidence of a contractual or statutory prohibition on removal without cause. Id. at 806-07.
58. See *Pa. State Police v. Pa. State Troopers' Ass'n*, 741 A.2d 1248, 1252 (Pa. 1999).
59. Id. at 1252.
60. Id. at 1253.
61. *City of Philadelphia v. Fraternal Order of Police Lodge No. 5*, 768 A.2d 192, 294 (Pa. 2001) (citation omitted).
62. 759 A.2d 913, 915 (Pa. 2000) ("[A] holding which would declare that such issues are to be decided first by a judge would set itself in opposition to the intrinsic purpose of the act; allowing such judicial interference in an area of labor law which the legislature has strived mightily to limit the judiciary's involvement would be highly improper.").
63. Id. at 242.
64. Id.
65. 768 A.2d 291 (Pa. 2001).
66. Id. at 295.
67. - *Fraternal Order of Police v. City of Philadelphia,* 768 A.2d 291 (Pa. 2001); *Pa. State Police v. Pa. State Troopers' Ass'n,* 741 A.2d 1248 (Pa. 1999); *City of Philadelphia v. Fraternal Order of Police,* 32 Pa. Pub. Empl. Rep. (LRP) 32,102 (PLRB Apr. 17, 2001).
68. See, e.g., id.
69. *Pa. State Police v. Pa. State Troopers' Ass'n,* 741 A.2d 1248, 1251 (Pa. 1999).
70. *City of Philadelphia v. Fraternal Order of Police Lodge No. 5*, 768 A.2d 291, 296-97 (Pa. 2001).
71. 768 A.2d 291 (Pa. 2001).
72. Id. at 293.
73. Id. at 297 (rejecting the City's arguments as "not cognizable within the confines of the narrow certiorari scope of review's definition of an excess of the arbitrator's powers").
74. 741 A.2d 1248 (Pa. 1999).
75. Id. at 1250.
76. Id. at 1252.
77. 32 Pa. Pub. Empl. Rep. 32,102 (PLRB Apr. 17, 2001),
78. PA. STAT. ANN. tit. 43, §§ 211.1–211.13 (West 1992).
79. Id. § 211.5.
80. PA. STAT. ANN. tit. 43, §§ 1102.1–1102.9 (West 2002).
81. Id. § 211.6(1)(a)–(f).
82. Id. § 211.6(2)(a)–(e).

XI. 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, must be proper as to form, and must be 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.

All cities and all boroughs, incorporated towns and first class townships with three or more police officers have civil service laws; all second class townships and all boroughs, incorporated towns and first class townships with fewer than three police officers are subject to the Police Tenure Act.[10] 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;
3. procedural rights prior to most adverse employment actions, including a hearing before a civil service commission or the municipal governing body.[11]

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.[12] Political affiliation is not limited to political party affiliation. The Constitution also prohibits discrimination by one faction of a political party against another faction.[13] Independent contractors as well as employees are protected from political discrimination.[14] The Constitution does not protect against discharge of "no-show" employees who obtain employment as a political reward.[15]

The 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: municipal solicitors,[16] public information officers,[17] assistant prosecutors[18] and parks superintendents.[19] By contrast, assistant public defenders[20] and police officers[21] 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.[22]

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.[23] 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 § 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.[24] 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.[25]

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.[26] 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.[27] 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.[28]

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.[29] The First and Fourteenth Amendments allow government employees to make limited public comment on matters of public concern.[30] This right is balanced against the employer's right to an orderly workplace.[31] 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.[32] 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.[33] The right does not extend to comments on matters of personal concern, rather than public concern.[34] An at-will public employee is not necessarily protected against discharge for the speech activities of another member of the employee's family.[35] Also, a policymaking employee has less First Amendment protection for speaking out on issues of public concern than a lower level employee.[36]

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.[37] The mere fact that a municipality dismisses an employee by public vote at a public meeting does not violate the employee's liberty interest.[38] Nor does a newspaper publication of the facts leading to a public employee's forced resignation.[39]

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.[40]

Drug Testing. The issue of drug testing of public employees has constitutional implications. The United States Constitution prohibits unreasonable searches and seizures from public employees.[41] This prohibition sets limits on municipalities' rights to test employees for drugs and alcohol.[42]

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 Constitution permits pre-employment or pre-promotion screening and periodic, pre-announced testing of employees.[43] Unannounced drug testing is permissible where the employer has "reasonable suspicion" of drug use.[44] Unannounced, random testing may take place in highly regulated or safety-sensitive employment (e.g., the transportation industry or police forces).[45] The United States Constitution permits drug testing of all individuals at an accident site.[46]

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.[47] 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.[48]

Veterans' Preference

Certain statutory protections apply to the hiring of public employees, most notably the veteran's preference.[49] 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 veterans preference.[50] The veteran's preference applies to both civil service and non-civil service hiring, but not to promotion.[51] 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.[52]

Whistleblower Protection

The Pennsylvania Whistleblower Law[53] 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.[54]

The Whistleblower Law requires the employee to plead, and prove, a discharge in retaliation for (a) making a good faith report of the employer's waste or wrongdoing, or (b) for participating in an official investigation.[55] To constitute a “good faith report,” the report must be supported by credible evidence.[56] 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.[57] The reported wrongdoing in question must be committed by the agency or its employees, not by third parties.[58]

The employee must state a causal connection between the **employee's** report of wrongdoing and the **employer's** retaliation.[59] 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.[60] 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.[61]

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XII. Police Regionalization

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Police regionalization is an established, yet emerging, concept. Police regionalization has not yet gained the level of acceptance that other types of intergovernmental arrangements enjoy. However, the concept is on the rise. Across the state, municipalities are increasingly considering police regionalization as a means by which to address the rising costs and increasing complexities of operating individual police forces. Recent proposals to charge municipalities for state police protection and renewed state and county-level initiatives for regional planning will likely prompt even more municipalities to study the concept. As a result, many municipal solicitors will undoubtedly face questions on how to regionalize their client's police forces.

There are three basic methods of sharing police service on a regional basis: centralized support services, contracted police services and consolidated police services. This article will focus on the third method. The discussion will provide background information, survey the scant law pertaining to regionalization, and identify selected issues that will confront solicitors whose municipal clients consider regionalization. Sources which describe other methods of regional policing and discuss issues not covered in this article are listed in the endnotes.[1]

Background

In a classic regionalization, municipalities agree to cooperate and consolidate their police departments in to a single police force. Conceptually, existing municipal police departments are "merged" into a new "consolidated" regional department. A single police district, encompassing the total geographic area of all participants, is created. The municipalities form a new administrative body distinct from the individual municipal governing bodies, usually designated as a commission or board.[2] Its function is to administer and operate the regional police department. The creation of a separate administrative body is the characteristic that distinguishes this method of regionalization from others. It is also the characteristic that causes the most municipal controversy—the perceived loss of absolute local control.

By the numbers, Pennsylvania's system of municipal policing is particularly well suited to the regional concept. There are nearly 1200 municipal police departments in Pennsylvania—twice as many as any other state. More than 60 percent of full-time departments have less than five officers.[3] National studies suggest consolidating local police departments with less than 10 officers. Pennsylvania has adopted policing standards which recommend that all municipalities consider consolidation.[4] Given the number and average size of police departments in this Commonwealth, basic principles of administration and the economies of scale, it would appear that the concept of police regionalization is especially appropriate in Pennsylvania.

However regionalization has been slow to gain acceptance. The first regional department was created in 1972. Since then, only 28 more have been formed. While an additional 277 municipalities are involved in contracted police services[5] and several others are in various stages of studying or forming regional departments, the numbers demonstrate there is still reluctance to part with local policing.

The mere mention of police regionalization is sure to galvanize a community and evoke emotional responses. Proponents typically argue that regionalization will decrease costs, increase services, improve efficiency and effectiveness, and result in a police force that is better equipped and trained to fight crime, without the burden of municipal boundaries. Opponents will be skeptical of these supposed advantages which, even advocates must admit, are sometimes difficult to document or are based in large measure on anecdotal evidence. In addition, police officers are often unconvinced that they will not lose benefits, rank, status or career opportunities. Other elected officials and residents will question the results of the regionalizing process. Many will believe that they will lose local "control" and "flavor" of their departments. The dynamic which has emerged is that Pennsylvania's deeply rooted history of local policing and local autonomy in municipal matters is slow to yield to the regionalization concept.

Regionalization is clearly a change from standard municipal police forces. However, it is a proven concept, which, if properly planned, studied and implemented, can yield beneficial results. The key to a successful regionalization effort is the development of a process that openly confronts all issues and concerns. The process will require the municipal solicitor to delve into a variety of issues, most of which are not clearly defined in existing law.

Authority to Regionalize

The authority to form a regional police department is found in three sources. Initially, Article IX, Section 5 of the Pennsylvania Constitution provides as follows.

> A municipality by act of its governing body may, or upon being required by initiative and referendum in the area affected shall, cooperate or 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 including other municipalities or districts, the Federal government, any other state or its governmental units, or any newly created governmental unit.

In addition, the Intergovernmental Cooperation Act ("Act")[6] provides for general enabling legislation that authorizes intermunicipal cooperation. Finally, the various municipal codes contain specific provisions authorizing municipalities to enter into joint municipal agreements and joint contracts for police protections.[7]

The Act requires municipalities to enter into an intermunicipal agreement before a cooperative effort begins. This agreement is the foundation for cooperatively running a police department. The agreement must address all business matters between the municipalities, including the type of commission that will supervise and operate the regional department, the method of appointing commission members, cost and revenue sharing, pensions, withdrawal and dissolution procedures, liability allocation and related matters. The agreement should clearly designate the powers, duties and authority that the participating municipalities are transferring to the commission. Finally, the agreement should address issues that are not specifically covered by the Act or other laws.

Unfortunately, existing constitutional and statutory provisions do little more than authorize and enable intergovernmental cooperation and establish a basic framework for initiating cooperation. Sadly, there exists neither a statutory scheme nor a body of appellate case law to act as a guide for the regionalization process. The concept must therefore emerge through us. The remainder of this article will address some of the emerging issues.

Status of the Governing Body

One issue not addressed in existing law is the status of the commission as a legal entity. The Act permits municipalities to delegate functions and powers to governmental or "other" entities.[8] However, regional police departments are not defined in the Act or other statutes as an independent entity. Similarly, commissions do not constitute either municipalities or authorities. Each solicitor must grapple with the question, "What type of entity is this?"

Regional commissions have now existed for almost 30 years. They have been able to apply for grants, own police cars, direct police officers and other employees in their duties, maintain and provide employee benefit programs and submit audits and reports. Thus, for basic business and administrative purposes, commissions are separate entities that are competent to act as employers of regional departments.

On the other hand, commissions are not considered "public employers" for labor law purposes. [9] Rather, the Pennsylvania Labor Relations Board ("PLRB") and our Supreme Court have held that the participating municipalities, acting by and through the commissions they create, are "joint employers" who are the "public employers" within the meaning of the Pennsylvania Labor Relations Act [10] and Act 111. [11] Thus, regionalization does not necessarily end a police force for labor purposes--it transmutes its form.

Finally, it is generally believed that the commission will not insulate municipalities from liability arising from regional police operations. Intergovernmental agreements typically handle this issue by requiring the commission to maintain adequate liability insurance designating both the commission and the municipalities served as insureds and including a mechanism to allocate uncovered liability between the municipalities. Therefore, regionalizing should not be viewed as a panacea for liability claims.

In sum, regional police commissions are legislatively authorized but not statutorily defined entities. They are capable of being legally recognized for various purposes but do not constitute entities that will totally divest participating municipalities from the policing function. The intermunicipal agreement creating these entities should specifically address the various ways in which the commission may be viewed.

Applicability of Codes and Laws

A related issue is the applicability of codes and laws to regional commissions. Each class of municipality has its own municipal code. In some areas, most prominently police civil service laws, the codes differ materially. The Act is silent as to whether the commission must be governed by the codes which bind the municipalities that create them.

Existing law provides only limited guidance. One common pleas court[12] has held that regional commissions are not subject to the Police Tenure Act.[13] The same court held that commissions are "agencies" within the meaning of the Local Agency Law.[14] As noted the PLRB has determined that commissions are not "public employers" for labor purposes. Finally, recent amendments to Act 600[15] bring regional departments within the ambit of municipal pension laws.

DCED takes the position that commissions are bound by general state laws, but need not comply with laws that regulate only a particular class of municipality unless the intermunicipal agreement provides otherwise. It is widely agreed that general state laws apply to commissions. However, opinions on the applicability of municipal codes vary. Two basic methods of addressing this issue have emerged.

First, some municipalities follow DCED's lead and take the position that municipal codes do not apply. This position is typically carried out in intermunicipal agreements by either not mentioning codes or characterizing commissions as "independent" entities that are not bound by the codes. The advantage of this position is that it provides the commission flexibility in promulgating their own policies and regulations on issues such as disci-

pline which would otherwise be guided by one or more codes. The disadvantage is that omitting statutory provisions that establish accepted protections and procedures is susceptible to legal attack. In addition, as a practical and strategic matter, failure to adopt a code procedure may prompt police unions to arbitrate matters that are mandatorily negotiable. The classic example is discipline. From a municipality's standpoint, the statutory discipline procedures are generally considered preferable to discipline that is subject to the grievance procedure.

Second, other municipalities opt to select a specific code that will govern or at leas adopt specific provisions of one or more of the applicable municipal codes. While this method is not guaranteed to remove all possibility of legal attack, it has the advantage of providing a legal framework with which both municipalities and police officers are familiar. In addition, adoption of a specific municipal code will provide guidance to the commission in nontraditional policing matters such as the sale of property.

The applicability of codes and laws is a matter that should be thoughtfully considered when implementing a regional police department.

Cessation of Existing Departments and Labor Obligations

Regionalization involves some interesting municipal and labor law issues. The complexity of the issues depends on whether the participating municipalities are subject to collective bargaining unit agreements and, if so, whether the agreements make regionalization a negotiable issue. If existing police departments are represented by a union, the participating municipalities must obey statutory requirements to refrain from engaging in unfair labor practices. While this area of law is still evolving, there is some established precedent.

Regionalization in the form of a consolidation involves abolishing or discontinuing each of the individual municipal police departments. In this area, basic municipal law issues are fairly well settled. Municipalities have the authority to create and abolish police departments. They also possess discretionary authority to terminate police services. Absent bad faith, courts will not interfere with, and the civil service laws will not prevent, the discretionary legislative decision to terminate police services.[16] On the other hand, if an abolishment is only a pretext or is motivated by bad faith, the municipality may be ordered to reinstate the department. The Commonwealth Court recently summarized the law in this area as follows.

It is established law that where there is affirmative evidence of a municipality's bad faith and that the abolition of an office or department is merely a pretense, a court may invalidate the municipality's action and order reinstatement of the discharged employees. Thus, the Pennsylvania Supreme Court has upheld writs of mandamus granted by the trial court where there was sufficient evidence that the abolition of a police officer's job or an entire police department was a pretext or a subterfuge which was meant to circumvent and undermine the purposes of the civil service law.[17]

The labor law issues are more complex. The PLRB has held that the subcontracting of police services is a mandatory subject of collective bargaining.[18] Therefore, a unilateral decision by a municipality to terminate its police department and replace it with another provider may constitute an unfair labor practice.[19] The only exception to this determination appears to be where a municipality terminates services and cedes policing responsibility to the Pennsylvania State Police.[20]

Absent limiting language in a collective bargaining unit agreement, the decision to consolidate is a managerial issue not subject to collective bargaining.[21] However, under current PLRB precedent, regionalization does not result in a "complete and permanent" cessation of municipal involvement, but rather, a transfer of the police function in a different format.[22] As a result, it is believed that the PLRB would find that participating municipalities have not discontinued police services in a way that would make their decision to regionalize immune from negotiations.

Specifically, the municipalities will have to bargain with their individual unions over the impact of regionalization and possibly the issue of transference of the police function. Impact bargaining, sometimes called "effects" bargaining, deals with issues such as continuance of work schedules, retention of seniority, vacation, holiday and sick leave rights. The transference issue results from the right of the individual unions to police in a specified area. The right of the individual unions to stop consolidation is an open question. Confronting the issue head-on may prevent unnecessary litigation. Ultimately, the commission will have to bargain with the new regional union for a new contract. Until a new contract is reached, the levels of benefits and salaries in effect when the regional department is formed must be continued by each municipality—even after consolidation.

In short, where municipalities with existing departments and collective bargaining agreements regionalize, there must be a set of both "decisional" and "effects" bargaining. These bargaining obligations are a critically important part of the regionalization process which should be coordinated and addressed when the intermunicipal agreement is being negotiated.

Pensions

Until 1996, regional police departments lacked specific enabling legislation for the creation and administration of their pension plans. Plans had evolved largely through audit activity of the Department of the Auditor General, court decisions and collective bargaining which, in some cases, resulted in benefit levels above those permitted under Act 600 for individual municipal plans.[23]

On May 10, 1996, the legislature amended Act 600 to include coverage of regional police departments. Among other things, the amendments added a requirement that regional departments establish pension plans with uniform benefits and provided a method of transferring service credits.

The amendments brought regional plans created after the effective date of the amendments under the umbrella of Act 600. However, issues still remain. For instance, the amendments do not address the question of how trustees are appointed to administer the fund or how Act 205[24] monies are to be distributed to the regional police department.

Although these questions remain, pensions are one area of regionalization in which municipalities and their solicitors have now been given some guidance. It is believed that the unanswered questions will soon be answered by legislative action or appellate court review.

Conclusion

The concept of police regionalization in Pennsylvania provides the municipal solicitor with an abundance of challenges. It is clear that the Commonwealth not only allows regionalization, but also assists in implementing the concept. If properly implemented, regionalization can provide a large, better-trained, and more efficient police force at lower costs to the communities served. The problem confronted by municipalities is that there is no definitive statutory or appellate framework for implementation. Those who embark on regionalization often proceed at their own peril and are guided solely by what others have done before them. In order to elevate a good concept to a practical solution, the legislature must adopt a specific statutory framework to address all aspects of regionalization.

References

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7. See Borough Code, Section 1202(34), (35); 53 P.S. § 46202(34), (35); First Class Township Code, Section 1502(LIII), (LIV); 53 P.S. §§ 56553, 56554; Second Class Township Code, Sections 1507, 1903, 1904; 53 P.S. §§ 66508, 66903, 66904.
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9. *Borough of Lewistown v. PLRB*, 558 Pa. 141, 735 A.2d 1240 (1999).
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XIII. Municipal Procurement

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Municipal procurement may be one of the more complex yet overlooked elements of municipal operations. Although procurement, on its face, seems to be a very straightforward process, there are many issues, principles and pitfalls with which municipalities and their solicitors should be familiar when purchasing goods and services.

Initially, it is important to consider the goal of municipal procurement, which is to obtain the best goods and services at the lowest possible price through the invitation of competition and the prevention of favoritism, improvidence, fraud and corruption.[1] Achievement of this established goal is shaped by the multitude of legislation and cases governing procurement. While the case law tends to deal primarily with narrow, fact-specific issues, the statutes set forth the general requirements that must be followed when undertaking a procurement. This chapter will focus primarily on the methods and procedures as described in the statutes while relying to some extent on case law.

When structuring a procurement, it is important to first review the enabling legislation applicable to the municipality. Although the general procedures for municipal procurement are fairly uniform, subtle differences exist in each municipal code requiring examination to assure that the procurement is conducted lawfully.

Enabling legislation sets forth the authority of a municipality to purchase, as well as the methods required for particular types of purchases. For example, enabling legislation dictates whether a municipality must solicit competitive bids, competitive price quotations or purchase from a single source. The legislation also contains the advertising and financial security requirements for competitive bidding and the procedures for competitive price quotations.

In addition to the applicable enabling legislation, the solicitor may need to review statutes of a specialized nature that govern certain types of municipal procurement. These statutes set forth requirements over and above those contained in the municipal codes. For example, purchases of automobiles, steel and construction services are all subject to regulation by additional legislation. It is important that the specialized statutes, as well as enabling legislation, be consulted before determining the proper method of procurement.

Generally, there are four methods of procurement, which may be used by municipalities: competitive sealed bids, competitive price quotations, sole source acquisition and competitive negotiations. A thorough understanding of these methods is necessary to successfully implement a municipal procurement.

Competitive Sealed Bids

Competitive sealed bids are primarily used to let contracts for construction and the purchase of goods in excess of $10,000 in total annual cost. An invitation to bid is publicly advertised in a newspaper of general circulation in the county in which the municipality is situated in accordance with the applicable enabling legislation. A firm, fixed-price contract (lump sum or unit price) is awarded to the lowest responsible bidder whose bid conforms to the specifications and other information contained in the bidding documents.[2] The opening of bids

and award of a contract must take place at a public meeting. Once the contract is awarded, the contractor is normally required to furnish the municipality with a performance bond in the amount of 50 percent of the contract price, however, the applicable enabling legislation should be reviewed to assure compliance.

The central concept in structuring a competitive bid is that a common and fair basis for competition must exist.[3] This includes the requirement that all bidders have equal access to the specifications, plans and any other information.[4] In addition, it is imperative that the rules established at the outset be followed during the bidding process.[5]

One of the more important elements of the bidding documents is the specifications and information provided to the bidders. The specifications should be clear, easy to understand and set forth all of the characteristics of the item to be purchased, without being overly restrictive. Specifications that are vague or unduly restrictive so as to limit competition are likely to be challenged.

A particularly troublesome concept in competitive bidding is the treatment of change orders, that is changes to the scope of work or specifications that typically come about during the performance of the contract. The issue of whether the change order may be included under the original bid or must be separately bid as a new undertaking depends upon whether the change represents work that is "incidental" to the original contract. The change cannot be so great or of such importance in money or scope of work as to constitute a new undertaking. Where a change in the amount of money is involved, both the percentage of the original contract and the actual dollar amount are relevant.[6]

In addition to the general requirements for competitive bidding, certain types of purchases are subject to additional regulation. A brief description of each statute is set forth below.

Motor Vehicle Procurement

If a municipality desires to purchase an automobile, it must comply with the Motor Vehicle Procurement Act, *62 Pa.C.S. 3731 et seq*., which requires the purchase of motor vehicles (including construction equipment) which are manufactured in North America. A vehicle is considered to be "manufactured" in North America if a substantial majority of the principal components are assembled into the final product in an assembly plant in the United States or Canada.[7] This requirement may be waived if the head of the municipality determines, in writing, that it is inconsistent with the public interest or the cost is unreasonable.[8]

Public Works

An area of purchasing that is regulated heavily by specialized statutes is public works projects. Public works involves the construction, reconstruction, alteration or repair of any public building or other public work or public improvement, including highway work. Because of the importance of these acts, it is necessary to summarize the salient provisions.

Separation of Specifications. The Separation Act, which is part of the enabling legislation for each municipality, requires that there shall be separate specifications and bids for particular categories of work in the construction of a public building. Typically, there are four types of work that must be bid separately: general construction, heating, ventilating and air-conditioning, plumbing, and electrical. Since the particular categories that require separate specifications and bids may differ among the types of municipalities, the applicable enabling act should be consulted.

Contracts for Public Works. The awarding and contracting of public works contracts in excess of $50,000 in total cost is governed by *62 Pa.C.S. 3901 et seq.* Provisions govern the time for awarding contracts, executing contracts and issuance of notices to proceed, as well as the amount of retainage. This legislation also addresses payment schedules and the arbitration of disputes arising under a contract.

Withdrawal of Bids. The withdrawal of bids in public works contracts is regulated by *73 P.S. 1601 et seq*. A bidder may withdraw a bid which is substantially lower due to a clerical mistake which was an unintentional and substantial arithmetical error or an unintentional omission of a substantial quantity of work, labor, material or services, provided that the bidder files a claim of right to withdraw the bid in writing within two business days after the bid opening and that the withdrawal does not result in awarding the contract on another bid to the same bidder, the bidder's partner or a business owned by or in which the bidder has a substantial interest.[9] The act also addresses the re-awarding of contracts where a bid has been withdrawn and the right of the municipality to contest the withdrawal.

Prevailing Wage. The Pennsylvania Prevailing Wage Act, *43 P.S. 165-1 et seq.*, requires that the prevailing wage be paid to all workers under public works contracts with estimated total project costs in excess of $25,000. The act requires that a municipality obtain a prevailing wage determination from the Department of Labor and Industry for a public works project.[10] The determination must be made a part of the bidding documents and the advertisement of the invitation to bid must contain a statement setting forth the requirement for prevailing wages.[11] The act also provides that a municipality must require all contractors to provide payroll certifications for the workers on the job before final payment is disbursed.[12] When using federal grant or loan monies for construction projects, wage rates set by the U.S. Department of Labor under the Davis-Bacon Act must be used.

Steel Products Procurement. Any public works project that involves the use of steel must comply with the Steel Products Procurement Act, *73 P.S. 1881 et seq*., which requires the use of steel manufactured in the United States. This requirement may be waived if the head of the municipality, in writing, determines that the necessary steel products are not produced in the United States in sufficient quantities to meet the requirements of the contract.

Financial Security. The financial security requirements for public works contracts in excess of $5,000 are governed by the Public Works Contractors' Bond Law, *8 P.S. 191 et seq*. Before a public works contract exceeding $5,000 is awarded to a prime contractor, the contractor must furnish financial security guaranteeing performance of the contract in the amount of 100 percent of the contract price and guaranteeing payment to suppliers of labor and materials in the amount of 100 percent of the contract price.[13] Financial security may take one of the following forms: (1) bonds executed by one or more surety companies legally authorized to do business in the Commonwealth of Pennsylvania; (2) irrevocable letters of credit issued by a federal or state chartered lending institution; or (3) restrictive or escrow accounts in a federal or state chartered lending institution.

Miscellaneous Procurement Procedure Legislation

The following legislation impacts on procurement procedure and should be considered as circumstances dictate.

Antibid-Rigging. The Antibid-Rigging Act, *62 Pa.C.S. 4501 et seq*., prohibits conspiracy and collusion to commit bid-rigging of public contracts. Section 4507 provides that a municipality may require bidders to execute noncollusion affidavits. Although noncollusion affidavits are not required, it is a good practice to incorporate them into the bidding documents. Noncollusion affidavit forms may be obtained from the Pennsylvania Attorney General's Office.

Non-Receipt of Bids. If a municipality advertises an item for bid and receives no bids, under *73 P.S. 1641 et seq.*, the item must be rebid. If again no bids are received, the municipality may purchase the item from a single source within 45 days of the date of the second advertisement.

Joint Purchasing. Any purchases undertaken jointly or cooperatively among municipalities must be done in accordance with *53 Pa.C.S. 2301 et seq*. Although many of the requirements are identical to the enabling legislation of the various municipalities, *Sections 2308 through 2314* should be reviewed carefully to assure compliance.

Competitive Price Quotations

The enabling legislation for various types of municipalities contains provisions that address the need to obtain competitive price quotations when a purchase exceeds a certain dollar amount, typically $4,000. In order to comply, written or telephonic price quotations must be obtained from at least three qualified and responsible vendors or contractors. If the price quotations are obtained by telephone, a written record must be made containing at least the date of the quotation, the name of the vendor or contractor and its representative, the address and telephone number of the vendor or contractor, a description of the good, service or public work which was the subject of the quotation and the price. If fewer than three qualified vendors or contractors exist in the market area within which it is practicable to obtain quotations, a memorandum should be prepared explaining the situation. Generally, all memoranda and other documentation must be kept on file by the municipality for a period of three years.

Sole Source Acquisition

Sole source acquisition involves procuring a good, service or public work from one supplier or source without competition because the cost does not exceed a certain dollar threshold (generally $4,000), which requires competitive bidding or quotations, or the type of purchase falls within one of the exceptions to competitive bidding or quotations as set forth in the enabling legislation. Although there are a number of exceptions to competitive bidding and quotations, several are more common and tend to be pervasive among all municipalities.

Piggyback Purchasing. The Administrative Code[14] provides that municipalities may purchase materials, supplies and equipment in accordance with contracts entered into by the Commonwealth of Pennsylvania, Department of General Services. This enables municipalities to "piggyback" on state contracts for purchasing purposes regardless of the dollar amount involved. Not only does this negate the need for competitive bidding with all of its associated expenses; it may result in a lower purchase price based on the economies of scale created in a statewide marketplace. Further statutory detail on cooperative purchasing is found at *62 Pa.C.S. 1901 et seq.*

Personal or Professional Services. Generally, purchases involving personal or professional services requiring peculiar skills or abilities or intellectual, scientific or aesthetic elements need not be the subject of competitive bidding or quotations. This particular exception has been held to include the services of, inter alia, attorneys,[15] engineers,[16] architects,[17] and pharmacists.[18] More recent cases have seemingly expanded the exception and held that it includes real estate appraisal services,[19] homeless services,[20] and standardized testing services.[21]

Patented and Manufactured Items. Where particular types, models, pieces of new equipment, articles, apparatus, appliances and vehicles are patented and manufactured, the purchase of the item need not be competitively bid or quoted. To qualify under this exception, however, the type or class of article sought by the municipality must be manufactured by only one company under patent or copyright protection, and there can be no competitor manufacturing the same type of class of article.[22]

Emergency Purchases. Municipalities may purchase from a single source without competitive bidding or quotations in the event of an emergency. There must be immediate danger to the public health, safety and welfare that the emergency procurement of a good or service would abate. It is important, however, that a

dangerous condition in fact exist. The mere potential for an emergency would not permit a sole source purchase where competitive bidding or quotation would otherwise be required.[23]

Public Utility Services. Traditionally, municipalities have been able to purchase utility services such as electricity and natural gas without competitive bidding due to their status as monopolies. Since the advent of competition in the public utility area, however, municipalities may be required to competitively bid electricity and other utilities which are competing in a manner similar to bidding gasoline and fuel oil.

Competitive Negotiations

This form of procurement is an optional method, which may be used for the purchase of personal or professional services. Competitive negotiations involves a process that will protect against favoritism, improvidence, fraud and corruption and encourage competition. The proposer in competitive negotiations, unlike the bidder in competitive bidding, is selected according to its qualifications and ability to perform the work, as well as price. This provides a municipality with a higher degree of flexibility without sacrificing the ability to obtain the lowest price when contracting for services.

The competitive negotiation process begins with the publication by the municipality of a Request for Proposals (RFP). The RFP should identify all of the significant criteria which will be used in the evaluation of the proposals, including price, and their relative importance. The RFP should also state that the award need not be made to the lowest proposer. The information provided to the proposers with the RFP should include all submission requirements, procedures and mechanisms for technical evaluation of proposals, selection criteria of the proposers for oral interviews and determination of the successful proposer.

It is important to remember that although competitive negotiations is an optional form of procurement, once a municipality elects to proceed in this manner it must follow the procedures and rules set forth in the RFP regardless of whether the municipality was obligated to engage in any competitive process at the outset.[24]

Pitfalls

As is the case with any legal procedure or process, there are common pitfalls with which a solicitor must deal. Set forth below are several potential hazards of which to be aware.

Lack of Uniform Procurement Code. Despite the adoption of the Commonwealth Procurement Code (which at one point during the legislative process included municipalities on a voluntary basis), there is no single procurement code that applies to all municipalities. Each type of municipality has its own mini-procurement code, which has certain quirks that cause it to vary slightly from the procedures of other municipalities. Although some of the basic elements of procurement are transferable between municipalities, care must be taken to review the applicable enabling legislation to assure that all details are addressed properly.

In addition, other pieces of legislation which affect procurement for all municipalities are scattered over several titles of Purdon's Statutes, thereby increasing the possibility of oversight. This now includes Part II of Title 62 of the Pennsylvania Consolidated Statutes. It is necessary, therefore, to be extremely thorough when researching and reviewing procurement law.

Strict Construction. The courts in Pennsylvania are known for strictly construing the legislation governing procurement. It is imperative that every "i" is dotted and every "t" is crossed when structuring a procurement. Shortcuts are dangerous, especially in a soft economy when disgruntled bidders and their attorneys look for any error on which they can hang their hats.

Drafting Specifications. Drafting bidding documents, in particular specifications for a procurement is, to a degree, an art. Be sure that the specifications are drafted by a qualified individual who is familiar with the

needs of the municipality and the item or service sought. Do not use, wholesale, a particular manufacturer's specifications in the preparation of bidding documents. As stated earlier, unduly restrictive specifications are trouble.

Conclusion

It is relatively clear to see that the seemingly simple process of purchasing goods and services is not so simple for municipalities. The need to review numerous statutes and cases, many of which are quite detailed and fact-specific, coupled with the art of drafting bidding documents can test even the most experienced solicitor. A proper approach, however, including thorough research of the applicable law and great attention to detail, will yield a successful procurement.

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XIV. 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 into the Consolidated Statutes by the Act of December 19, 1996 (the "Act").[2] This Act 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 the Act, this type of borrowing is defined as "lease-rental debt" and is regulated by the Act. 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 the Act and remains free of restriction. Now most types of local government entities other than authorities are covered by the Act. This includes counties, school districts, and all the various classes of municipalities.[3]

Borrowing limits under the Act 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 the Department of Community and Economic Development (the "Department"), but no approval is required.

For all other types of borrowings to be legal, the issuer of the debt must file certain papers with the Department and obtain its approval of the proceedings prior to issuing the debt. Three main documents must be filed with the Department. 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. The Act specifies the contents of these advertisements and provides that its requirements govern, notwithstanding any other statute.[10]

The second important document for the Department 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 the Department, 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 the Department 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 the Department does not approve a filing or take other action within 20 days after the filing, it is deemed approved.[15] Usually, the Department 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 the Department approval is received.

A simplified procedure is available for small borrowings for capital purposes defined as less than under $100,000 or 30 percent of the borrowing base 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 (the "Code") and prior laws. There are a number of requirements which 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 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 Service. 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 Code 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 Code requires that any arbitrage profits be returned to the U.S. Treasury every 5 years. These so-called arbitrage rebate provisions are complicated also, but there are various exemptions which may apply. The most important of these exemptions relates to issuers which 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]

This field is so complicated, 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 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 regulate issuers of municipal bonds directly. 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 to one of several National Recognized Municipal Securities Information Repositories ("NRMSIR's").

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, major employee problems or other factors which could affect the ability of the issuer to repay the debt.

More recently, the SEC amended Rule 15c2-12 to impose an additional requirement applicable to all bonds issued after the beginning of 1996. This amendment prohibits underwriters from underwriting a new issue of bonds unless they have received from the issuer prior to the date of issue a continuing disclosure agreement. When bonds are guaranteed by another municipal entity it becomes an "obligated person" and also must sign such an 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 provided to each NRMSIR. The obligation is modified if all "obligated parties" on an issue have less than $10 million 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 the NRMSIR's if any one of certain specified types of events of defaults or other major transactions occur.

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 a full partner in the borrowing procedures, and therefore should review all draft documents as well as participating in all meetings relating to the financing. In some instances he 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 opinion.

The solicitor should not give an opinion on a municipal borrowing unless he is certain that he understands 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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11. 53 Pa. C.S.A. §8024.
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XV. 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. The power of the Commonwealth to exercise eminent domain is an inherent attribute of sovereignty, but to be called into operation there must be 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 benefitted."[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[17] should also be consulted for its potentially damaging effect on any taking.

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.

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 ("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" condemnor or 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 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 required.[20] Filing "Declaration of Taking" begins the condemnation. The Code details where to file,[21] the contents required,[22] what notice and service of notice is required,[23] and what involvement other interest holders, such as mortgagees, should have.[24]

The date the Declaration of Taking is filed establishes the price ,[25] 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.[26]

Section 1-522 of the 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. While the Code at § 1-611 provides for delay damages to be 6 percent per year, courts have held that the 6 percent may be found to be constitutionally insufficient, warranting a higher interest rate such as prevailing commercial loan rates.[27]

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, are due to the condemnee. The Code attempts to insure 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."[23]

"Just Compensation" and Ancillary Damages

The Code includes a chapter (Article VI) 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 § 1-602(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 such condemnation and as affected thereby, and such other damages as are provided in this Code."

The just compensation definition is built on the concept of "fair market value." Section 1-603 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, or replacement cost approach. These three approaches are in fact mentioned in Section 1-705, 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.[28] 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.[29]

There are certain ancillary damages mentioned in the Code. The Code 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.[30] The Code also covers relocation expenses, transfer taxes and other closing costs, limited reimbursement of the condemnee's professional fees (up to $500, or more in the case of de facto condemnation), increased mortgage costs and delay damages.[31] 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.[32] 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 Code, and the courts, continue to find temporary access difficulties to be noncompensable.[33]

Not all takings cause damages. Some cause benefits. Section 1-606 addresses the sometimes perplexing mandate, found in § 1-602, 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 1-606 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." Dispute over damages is 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."[34]

The Board of View

The first step is for an aggrieved party to file a petition for the appointment of viewers.[35] Either 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.[36] The court shall "promptly" appoint three viewers, one of whom shall be an attorney and chairman of the board. The Code provides various specifics on notice, required viewing of the premises, etc., all found in Code, Article V. Any objection to the petition must be filed within twenty days, and, again, is to be "promptly" resolved by the court.[37]

The viewers may hear claims for removal expenses, business dislocation damages and moving expenses either separately or together with the just compensation issue.[38] There is a right to subpoena.[39] The Code provides for appointment of a trustee ad litem or a guardian ad litem if appropriate.[40] In "de facto" condemnations the burden of proof is clearly on the landowner; in filed condemnations the burden is not as clear.[41] The Board is not bound by formal rules of evidence.[42] According to the present Code, the condemnor "shall" present expert testimony on damages; the condemnee has no such requirements.[43]

The board must issue a concise report, the requirements of which are found in § 1-511. The report is to be filed within 30 days of the final hearing, § 1-513, and some prior notice to the parties or attorneys, intended to facilitated pre-filing corrections, is also included in the Code.

Appeal to Court

The 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 their award, are not admissible at court trial.[44] Evidence of a property's tax assessment value is also precluded.[45] 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.[46] 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 Code provides that the condemnee shall be plaintiff and the condemnor the defendant, regardless of who filed the appeal.[47] Either party may compel a viewing of the property by the fact finder.[48] Where the court has viewed the property, it may disregard expert testimony in reaching a valuation figure.[49] 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.[50] 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 .[51]

The court's disposition of objections to the Board of View's determinations, other than amount of award, by confirming, modifying or changing the report as part of its statutory duty to preliminarily determine such objections, constitutes "a final order."[52] 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 Code, but not for non-jury trials.[53] 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."[54]

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.[55] Precondemnation 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 precondemnation publicity might be.[56] "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 Code.[57]

"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,"[58] and even regulatory deprivation of all economically valuable use of property is noncompensable if the challenged limitation was possible under the state's common law nuisance provisions.[59] 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.[60]

Temporary regulatory takings are theoretically possible.[61] There was a bit of a scare in Pennsylvania when a county court, and then the Commonwealth Court, allowed convening of a Board of View to determine damages occasioned by inability to operate a quarry while the landowner successfully challenged the ordinance which precluded that use; the State Supreme Court however, reversed and confirmed that is not the type of damage comparable as a government taking.[62] Compensable regulatory takings remain rare.

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18. See *Com. Dept. of General Services v. Ogontz Area Neighbors Association*, 483 A.2d 448, 505 Pa. 614, 1984, where Commonwealth DPW was turned from condemning a site for a mental health center due to local zoning.
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37. 26 P.S. 1-504.
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XVI. Municipal Investments

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Local governments have lost a significant amount of money in unwise investments around the nation. As an example, some school districts in Pennsylvania suffered significant investment losses in 1997.

Here are a few suggestions for solicitors on ways to avoid investment problems:

Know which investments are legal under your code. Make sure you revisit the statute which describes the legal investments for each type of municipal entity you represent. These are: Townships of the First Class - *53 P.S. §56705.1*; Townships of the Second Class - *53 P.S. §68204*; Boroughs - *53 P.S. §46316*; School Districts - 24 P.S. §4?440.1; Municipal Authorities - *53 P.C.S. §5611*; Cities of the 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*; and Counties of the Third through Eighth Classes - *16 P.S. §1706*. The investment of bond proceeds by local governments (except municipal authorities) is governed by the Local Government Unit Debt Act - *53 P.C.S. § 8224*. If you represent an authority, also check the investment provisions in your Trust Indenture.

Encourage your clients to develop a sound business practice. Almost all of these investment statutes state that the local government shall invest its moneys "consistent with sound business practice." Some of the statutes go on to set standards for prudent investing; they provide that the local government should "exercise 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."

These standards can be restated in a more straightforward manner: (1) avoid speculation; (2) do not do anything you would not do with your own money; (3) do not invest in any investment you do not understand; and (4) understand the return that can be earned and the risks involved and err strongly on the side of preserving the safety of the principal.

Most 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.

Certificates of Deposit: FDIC Insurance. If you invest in certificates of deposit, or if you deposit moneys in other accounts in banks or savings and loans, make sure you understand how your deposit is protected. There are two ways your deposit can be protected: Federal Deposit Insurance Corporation (FDIC) insurance or a pledge of collateral.

A local government investing in an insured institution located in the same state is insured by FDIC up to $100,000 for all demand deposits combined (checking accounts bearing no interest) plus up to $100,000 for all time and savings deposits combined (such as NOW accounts, money market accounts, savings accounts and certificates of deposit). For example, a Pennsylvania local government with $30,000 in a demand checking

account, $60,000 in a savings account and $60,000 in a certificate of deposit in a Pennsylvania institution would be insured for the full $30,000 in the checking account and for $100,000 of the $120,000 in the savings account and certificate of deposit.

A Pennsylvania local government is insured by FDIC up to $100,000 for all accounts combined in an out-of-state insured institution. For example, a Pennsylvania local government with $30,000 in a demand checking account, $60,000 in a savings account and $60,000 in a certificate of deposit in an insured institution located in Maryland would be insured up to $100,000 and would be uninsured for $50,000.

With respect to 457 Plans, the general rule is that FDIC insures each participant in the plan up to $100,000 provided the institution meets the minimum capital requirements of FDIC. Be sure to check that the institution which holds your 457 Plan funds meets these minimal capital requirements.

Certificates of Deposit: Collateralization. If a local government has money in an institution in excess of the FDIC insurance limit, the local municipal entity should make sure that the institution pledges the institution's own securities as collateral for the deposit. Usually the securities pledged by the institution are U.S. Government securities.

The collateral pledge can be handled in one of two ways. The government unit and the institution can enter into a two-party agreement under which the institution pledges securities to secure only that local government's deposits, or the institution can pledge a pool of securities to secure on a joint basis the deposits of many local government units pursuant to Act 72 of 1971 72 P.S. §3836?1 et seq.

Whichever way your deposits are collateralized, make sure that:

- you have a written agreement with the institution regarding the collateral pledge;
- the pledge is approved by the institution's board of directors or loan committee, and such approval is reflected in the institution's minutes and is kept continuously as an official record of the institution;
- the market value (not just the face value) of the pledged securities is tested frequently and is at least equal to the amount of the deposits plus accrued interest;
- the pledged securities are U.S. Government Securities; and
- you request from the bank monthly reports on the amount of your deposit, the identity of the collateral and the market value of the collateral.

Act 72 was amended by Act 139 of 2000 to permit the depository institution to secure its public deposits with a Federal Home Loan Bank letter of credit rather than with a pledge of collateral.

U.S. Government Securities. Local entities may invest in securities of the U.S. Government or its agencies or instrumentalities which are backed by the full faith and credit of the United States (such as U.S. Treasury notes, bills or bonds and securities of the Government National Mortgage Association). These are the most secure investments in the world. Credit risk is not a concern, but you still need to be concerned about market risk. Make sure that you match the length of the investment to your anticipated need for the money. If you have to sell a U.S. Government or any other investment security before its maturity, you take the risk that a rise in interest rates will lower the market value of your security, and you could be facing a loss.

Local governments may also invest in short-term obligations of the U.S. Government or its agencies or instrumentalities, whether or not such securities are backed by the full faith and credit of the U.S. Government. These generally are also very secure investments. “Short term” is usually understood to mean one year or less.

Be sure you fully understand the nature of the particular federal agency security before investing. You may be approached to buy collateralized mortgage obligations (“CMOs”) or individual principal or interest payments of a larger security (“STRIPS”). These are the sorts of investments which are subject to significant market risk. If you are being offered very high interest rates, it is only because you are subjecting yourself to increased risk with respect to your initial deposit. There is no free lunch.

You can also buy U.S. Government securities under a repurchase agreement with a bank or a broker. You purchase the securities subject to an agreement to sell them back to the other party on a specific date at a specific price. If you do enter into repurchase agreements, be sure (1) the other party is a solvent institution, (2) you sign a written agreement, (3) the securities are actually delivered to your custodian and are held in an account in your name, and (4) the securities have a market value at least equal to the amount of your purchase price plus accrued interest.

Other Investments. If you invest in local government investment pools or in investment companies which in turn invest in U.S. Government securities and certificates of deposit, you should obtain and read the prospectus carefully to make sure you understand how your money is being invested.

Certain counties and cities are authorized to invest in commercial paper, which consists of short-term, unsecured notes of private corporations. The credit worthiness of the corporate issuers varies considerably, and you should only invest in commercial paper if you are very familiar with that market.

This article is intended to provide general information and should not be relied upon as advice in specific situations.

XVII. Municipal Retirement Plans

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Introduction; Types of Plans

Scope of Article; Retirement Plans
This article discusses retirement plans of Pennsylvania municipalities and municipal authorities, other than those of first class, second class, or second class-A cities. A retirement plan is a compensation program for employees which primarily provides for benefits to be paid after an employee terminates his/her employment with the governmental employer, often not until the attainment of retirement age. Retirement plans often contain some supplementary benefits, such as disability benefits and death benefits, but they must be incidental to the primary purpose of providing retirement income for the employee. This article does not discuss post-retirement medical benefits, life insurance, disability insurance or other benefit programs which may be available to employees.

Defined Contribution vs. Defined Benefit
Defined Contribution. A "defined contribution" plan is a plan which establishes individual accounts for each participating employee. Employer contributions to the plan are allocated to these individual accounts, and the accounts are credited with their proportionate share of the earnings of the plan's investments. When the employee becomes eligible to receive benefits, the amount of benefits to be received is equal to the balance in the employee's plan account. Typically, the employer's contributions to the plan for an employee's account are based on a formula of X percent of the employee's compensation.

Defined Benefit. A "defined benefit" plan is a plan which guarantees each qualifying employee a particular benefit when the employee retires and is able to begin receiving benefits. The benefit is based on a fixed formula. For example, one type of formula would provide that each employee receives x percent of his final monthly compensation (or the average of his monthly compensation during the last 3 or 5 years of employment) each month from retirement until death. Another formula is a flat dollar amount per month. A third type, known as a unit benefit formula, provides a benefit of x percent of final monthly compensation multiplied by the number of years of service for the governmental employer. There are no individual accounts in this plan. Employer contributions to the plan are based on the amount of money which will be needed to pay the benefits when they will finally become due.

Comparison. In a defined contribution plan, the amount of employer contributions to the plan is defined, and the amount of benefits paid depends on the amount of contributions over the years and the investment performance of the plan. If the investments do especially well, the employees will receive more benefits; if they do poorly, the employees will receive fewer benefits. Either way, the municipality-employer knows what its obligations to the plan are. In a defined benefit plan, on the other hand, the amount of benefits to be paid to each employee is defined, but the amount of contributions to be paid depends on factors such as whether the employee eventually qualifies for benefits, how long he/she lives, and the investment performance of the plan. If the investments do especially well, the benefits to the employee remain the same, but the employer will not be required to contribute as much to the plan; if the investments do poorly, the employer will be required to contribute more to the plan than it anticipated in order to fund the promised benefits.

A defined benefit plan, particularly one which provides a benefit based on final compensation but not on years of service, tends to favor older employees over younger employees. It also permits the award of benefits for years of service before the date the plan was adopted, which would not be possible under a defined contribution plan. As such, it can provide an instant full benefit for employees never covered by a pension plan who are close to retirement age. Of course, the municipality will have to pay for that benefit.

Qualified vs. Nonqualified

Qualified Plans. A "qualified" plan is a retirement plan which meets the applicable requirements of Internal Revenue Code § 401 et seq. Qualification provides two principal tax advantages: (i) employer contributions to the plan on behalf of employees are not taxable to employees until benefits are actually distributed; and (ii) income earned by the qualified plan is exempt from taxation until distributed. The other main advantage of qualified plans, the deductibility of employer contributions to the plan, is not relevant to tax-exempt governmental entities. Because of these significant tax advantages for employees, it is important that government plans satisfy the applicable federal qualification requirements.

Section 457 Deferred Compensation Plans. One type of retirement plan which is not a qualified plan but which has special status under federal law is a Deferred Compensation Plan under Section 457 of the Internal Revenue Code. This type of plan is only available to state and local governments and tax-exempt organizations. This type of plan also provides that employees are not taxed on plan contributions until the benefits are actually distributed.

Contributory vs. Non-Contributory

A contributory plan is one in which the employees are required to contribute some amount, usually a percentage of compensation, to the plan in order to receive a benefit. If contributions are made and the employee does not eventually qualify for regular benefits, the employee is able to receive a return of the contributions. Generally under federal law, employee retirement contributions are made on an "after-tax" basis – the contributions are made to the plan after taxes have been withheld from the employee's gross income. Later, when benefits are paid, no further income taxes will be due on those amounts. However, under a special tax provision applicable to government plans, certain employee contributions may be designated and treated as being employer contributions. *Internal Revenue Code § 414(h)(2)*. As a result, income taxes on those contributions are not paid at the time the contributions are made, but only when benefits are paid.

Union vs. Non-Union

Where employees are members of a collective bargaining unit, retirement benefits are clearly subject to collective bargaining, and changes cannot be implemented unilaterally.

One odd result of collective bargaining is a line of cases that effectively allows a municipality to exceed the powers granted to it by statute, which runs counter to the usual rule in Pennsylvania. If a collective bargaining arbitration award grants a benefit which is beyond the powers of the municipality under state law, the municipality may appeal to have the court overturn the award of an illegal benefit. *City of Washington v. Police Department of the City of Washington,* 436 Pa. 168, 259 A.2d 437 (1969). However, if the municipality does not file a timely appeal, or if the municipality voluntarily agrees to an illegal benefit in a collective bargaining agreement, the courts have held the municipality to be estopped from questioning the propriety of the benefit at a later time. *Appeal of Upper Providence Police Delaware County Lodge #27 Fraternal Order of Police*, 514 Pa. 501, 526 A.2d 315 (1987); *City of Wilkes-Barre v. Wilkes-Barre Firefighters Association*, 596 A.2d 1271 (Pa. Commw. 1991). Providing illegal benefits could jeopardize state pension aid, result in a surcharge action or create other problems, and so a municipality should be very careful in extending pension benefits by acquiescing in a collective bargaining agreement or arbitration award.

State Enabling Laws

Uniformed Plans – Police – Fewer than Three Officers

Boroughs. 53 P.S. §§ 46131–46137 provides that a Borough which has a police force of fewer than three members may establish a pension fund or purchase retirement annuity contracts for its police officers. The terms of the retirement plan are left to the discretion of the Borough.

First Class Townships. A First Class Township which has a police force of fewer than three members must establish a police pension fund or pension annuity under 53 P.S. §§ 56409–56415 (unless a private organization already has done so). Most terms of the retirement plan are left to the discretion of the Township, although (i) employee contributions are limited to 4 percent of pay; (ii) if a minimum period of service is prescribed for benefits, the minimum may not be less than 20 years; and (iii) benefits must be based on the final monthly pay of the officer, up to a maximum of 50 percent of final monthly pay.

Second Class Townships. A Second Class Township which has a police force of fewer than three members may, but need not, establish a police pension fund or pension annuity. Most terms of the retirement plan are left to the discretion of the Township, although employee contributions are limited to 3 percent of pay, and a minimum of 20 years of continuous service is required in order to receive benefits. *53 P.S. § 66910*.

Act 600. In addition to the pension authorizations under the municipal codes, Act 600 of 1955 (discussed below) provides that a borough, town or township which maintains a police force with fewer than three full-time members may establish a pension fund in accordance with the provisions of that Act.

Police – Three or More Officers

Boroughs, Towns, Townships. Act 600 of 1955, 53 P.S. §§ 767–778, provides that each borough, town and township which maintains a police force of three or more full-time members shall establish a police pension fund or pension annuity to provide the benefits required or authorized by the Act. The Act also applies to regional police departments created by such municipalities. However, any pre-1996 regional police department plans may continue to use any eligibility or benefits provisions found in those plans even if they do not comply with Act 600, until those provisions are amended. *53 P.S. § 777.1*. Act 30 of 2002 made major changes to Act 600.

- **Superannuation Retirement Benefit.** Full retirement benefits under an Act 600 plan may only be provided after a minimum period of service of 25 years in the same municipality or regional police department, and the attainment of age 55 (or age 50 if the municipality agrees and the reduction is actuarially sound). *53 P.S. § 769*. Act 600 preempts any ordinance which permits earlier benefits, such as an ordinance permitting retirement at age 60 with 20 years. *Perruso v. Township of Palmer,* 141 Pa. Commw. 520, 596 A.2d 292 (1991). The only exception is for an ordinance in effect prior to October 21, 1965, which permitted retirement after 20 years (and attainment of age 60 or 55). *53 P.S. § 769, 2nd paragraph*. No reduction below age 55 is permitted if there has not been an actuarial study, *Cheltenham Township v. Cheltenham Police Department*, 8 Pa. Commw. 360, 301 A.2d 430 (1973), although arbitrators may award the reduction conditioned on a finding of feasibility in a pending actuarial study, *Chirico v. Board of Supervisors for Newtown Township*, 518 Pa. 572, 544 A.2d 1313 (1988). Service in a regional police department is generally recognized for a municipality which leaves the regional department, service in a municipal department is generally recognized for a regional police department which includes the municipality; police service for a municipality which provides police protection for another municipality may be recognized by the second municipality if it establishes its own department; and police service for a municipality which disbands its department and contracts for service from another municipality may be recognized by the second municipality. *53 P.S. § 770(d)-(f)*. An Act 600 plan is a defined benefit plan, and the amount of monthly normal retirement benefits is equal to 50 percent of the officer's final average monthly compensation during a period of no more than the last 60 months of employment or less than the last 36 months of employment. However, if the officers are covered under federal Social Security, the monthly benefits may be reduced by up to 75 percent of the old-age social security benefits received by the officer for service

credited under the plan. *53 P.S. § 771(c)*. The social security reduction is only made if the individual retiree is eligible for social security benefits, so that a retiree over age 65 who earns enough compensation to be ineligible for social security benefits until age 70 will not have his police pension reduced until he reaches age 70. *DeLellis v. Borough of Verona*, 541 Pa. 3, 660 A.2d 25 (1995). If employee contributions have ever been made to the plan based on total compensation earned by an officer, including overtime and extra work pay, then benefits must be based on total compensation earned by the officer, including overtime and extra work pay. Otherwise, benefits may be based solely on base compensation. *Borough of Nazareth v. Nazareth Borough Police Association,* 545 Pa. 85, 680 A.2d 830 (1996), aff'g 161 Pa. Commw. 354, 636 A.2d 1289 (1994); *Palyok v. Borough of West Mifflin,* 526 Pa. 324, 586 A.2d 366 (1991); *Borough of Beaver v. Liston,* 76 Pa. Commw. 619, 464 A.2d 679 (1983).

- **Military Service Credit**. In determining the number of years of service completed by a police officer for a municipality, certain service in the military of the United States may be counted. Any officer, who enters the military after having been employed by the municipality, and then returns to the municipality within 6 months after separating from the military, automatically receives pension credit for all military time. *53 P.S. § 770(a)*. In addition, under a 1990 amendment, a municipality is authorized, but not required, to permit officers to purchase credit for military service prior to initial employment with the municipality. No more than 5 years of service may be so purchased, and the purchase price per year is equal to the average normal cost of borough and township police pension plans (up to a maximum of 10 percent), multiplied by the officer's average compensation during his/her first 3 years of employment, plus interest at 4.75 percent compounded annually from the date of hire to the date of purchase. *53 P.S. § 770(b)*. Notwithstanding the above rules, no credit may be granted for military service that is credited for any other government pension, except the non-regular service pension under 10 U.S.C. Ch. 67. *53 P.S. § 770(c)*.

- **Length of Service Increments.** In addition to the regular 50 percent pension benefit, a municipality may pay length of service increments for years of service beyond 25 years. However, the maximum length of service increment is $100 per month. *53 P.S. § 771(f)*.

- **Cost of Living Adjustments**. An Act 600 plan may also provide cost of living adjustments for members receiving retirement benefits, subject to four restrictions: (1) the cost of living increase for any member may not exceed the percentage increase in the Consumer Price Index since the last year the member worked; (2) the total benefits received by the member, including cost of living adjustments, may not exceed 75 percent of final average salary; (3) the total cost of living increase shall not exceed 30 percent, and (4) the benefit may not impair the actuarial soundness of the plan. *53 P.S. § 771(g)(1)*. However, if the assets of the plan are greater than the present value of all future plan benefits, the benefits of a person who has received pension benefits for at least 20 years may be increased to the greater of 100 percent of average compensation or $10,000 per year. *53 P.S. § 771(g)(2)*.

- **Early Retirement Benefit.** Besides the normal 25-year service benefit, Act 600 permits a municipality to provide an early retirement benefit for officers who terminate after 20 years of service but before qualifying for a normal superannuation retirement benefit. The early retirement benefit begins as of the date elected by the officer with benefits that are the actuarial equivalent of a partial benefit. The officer will receive a partial benefit equal to the normal 50 percent benefit (based on his final compensation while working) multiplied by a fraction whose numerator is the number of years of service actually worked, and whose denominator is the number of years of service he/she would have worked if he/she had continued in employment until the normal retirement date. *53 P.S. § 771(i)*

- **Vested Benefit.** Act 600 also permits a municipality to provide a "vested" benefit for officers who terminate after having completed at least 12 years of service but before qualifying for a normal superannuation retirement benefit. If the benefit is provided, an officer who terminates must file an election to vest benefits within 90 days after the termination. Then, when the former officer reaches the date on which he would have been able to retire with a full normal retirement benefit, he will receive a partial benefit equal to the normal 50 percent benefit (based on his final compensation while working) multiplied by a fraction whose

numerator is the number of years of service actually worked, and whose denominator is the number of years of service he/she would have worked if he/she had continued in employment until the normal retirement date. *53 P.S. § 771(h)*. Since the vested benefit is discretionary, a municipality may provide a vested benefit for some officers yet exclude those officers who terminate employment because of death from receiving the benefit. *Waros v. Borough of Vandergrift*, 161 Pa. Commw. 538, 637 A.2d 231 (1994).

- **Disability Benefits**. After Act 2002-30, municipalities must provide disability benefits for officers who become permanently disabled in a service-related injury. The benefits must be paid at a rate no less than 50 percent of the officer's salary at the time the disability was incurred, less the amount of any social security disability benefits received for the same injuries. *53 P.S. § 771(e)(1)*. The Pennsylvania Supreme Court has ruled that Act 600 does not authorize or permit the payment of disability benefits to an officer who becomes disabled in a non-service related injury while not on duty. *Chirico v. Board of Supervisors for Newtown Township*, 518 Pa. 572, 544 A.2d 1313 (1988). Similarly, time missed from work for a non-service related disability cannot be counted towards the years of service required for a normal or vested pension. *Borough of Ellwood City vs. Ellwood City Police Department Wage and Policy Unit*, 805 A.2d 649 (Pa. Commw. 2002).

- **Death Benefits for Survivors.** After Act 2002-30, an Act 600 plan must provide for death benefits. 53 P.S. § 767 provides that the death benefit is in an amount no less than 50 percent of the pension the police officer was receiving or would have been receiving had he been retired at the time of his death. Thus, if an officer was not actually receiving pension benefits at the time of his death, or could not have been receiving benefits at that time if he had retired earlier, there is no regular death benefit authorized under § 767. *Cooley v. East Norriton Township,* 78 Pa. Commw. 11, 466 A.2d 765 (1983); *Kerr v. Borough of Union City*, 614 A.2d 338 (Pa. Commw. 1992). (If an officer dies, never received any pension benefits and is not entitled to death benefits, his designated beneficiary or estate is entitled to a refund of his employee contributions, plus interest.) Regular death benefits are paid only to a surviving spouse or minor children. If there is a surviving spouse, benefits are paid until the spouse's death. (Prior to Act 2002-30, a spouse lost benefits if he/she remarried.) If there is no surviving spouse, or if the spouse dies, benefits are paid to any children until they attain age 18, or if attending college, through age 23. Act 2002-30 also requires municipalities to immediately start paying death benefits to surviving spouses (but not children) of officers who died before April 17, 2002, so long as the spouses were not remarried as of that date. Act of April 17, 2002, Pa. Laws 239, No. 30, § 4. In addition, 53 P.S. § 771(e)(2), as amended by Act 2002-30, now requires a death benefit for families of members "killed in service" at a rate equal to 100 percent of the officer's salary at the time of his/her death.

- **Employee Contributions.** Police officers are required to contribute a portion of their compensation to the police pension plan to provide for their benefits. The minimum amount of member contributions which may be set by a municipality is 5 percent (lower if there is a social security offset to pension benefits), and the maximum is 8 percent. A municipality is only permitted to contribute local money to the plan after officers pay at least the 5 percent minimum required contributions. However, the municipality may reduce or eliminate the employee contributions by an annual ordinance or resolution. Prior to Act 2002-30, contributions could only be reduced or eliminated if state aid and any other sources (other than municipality contributions) were sufficient to cover the actuarial requirements of the plan. However, that requirement has now been eliminated. *53 P.S. § 772(c)*. Thus Act 111 arbitrators are now free to require the annual elimination of employee contributions.

  If an officer dies before his/her pension has vested, the officer's surviving spouse (or if none, the children under age 18 or attending college through age 23) are entitled to repayment of the member's contributions plus interest or other increases in the value of the member's investment in the pension fund, unless the officer has designated a different beneficiary. *53 P.S. § 767(a)(5)*. Act 2002-30 added this language. Under a different provision in effect before Act 2002-30 and not amended thereby, if an officer dies or terminates employment and is not qualified to receive any benefits under the plan, he (or his beneficiary/estate) is entitled to receive a return of the employee contributions made to the plan, plus interest. *53 P.S. § 775*.

A municipality may not return past employee contributions to officers who are currently working or are eligible to receive plan benefits, and cannot be ordered to do so by an Act 111 arbitrator. *Stroud Township v. Stroud Township Police Association,* 157 Pa. Commw. 228, 629 A.2d 262 (1993), appeal denied, 536 Pa. 649, 639 A.2d 35. However, the legislature has grandfathered returns of employee contributions made under collective bargaining agreements or arbitration awards prior to February 23, 1994. *53 P.S. § 772*; *Borough of Jim Thorpe v. Jim Thorpe Borough Police Department*, 682 A.2d 73 (Pa. Commw. 1996). Retired officers who are eligible to receive pensions are not entitled to a refund of their contributions, even if the plan is over-funded. *Lee v Municipality of Bethel Park*, 722 A.2d 1165 (Pa. Commw. 1999).

Third Class Cities. Retirement benefits for police in Third Class Cities are provided in the Third Class City Code at 53 P.S. § 39301–39309.

- **Superannuation Retirement Benefit**. Full retirement benefits under the plan may only be provided after a minimum period of continuous service, which must be no less than 20 years. The city may also prescribe a minimum age for normal retirement benefits, which age may not be less than 50, but it is permissible to have a pension after 20 years of service regardless of the officer's age. 53 P.S. § 39302; *City of Reading v. Reading Lodge Fraternal Order of Police No. 9*, 15 Pa. Commw. 344, 325 A.2d 675 (1974).

  A police pension plan is a defined benefit plan, and the amount of monthly normal retirement benefits is a percentage of the officers final monthly rate of pay (or, if greater the highest average salary earned during any 5-year period of employment). The percentage selected may not exceed 50 percent. *53 P.S. § 39303(a)*. However, if a Third Class City (or one operating under an optional charter or home rule charter) had a benefit greater than 50 percent in effect on June 19, 2002, it is not bound by the 50 percent limitation. *53 P.S. § 39303(a.1)*.

  Unlike an Act 600 plan, the compensation used to compute benefits in a Third Class City Police Plan is the fixed amount of compensation paid at regular, periodic intervals by the city (which presumably does not include overtime and extra duty work). *53 P.S. § 39309*.

- **Military Service Credit.** A City may permit an officer to purchase up to 5 years of pre-employment military service to be counted towards the minimum service requirements of the plan. The purchase price is equal to the amount that he/she would have paid to the pension fund had he been a member during the period for which he/she desires credit, plus the amount which is the equivalent of the contributions of the City on account of such military service. *53 P.S. § 39302*.

- **Service Increments.** In addition to the regular pension benefit, every contributing officer is entitled to receive a service increment for years of service beyond the minimum number required for the normal retirement benefit. The service increment is equal to 1/40 of the normal retirement benefit of the officer, multiplied by the number of years beyond the minimum number required for a normal retirement benefit (not counting any years after age 65), up to a maximum of $100 per month. A contributor must make an additional contribution for this service increment, up to a maximum of $1 per month. No contributions are required after age 65. After June 19, 2002, a city may agree to make service increments of more than $100 per month (but not more than $500 per month), provided that the extra contribution made by the contributor is also proportionately increased (but not more than $5 per month). *53 P.S. § 39303(b).*

- **Cost of Living or other Post-Retirement Adjustments**. A city may, in its discretion, increase the pensions of persons receiving pension benefits after the termination of services. The increases may be based on the cost of living, but the total benefit may not exceed 50 percent of the current salary being paid patrolmen of the highest pay grade. *53 P.S. § 39303.1*.

- **Vested Benefit**. Besides the normal retirement benefit, the Third Class City Code permits a city to provide a "vested" benefit for officers who complete at least 12 years of service but do not qualify for a normal superannuation retirement benefit. If the benefit is provided, an officer who terminates must file a written

notice of intent to vest benefits no less than 30 days before terminating employment, he/she must be in good standing with the department, and he/she must specify the proposed termination date. Then, when the former officer reaches the date on which he would have been able to retire with a full normal retirement benefit, he/she will receive a partial benefit equal to the percentage used for the normal retirement benefit, multiplied by the officer's compensation (based on the greater of the monthly salary of the officer at the time he/she filed the notice to vest or the highest average salary earned during any 5-year period of employment), and multiplied by a fraction whose numerator is the number of years of service actually worked, and whose denominator is the number of years of service he/she would have worked if he/she had continued in employment until the normal retirement date. *53 P.S. § 39302.1*.

- **Disability Benefits.** The Third Class City Code provides that any officer who becomes permanently and totally disabled due to injuries sustained in the line of duty shall be deemed to be fully vested and eligible for immediate pension benefits regardless of the number of years of service. The pension fund is then subrogated to any worker's compensation or Heart and Lung Act (*53 P.S. § 637*) payments to the officer. *53 P.S. § 39303.2*. A police officer who becomes totally disabled due to injuries or mental incapacities not in the line of duty and is unable to perform the duties of a police officer may be entitled to a pension of 25 percent of his/her annual compensation, if he/she has less than 10 years of service, and a pension of 50 percent of annual compensation if he/she has ten or more years of service. *53 P.S. § 39303(d)*. A person is considered disabled due to injuries sustained in the line of duty if such injuries are a substantial contributing factor to the disability; they need not be the sole cause of the disability in order for benefits to be paid. *Miller v. Bethlehem City Council*, 760 A.2d 446 (Pa. Commw. 2000).

- **Death Benefits for Survivors.** A police plan in a Third Class City must offer limited death benefits. The mandatory minimum death benefit is in an amount equal to 50 percent of the pension the police officer was receiving or would have been receiving had he been retired at the time of his death. (Required death benefits, therefore, do not apply to a person who has not yet qualified to start receiving pension benefits. See discussion of Act 600 death benefits, above.) A benefit equal to the pension the police officer was receiving or would have been receiving had he been retired at the time of his death may be provided. *53 P.S. § 39303(c)*. Further, death benefits may be provided with regard to an officer who has less than 10 years of service and dies due to injuries not in line of duty, in an amount of 25 percent of his annual compensation. For death after 10 years of service, the benefit may be 50 percent of the officer's annual compensation. A disability pension may be continued as death benefits after the death of the disabled officer. *53 P.S. § 39303(d)*. (Strangely, the statute does not seem to authorize death benefits for an officer with less than 10 years of service who dies due to injuries in the line of duty, but does authorize them for such an officer who dies due to injuries not in the line of duty.) Death benefits are paid only to a surviving spouse or minor children. If there is a surviving spouse, benefits are paid until the spouse's death. If there is no surviving spouse, or if the spouse dies, benefits are paid to any children under age 18 until they attain age 18. *53 P.S. §§ 39301, 39303(c)*. If an officer dies not in the line of service before being entitled to a pension, and has no surviving spouse or minor children, his estate is entitled to a refund of his employee contributions, without interest. *53 P.S. § 39308*.

- **Employee Contributions**. Police officers may be required to contribute up to 4 percent of their compensation to the police pension plan to provide for their benefits, plus up to an additional 1 percent of their compensation to provide for death benefits to surviving spouses and minor children. *53 P.S. § 39301*. If an officer terminates employment and is not qualified to receive any benefits under the plan, he is entitled to receive a return of the employee contributions made to the plan, without interest. *53 P.S. § 39308*. It would appear under a 1990 amendment to the Third Class City Code that, unlike an Act 600 plan, the compensation on which employee contributions is based (and which is used to compute benefits) is the fixed amount of compensation paid at regular, periodic intervals by the city (which presumably does not include overtime and extra duty work). *53 P.S. § 39309*. A city (or an arbitrator) may eliminate member contributions. *City of Butler v. City of Butler Police Department, FOP Lodge No. 32*, 780 A.2d 847 (Pa. Commw. 2001).

Uniformed Plans – Firefighters

Retirement benefits for paid firefighters in Third Class Cities are provided in the Third Class City Code at 53 P.S. § 39320–39328. There are no firefighter pension provisions in the Borough and Township Codes. The benefits are to be provided through annuity contracts or a firemen's pension fund, which shall be managed by a board of managers specified in the statute. If an organization for the benefit of paid firefighters already exists which has charge of pension funds, the city pension shall not be established without a 2/3 vote of the members of the organization to transfer the pensions to the city pension. *53 P.S. § 39320*.

- **Superannuation Retirement Benefit**. Full retirement benefits under the plan may only be provided after a minimum period of continuous service, which must be no less than 20 years. The city may also prescribe a minimum age for normal retirement benefits, which age may not be less than 50, but it is permissible to have a pension after 20 years of service regardless of the officer's age. *53 P.S. § 39321*. Service does not include time as a volunteer firefighter in the city prior to the establishment of a paid city fire department. *Local 1400, Chester City Fire Fighters Ass'n v. Nacrelli,* 30 Pa. Commw. 242, 373 A.2d 472 (1977). A firefighter pension plan is a defined benefit plan, and the amount of monthly normal retirement benefits is 50 percent of the firefighter's final monthly salary (or, if greater the highest average salary earned during any 5-year period of employment). 53 P.S. § 39322(a). "Salary" includes only base compensation—fixed compensation paid at regular, periodic intervals. 53 P.S. § 39328. However, if a Third Class City (or one operating under an optional charter or home rule charter) had a benefit greater than 50 percent in effect on June 19, 2002, it is not bound by the 50 percent limitation. *53 P.S. § 39322(a.1)*.

- **Military Service Credit**. A City may permit a firefighter to purchase up to 5 years of pre-employment military service to be counted towards the minimum service requirements of the plan. The purchase price is equal to the amount that he/she would have paid to the pension fund had he been a member during the period for which he/she desires credit, plus the amount which is the equivalent of the contributions of the City on account of such military service. *53 P.S. § 39321*.

- **Service Increments**. In addition to the regular pension benefit, every contributing firefighter is entitled to receive a service increment for years of service beyond the minimum number required for the normal retirement benefit. The service increment is equal to 1/40 of the normal retirement benefit of the firefighter, multiplied by the number of years beyond the minimum number required for a normal retirement benefit (not counting any years after age 65), up to a maximum of $100 per month. A contributor must make an additional contribution for this service increment, up to a maximum of $1 per month. No contributions are required after age 65. After June 19, 2002, a city may agree to make service increments of more than $100 per month (but not more than $500 per month), provided that the extra contribution made by the contributor is also proportionately increased (but not more than $5 per month). *53 P.S. § 39322(b).*

- **Cost of Living or other Post-Retirement Adjustments**. A city may, in its discretion, increase the pensions of persons receiving pension benefits after the termination of services. The increases may be based on the cost of living, but the total benefit may not exceed 50 percent of the current salary being paid firefighters of the highest pay grade. *53 P.S. § 39322.1*.

- **Vested Benefit**. Since 1993, a vested benefit may be provided by the city to persons with at least 12 years of service. The benefit commences at the time the employee would have qualified for a normal pension, the amount is based on the employee's monthly pay at the time of termination, and is a fraction of the normal retirement formula with the numerator being the number of years of service completed and the denominator being the number of years which the employee would have completed had he/she continued to work until normal retirement. *53 P.S. § 39320.1*.

- **Disability Benefits.** It would appear under the Third Class City Code that in-service disability benefits are permitted, but not required, and the amount of such benefits are discretionary. *53 P.S. § 39322(a)*.

- **Death Benefits for Survivors.** A firefighters plan in a Third Class City must offer limited death benefits. The mandatory death benefit is in an amount equal to the pension the firefighter would receive, and does not depend on whether the firefighter was qualified for benefits at the time of his death. *Appeal of Stanton,* 499 Pa. 151, 452 A.2d 496 (1982); *cf. Chirico v. Board of Supervisors for Newtown Township,* 518 Pa. 572, 544 A.2d 1313 (1988) ("in the service" vs. "in service"). Death benefits are paid only to a surviving spouse or minor children. If there is a surviving spouse, benefits are paid throughout the spouse's lifetime, without regard to remarriage. *53 P.S. § 39321*. Although spousal benefits are mandatory, it would appear that benefits to minor children under age 18 are optional, and the amount of benefits to be provided is discretionary. *53 P.S. § 39322(a)*. If an officer dies not in the line of service before being entitled to a pension, and has no surviving spouse or minor children entitled to benefits, his estate is entitled to a refund of his employee contributions, without interest. *53 P.S. § 39327*.

- **Employee Contributions**. Firefighters may be required to contribute up to 4 percent of their compensation to the firefighter pension plan to provide for their benefits, plus up to an additional 1 percent of their compensation to provide for death benefits to surviving spouses and minor children. *53 P.S. § 39320.* If a firefighter terminates employment and is not qualified to receive any benefits under the plan, he is entitled to receive a return of the employee contributions made to the plan, without interest. *53 P.S. § 39327*. The compensation on which employee contributions are based is the base pay, which includes holiday pay, but does not include overtime or special duty pay. *Thoder v. City of Bethlehem*, 37 Northampton Co. L. Rev. 42 (Pa. C.P. 1965). In addition to the regular employee contributions, firefighters may also be required to contribute up to $1/month (until age 65) to help pay for service increments to pension benefits. *53 P.S. § 39322(b)(2)*.

Pennsylvania Municipal Retirement System
In addition to the Act 600 and Third Class City police pension plans, a municipality may elect to cover its police officers and firefighters under the Pennsylvania Municipal Retirement System, provided that they are agreeable to such coverage.

Special Ad Hoc Municipal Police and Firefighter Postretirement Adjustments.
Under a special act adopted in 1988, police officers and firefighters who began receiving a retirement or disability pension benefit before January 1, 1985 and who have terminated all active employment with the municipality as a police officer or firefighter are entitled to receive a special increase in their benefits based on their status as of January 1, 1989. If, on that date, such a person was retired at least 20 years, the increase is $150/month; if retired at least 10 years, $75/month; if totally disabled but retired less than 10 years, $50/month; if retired at least 5 years, $25/month. *53 P.S. § 896.101 et seq*. The state will reimburse the municipality for this benefit (but, naturally, that will reduce the amount of state aid available overall for regular benefits).

A similar act was adopted in 2002. Act 2002-64, amending 53 P.S. § 896.101 et seq. This new adjustment applies to police officers and firefighters who began receiving a retirement or disability pension benefit before January 1, 1996 and who have terminated all active employment with the municipality as a police officer or firefighter are entitled to receive a special increase in their benefits based on their status as of July 1, 2002. The formula is more complicated than for the original 1989 adjustment, and the statute should be consulted. It is based on the number of the years the retiree worked for the municipality and the number of years that the retiree has been retired as of January 1, 2001. Once again, the state will reimburse the municipality for this benefit (but, naturally, that will reduce the amount of state aid available overall for regular benefits).

Non-Uniformed

As a general matter, the enabling acts authorizing non-uniformed pension plans do not specify any eligibility, benefit, type of plan, or other requirements for such plans. The provisions of such plans are left to the discretion of the local governing body. However, the Third Class City Code provides only for two very detailed

types of plans. In addition to the plans authorized under the municipal codes, each municipality and authority may join the Pennsylvania Municipal Retirement System

Third Class Cities. Retirement benefits for non-uniformed employees in Third Class Cities are provided in two separate subdivisions of the Third Class City Code. One plan (which shall be referred to as an "Original" Plan in this summary) is provided under subdivision (c) of Article 43, 53 P.S. §§ 39340–39353. The other (which shall be referred to as an "Optional" Plan in this summary) is provided under Article 43-A, 53 P.S. §§ 39371–39384. Under both plans, the composition of the administering board is set forth by statute. *53 P.S. §§ 39341, 39373.*

- **Superannuation Retirement Benefit.** Retirement age under both the Original Plan and the Optional Plan is set at 60 years with 20 years of service. *53 P.S. §§ 39342, 39374(a)*. However, other provisions of the Optional Plan statute effectively allow a person to qualify for a normal retirement pension in that Plan at age 55 after 20 years of service, with payments commencing immediately upon retirement. *53 P.S. § 39374(a), (b)(1).*

  Both the Original and the Optional Plan are defined benefit plans. The basic amount under the Original Pension is 50 percent of the employee's highest average salary during any 5-year period of employment. *53 P.S. § 39343.* The basic amount under the Optional Pension is 50 percent of the employee's highest average salary during any 5-year period of employment or, if higher, 50 percent of the employee's rate of pay at retirement. *53 P.S. § 39374(a)*. However, under both Plans, the basic amount will be reduced by 40 percent of the primary insurance amount of social security benefits to be received by the employee based on service for the city if the employee was covered by federal Social Security in his city position. *53 P.S. §§ 39343, 39374(c)*. The city pension board may eliminate this reduction if it offers employees the chance to make a payment to the board equal to the difference between the amount of employee contributions actually paid to the plan and the amount of employee contributions which would have been made if they were paid on all compensation at the contribution rate for salary in excess of the social security wage limit. After any such election, future employee contributions on all compensation earned must be paid at the rate for salary in excess of the social security wage limit. *53 P.S. §§ 39343.1, 39374(c.1)*.

- **Military Service Credit**. There is no provision for the purchase of military service in the Original Plan. The Optional Plan permits an employee to purchase up to 6 years of service for active duty with the armed forces of the United States (which apparently does not include pre-employment military service) at the rate of 3 percent of his last monthly salary prior to entering the military service multiplied by the number of months purchased. *53 P.S. § 39371*.

- **Service Increments.** There is no provision for service increments in the Original Plan. Under the Optional Plan, the city may provide a service increment benefit in additional to the normal retirement benefit. The service increment benefit is equal to 1/40 of the normal retirement benefit multiplied by the number of complete years worked in excess of 20 years, not counting any years after age 65. The service increment benefit is only paid if the employee chooses to contribute an additional 0.5 percent of his/her salary to the pension fund. The contributions may be withdrawn or refunded after termination of employment if no service increment will be paid. *53 P.S. § 39374(e)*.

- **Cost of Living or other Post-Retirement Adjustments.** There is no provision for a post-retirement adjustment in the Original Plan. Under the Optional Plan, a city may, in its discretion, increase the pensions of persons receiving pension benefits after the termination of services. The increases may be based on the cost of living, but the total benefit may not exceed 50 percent of the current salary being paid to non-uniformed employees of the highest pay grade. *53 P.S. § 39374.1*.

- **Vested Benefit**. Under the Original Plan, any person who has completed 20 years of service, but terminates employment voluntarily or involuntarily before age 60, may receive a normal retirement benefit commencing at age 60, provided he/she continues to make monthly payments to the plan in the amount of the last monthly employee contribution before termination. *53 P.S. § 39343.*

In addition, since 1996, a vested benefit may be provided by the city under the Original Plan to persons with at least 12 years of service. The benefit commences at the time the employee would have qualified for a normal pension, the amount is based on the employee's monthly pay at the time of termination, and is a fraction of the normal retirement formula with the numerator being the number of years of service completed and the denominator being the number of years which the employee would have completed had he/she continued to work until normal retirement. *53 P.S. § 39343.2*.

Under the Optional Plan, any person who completes 20 years of service and voluntarily retires may receive a normal retirement benefit commencing at age 55, provided he/she continues to make monthly payments to the plan through age 55 in the amount of the last monthly employee contribution before termination. *53 P.S. § 39374(a), (b)(1)*. A person who completes 12 years of service, attains age 60, and is involuntarily retired is entitled to receive a normal pension multiplied by a fraction whose numerator is the number of years of service and whose denominator is 20. A person who completes 12 years of service and is involuntarily retired before attaining age 60 is entitled to receive a pension commencing at age 60 in an amount equal to a normal pension multiplied by a fraction whose numerator is the number of years of service and whose denominator is 20. *53 P.S. § 39374(b)(1)*. Finally, the city pension ordinance may provide for a vested benefit for employees who voluntarily terminate after 12 years of service but before 20 years of service, provided they give 30 days notice of the termination date. The amount of the pension is equal to the normal pension multiplied by a fraction whose numerator is the number of years of service and whose denominator is the number of years of service the employee would have had had he/she continued in employment until the minimum retirement date. *53 P.S. § 39374(b)(3).*

- **Disability Benefits.** Under the Original Plan, an employee who becomes totally and permanently disabled from performing the duties of his/her position after 10 years of service and before age 60 is entitled to a full pension, commencing immediately. *53 P.S. § 39343*. Under the Optional Plan, an employee who becomes totally and permanently disabled from performing the duties of his/her position after 15 years of service and before age 55 is entitled to a full pension, commencing immediately. *53 P.S. § 39374(b)(2)*.

- **Death Benefits for Survivors**. Under both Plans, city council may provide for benefits to the surviving spouse of a retiree, or an employee who is killed in the service. If the benefit is provided, it continues until the earlier of the surviving spouse's death or remarriage. The amount of the benefit is 50 percent of the pension the employee was receiving or would have been entitled to had he been retired at the time of his death. *53 P.S. §§ 39343, 39374(d)*.

- **Employee Contributions**. Employees who are covered by the Original Plan and the Optional Plan are required to make contributions to those plans. The contributions for both Plans are 3.5 percent of compensation up to the social security wage limit and 5 percent of compensation over the social security wage limit, if the city has elected to cover its employees under federal Social Security. *53 P.S. §§ 39344.1, 39380.1*. (In the absence of a Social Security election, employee contributions are 2 percent of compensation in the Original Plan and 3 percent of compensation in the Optional Plan, plus up to an additional 1 percent in both plans to fund surviving spouse death benefits. *53 P.S. §§ 39344, 39375.)* If an employee should terminate employment or die and be not qualified for any pension benefits under the plan, he/she (or his/her estate) is entitled to a refund of the employee contributions, without interest. *53 P.S. §§ 39344, 39375.*

Boroughs. The Borough Code explicitly grants Boroughs the right to enter into contracts with insurance companies for annuities or pensions for Borough employees, and to appropriate monies for such purposes, *53 P.S. § 46202(37)*, but does not directly authorize a non-insurance pension fund. Nonetheless, the Borough Code does authorize a special one-half mill property tax to provide for pensions, retirement, or the purchase of annuity contracts for borough employees, *53 P.S. § 46302*, and so would seem to recognize the power to establish a plan. The state Auditor General's office accepts all such plans. In addition, *53 P.S. § 46105* authorizes post-retirement compensation plan in lieu of a pension or retirement system (although treated as a pension plan for funding purposes) for employees too old to advantageously join a pension or retirement system. Employees

are eligible for such a plan after working at least 10 years and retiring after age 60. The maximum benefit is 50 percent of final salary. Contributions must be from the general tax millage and not the special one-half mill tax.

Towns. There is no explicit reference to pensions in the law relating to Incorporated Towns.

First Class Townships. The First Class Township Code authorizes such Townships to enter into contracts with insurance companies to provide annuities or pensions. *53 P.S. §§ 56523, 56563*. The Code does not make any explicit reference to a pension plan not provided through insurance, but the state Auditor General's office accepts such plans. In addition, as for Boroughs, 53 P.S. § 55605 authorizes post-retirement compensation plan in lieu of a pension or retirement system (although treated as a pension plan for funding purposes) for employees too old to advantageously join a pension or retirement system. Employees are eligible for such a plan after working at least 10 years and retiring after age 60. The maximum benefit is 50 percent of final salary. Contributions must be from the general revenue tax millage.

Second Class Townships. The Second Class Township Code expressly authorizes such Townships to contract with an insurance company or otherwise provide for annuities or pensions, and to appropriate such funds as necessary to pay premiums, charges, or costs. *53 P.S. § 66512(e)*. Township Supervisors who are employees of the Township are permitted to participate in such plans to the same extent that other employees are permitted, if the Township auditors approve participation. Once Supervisor-employees are permitted to the join the plan, the auditors cannot rescind the approval; however, thereafter the auditors must approve any change in the rate of contribution or benefit formula of the Township pension plan. Non-employee supervisors may not participate. *53 P.S. § 65606(b)*. No other elected officials may participate in the plan, nor may appointed officials who are not employees of the Township. *53 P.S. § 66512(e)*.

Home Rule Charter Municipalities. No specific form of pension is mandated or authorized under the Home Rule Charter Law. However, a home rule charter municipality is not permitted to diminish the rights of any present or former employee in a pension or retirement system, *53 Pa. Cons. Stat. § 2962(c)(3)*, nor enact any provision inconsistent with any statute enacted before the Home Rule Charter Law affecting the rights, benefits, or working conditions of any municipal employee, *53 Pa. Cons. Stat. § 2962(c)(5)*. Accordingly, a former borough or township subject to Act 600 remains subject to Act 600 when it becomes a home rule charter municipality, and cannot be required by an arbitrator to provide benefits greater than under Act 600. *Municipality of Monroeville v. Monroeville Police Department Wage Policy Committee*, 767 A.2d 596 (Pa. Commw. 2001), appeal denied, 566 Pa. 672, 782 A.2d 551; *Brotherhood of West Chester Police v. Borough of West Chester,* 798 A.2d 797 (Pa. Commw. 2002). Further, no Home Rule Charter municipality may exercise powers contrary to, or in limitation or enlargement of powers granted by acts of the General Assembly which are applicable in every part of the Commonwealth, *53 Pa. Cons. Stat. § 2962(c)(2), (e)*, including, without limitation, the Municipal Pension Plan Funding Standard and Recovery Act (Act 205 of 1984).

Municipality Authorities. The Municipality Authorities Act authorizes authorities to enter into group insurance contracts for the benefit of its employees, and to set up a retirement or pension fund for such employees. *53 Pa. Cons. Stat. § 5607(d)(20)(ii).*

Pennsylvania Municipal Retirement System

Any city, town, township, or municipality authority may elect to join the Pennsylvania Municipal Retirement System ("PMRS") and provide benefits in accordance with that law for its uniformed and/or police and/or firefighters. *53 P.S. § 881.101 et seq.* PMRS is a system administered and managed at the state level, which can obtain the investment and administrative cost benefits of a large fund, and which can provide for portability of benefits from one municipality to another. For example, under PMRS, an employee who is a member of PMRS in one municipality and who leaves that municipality to work for another municipality which is a member of PMRS will receive benefits based on combined years of service.

PMRS provides a standardized plan for non-uniformed employees under Article II of the Pennsylvania Municipal Retirement Law, *53 P.S. § 881.201 et seq*., a standardized plan for police and firefighters under Article III of the Law, *53 P.S. § 881.301 et seq.*, and an optional plan providing different or additional benefits under Article IV of the Law, *53 P.S. § 881.401 et seq*.

An Article IV plan may not provide for any benefits in excess of or minimum member contribution rates less than those available to that municipality for the class of employees covered by the plan under any existing law pertaining to the establishment of a retirement or pension system, except to the extent excess investment earnings are so allowed under the PMRS law. *53 P.S. § 881.403*.

A municipality which has joined PMRS under Article II, III, or IV may enter into an Article IV contract with PMRS to increase benefits, provided that the contract does not provide benefits or employee contribution rates which are prohibited as described in the preceding paragraph of this summary. No new Article IV contract may decrease PMRS benefits. If any proposed contract would require increased employee contributions to fund increased benefits, it must be approved in writing by at least 75 percent of the member employees. *53 P.S. §§ 881.215, 881.317, 881.413.*

PMRS plans are funded by municipal contributions actuarially determined by PMRS and any required employee contributions. The municipality must amortize any under-funding of pension liabilities for service prior to joining PMRS over a period not exceeding 30 years, at the option of the municipality. (The municipality may transfer over funds from a pre-existing pension plan when it joins PMRS). Funding for newly accruing liabilities during the life of the PMRS plan is determined by PMRS at a rate necessary to fully fund the plan on an actuarial basis (and may be expressed as a percentage of payroll). *53 P.S. §§ 881.205, 881.306, 881.404*. In the case of a police or fire plan, any state aid payments must be used by a municipality first to reduce unfunded past service liabilities. *53 P.S. §§ 881.306, 881.404.*

A municipality which joins PMRS under Article III is deemed to comply with Act 600 and any other statute requiring the creation of a pension or retirement system for police or fire fighters. *53 P.S. § 881.315.*

A municipality which joins PMRS may only withdraw from the system if it has been enrolled for at least 5 years, has met all financial obligations to the system, and has received the approval of at least 75 percent of the municipal employees affected by the withdrawal. *53 P.S. §§ 881.214, 881.316.*

Election to Join PMRS When A Pension System Already Exists. When a municipality already has one or more existing pension systems, it cannot elect to join PMRS unless 75 percent of all the members of each pension system elect to become members of the PMRS system. (However, if the municipality only proposes to provide PMRS coverage for employees not covered by an existing pension system, the municipality may elect PMRS if 75 percent of the employees not covered by an existing pension system elect to join PMRS.) After the municipality elects PMRS, any employees who did not initially elect PMRS may still elect to transfer their benefits to the PMRS plan within 3 years after the municipality joins PMRS. Any employees who do not elect to transfer coverage will remain covered under the existing local pension plans. *53 P.S. §§ 881.113, 881.203, 881.303, 881.402.*

Separate Plans for Each Class of Employees; Plan Coverage. When a municipality joins PMRS, separate arrangements must be made for each class of employees—non-uniformed employees, police officers, and paid firefighters. In a plan for non-uniformed employees, all permanent non-uniformed employees (other than elected officials and temporary or seasonal employees, and other than those covered by an existing pension plan who do not elect to join PMRS) must be covered. Each municipality may determine whether membership for elected officials and temporary or seasonal workers will be compulsory, optional (if elected within 1 year after hire or joining of PMRS), or prohibited. In a plan for police officers, all officers must be covered, and in a plan for fire fighters, all fire fighters must be covered. (However, the Pennsylvania Supreme Court has determined that a municipality may cover newly-hired employees under an Article III PMRS plan, while keeping existing employees in a local plan, and do so without submitting the PMRS plan to a 75 percent vote of

existing members. *City of Allentown v. Local 302, International Association of Fire Fighters*, 511 Pa. 275, 512 A.2d 1175 (1986).) If a municipality establishes a policy of placing new employees in a probationary status, it may refrain from enrolling those employees for up to one year from the date of hire, but then service credits will not be earned for the time of probation. *53 P.S. §§ 881.203, 881.303, 881.402*.

Service Credit. In an Article II or Article III plan, in determining the number of years of service completed by an employee for PMRS purposes, all years of service in the employ of the municipality are counted, both before and after joining PMRS, and regardless of whether the service is continuous. (However, a municipality may limit credit for service prior to joining PMRS to 10 years. *53 P.S. § 881.205(1)*. A person who leaves the employ of one member municipality and later is employed by another member municipality has credit under Article II and Article IV equal to the total service for both municipalities. Liability for pension costs is prorated by PMRS between the two municipalities. Military service may also be purchased, if it was served during time of war, armed conflict, or national emergency. Intervening service in the military after at least 6 months of municipal employment is credited so long as the employee returns to municipal employment within 6 months after discharge, and either pays his employee contributions during active military service, within 30 days after returning to employment, or in salary reductions agreeable to PMRS plus interest after his return to employment. Up to five years of other military service may also be purchased, if the employee subsequently works at least 5 years for the municipality. The purchase price is equal to the employee's basic contribution rate and the municipality's normal contribution rate for the years purchased, times the number of years purchased, plus interest from date of employment to date of purchase. *53 P.S. §§ 881.204, 881.305.* Past service credit (prior to joining PMRS), and credits and purchase prices for allowable military service in an Article IV plan is as provided in the Article IV contract. *53 P.S. § 881.403(12), (13)*.

Employee Contributions. Employees covered by an Article II plan are required to contribute to the plan, via payroll deduction, 3 percent of their compensation up to the social security wage limit, plus 6 percent of their compensation in excess of the social security wage limit. (However, persons who joined the plan before January 1, 1979 may pay the rate applicable on their entry into the plan, if lower.) An employee may increase his final pension by making employee contributions for years of service before the municipality joined PMRS (except to the extent the municipality has obligated itself to pay for such prior member contributions). The payments may be made in a lump sum, or through payroll deduction in an amount not less than 1/3 of the regular employee contributions. *53 P.S. § 881.206*.

Employee contributions under an Article III plan are in a uniform amount not to exceed 8 percent of compensation. In the case of an employee covered by Social Security, the employee contribution on the portion of compensation up to the social security wage limit is reduced by 40 percent of the FICA tax on employees (not including the portion of the tax attributable to disability coverage). *53 P.S. § 881.307*.

Mandatory employee contributions under an Article IV plan are determined by the Article IV contract. In addition, an Article IV contract may provide for additional voluntary employee contributions to increase the employee's pension. *53 P.S. §§ 881.405, 881.403(10), (12).*

When the municipality joins PMRS, each employee is entitled to receive credit for all amounts contributed by the employee under any pre-existing local retirement plan. *53 P.S. § 881.113, 881.203, 881.303, 881.402.*

Superannuation Retirement Benefit. In the case of an Article II plan, the superannuation retirement age is 65; in the case of an Article III plan, that age is 55. An Article IV plan may provide for a different age. *53 P.S. § 881.102*. In determining benefits, the "final salary" of an employee is the average amount of compensation earned by the employee in the 3, 4, or 5 year period for which compensation was the highest. The number of years is as determined by the municipality. In an Article IV plan, the contract may provide a different definition of "final salary." *53 P.S. § 881.102*. The "prior salary" of an employee is the compensation earned by the employee during the year before the municipality joined PMRS. *53 P.S. § 881.102.*

Upon reaching superannuation retirement age, an Article II member may retire and receive equal monthly payments for the remainder of his/her life in an amount equal to the sum of (a) payments of equivalent actuarial value to the amount of employee contributions made to the plan, plus interest; (b) 1/250 of the portion of his final salary up to the social security wage limit multiplied by the number of years of service while a member of the PMRS plan; (c) 1/125 of the portion of his final salary in excess of the social security wage limit multiplied by the number of years of service while a member of the PMRS plan; (d) 1/250 of the portion of his prior salary up to the social security wage limit multiplied by the number of years of service prior to joining PMRS (unless limited to 10 years by the municipality); (e) 1/125 of the portion of his prior salary in excess of the social security wage limit multiplied by the number of years of service prior to joining PMRS (unless limited to 10 years by the municipality); (f) 1/250 of the portion of his prior salary up to the social security wage limit multiplied by the number of years of service prior to joining PMRS for which the municipality has obligated itself to pay past member contributions; and (g) 1/125 of the portion of his prior salary in excess of the social security wage limit multiplied by the number of years of service prior to joining PMRS for which the municipality has obligated itself to pay past member contributions. However, the maximum benefit shall be equal to 50 percent of the employee's final salary plus the equivalent actuarial value to the amount of employee contributions made to the plan, with interest. *53 P.S. § 881.208*.

Upon reaching superannuation retirement age, an Article III member may retire and receive equal monthly payments for the remainder of his/her life in an amount equal to the sum of (a) payments of equivalent actuarial value to the amount of employee contributions made to the plan, plus regular interest, plus excess interest earned on his employee contributions; (b) 1/100 of his final salary multiplied by the number of years of service while a member of the PMRS plan; (c) 1/100 of his prior salary multiplied by the number of years of service prior to joining PMRS; reduced by 40 percent of the social security primary insurance amount received by the employee when he qualifies to receive it which is based on wages earned for service covered by the PMRS plan. However, the maximum benefit shall be equal to 50 percent of the employee's final salary plus the equivalent actuarial value to the amount of employee contributions made to the plan, with interest. Notwithstanding these basic rules, any person who was a member of an Act 600 police plan will be entitled to retire at the age provided under the Act 600 plan, and will be entitled to a total benefit equal to that provided under Act 600. *53 P.S. § 881.309*.

Upon reaching superannuation retirement age, an Article IV member may retire and receive the benefits specified in the Article IV contract. *53 P.S. §§ 881.407, 881.403(1), (2), (7)*.

Termination of Service. If an Article II or III member terminates employment, voluntarily or involuntarily, prior to superannuation retirement age, or dies without any death benefits, he/she (or his/her beneficiary or estate) will be paid the full amount of his/her employee contributions, plus regular interest and excess interest earned thereon, unless he/she has vesting or involuntary retirement rights and exercises those rights. Upon a later return to service with the same municipality, he/she will be restored to his rights as of the date of the first termination if he/she repays the contributions and interest to the plan. *53 P.S. §§ 881.207(a), (d); 881.308(a), (d)*.

If an Article IV member terminates employment, voluntarily or involuntarily, prior to superannuation retirement age, or dies without any death benefits, he/she (or his/her beneficiary or estate) will be paid the full amount of his/her employee contributions, plus regular interest and excess interest earned thereon (if provided in the Article IV contract), unless he/she has early retirement rights and exercises those rights. Upon a later return to service with the same municipality, he/she will be restored to his rights as of the date of the first termination if he/she repays the contributions and interest to the plan. *53 P.S. §§ 881.406(a), (e); 881.403(3)*.

Early Retirement and Vested Benefits. Under an Article II or III plan, if a member is terminated involuntarily after 8 years of service, or voluntarily after 24 years of service, but before superannuation age, he/she is entitled either to a return of employee contributions and interest, or an immediate benefit of equal monthly payments for life of equivalent actuarial value to the sum of employee contributions plus interest, and the

present value of a superannuation retirement benefit commencing at superannuation retirement age. In addition, a person with at least 12 years of service who terminates before superannuation age may elect within 90 days after the termination to vest his benefits until he attains superannuation retirement age. After vesting, an employee may later elect a return of member contributions and interest, a superannuation retirement benefit commencing at superannuation retirement age, or, if involuntarily terminated or voluntarily terminated after 24 years, an immediate early retirement benefit. If he/she dies before receiving the benefits, the employee contributions and interest through date of death will be paid to his beneficiary or estate. *53 P.S. §§ 881.210, 881.213, 881.311, 881.314.*

Early retirement and vesting benefits under an Article IV plan are as set forth in the Article IV contract. *53 P.S. §§ 881.408, 881.410, 881.403(2), (5).*

Death Benefits for Survivors. Under an Article II or Article III plan, at the time of superannuation or early retirement, the employee may elect to receive his/her benefits either in a single life annuity, or in a reduced amount of equivalent actuarial value which provides for death benefits. The death benefits may either be (a) payments which continue for the life of his designated beneficiary in the same amount as during the employee's life; (b) payments which continue for the life of his designated beneficiary in an amount equal to 50 percent of the amount paid during the employee's life; or (c) payments (in a lump sum and/or annuity as selected by the beneficiary) of the difference, if any, between the present value of the retirement benefit at the time of retirement and the amount of payments actually made. *53 P.S. §§ 881.211, 881.312*. Death benefits under an Article II plan for persons who have not started receiving a pension are only provided if elected by the municipality in the ordinance adopting the plan, whereas this option does not exist for an Article III plan. If so provided, an employee who is entitled to a superannuation retirement or who has 24 years of service may file an election of death benefit options. (If not is filed, it is presumed he/she elected option (c) above.) Then, if the employee dies before receiving a pension, death benefits are provided as if the employee retired on the day before his death. *53 P.S. §§ 881.209, 881.310.* Note that neither Article II nor Article III provides for death benefits (other than a return of employee contributions and interest) for persons who have not attained superannuation age or completed 24 years of service. Article IV plans provide the same forms of benefit (single life annuity, 100 percent joint and survivor annuity, 50 percent joint and survivor annuity, etc.) for retirees as for Article II and III plans, plus any other forms included in the Article IV contract. Other death benefits are as provided in the Article IV contract. *53 P.S. §§ 881.403(6), 881.409, 881.403(8).*

Disability Benefits. Under an Article II or III plan, if an employee becomes disabled prior to superannuation retirement age such that he/she is unable to engage in any gainful employment, and the employee either has at least 10 years of service or suffered a service-connected disability (one compensable under worker's compensation or the occupational disease act), he may receive immediate monthly benefits for life (or so long as disabled) equal to 30 percent of final salary for a non-service-connected disability and 50 percent of final salary for a service-connected disability, less any payments under worker's compensation or the occupational disease act. Alternatively, a disabled employee with at least 8 years of service may elect early retirement or vested benefits as an involuntary retirement. *53 P.S. §§ 881.212, 881.313.*

Disability benefits under an Article IV plan are as set forth in the Article IV contract. *53 P.S. §§ 881.403(4), 881.411.*

Cost of Living Increases. To the extent permitted for the type of municipality and the class of employees covered, an Article IV plan may include provisions for cost-of-living increases and limitations. *53 P.S. § 881.403(9).*

Excess Investment Earnings. From time to time, if there are excess investment earnings beyond the amounts needed for regular interest and expenses of the plan to fund retirements, the municipalities which are members of PMRS may allocate those excess investment earnings either to provide cost-of-living increases to retirees, or to reduce the employee contributions of active employees. *53 P.S. § 881.104(12), (12.1), (12.2).*

Section 457 Deferred Compensation Plans
72 P.S. § 4521.2 expressly authorizes each political subdivision of the Commonwealth to establish a deferred compensation plan under Section 457 of the Internal Revenue Code for their elected or appointed officers and employees who perform services for the political subdivision. Although the amounts contributed to the plan will be exempt from current federal taxation (as will the earnings thereon), the contributions are subject to current Pennsylvania state income tax and local earned income tax. *72 P.S. § 4521.2(f)*. The state act provides a few requirements for such plans, and should be consulted prior to the implementation of a plan, but basically incorporates the requirements of federal law. (See below).

Excess Benefits
Notwithstanding the statutes described above, many municipal pension plans provide benefits or rights in excess of the statutory restrictions. The Auditor General's office has indicated that it may reduce the amount of state aid a plan may receive to the extent the plan provides excess benefits. A municipality may not unilaterally reduce or eliminate excess benefits from its plan, because this is considered an unconstitutional impairment of the employment contracts of both non-vested and vested employees. *Ass'n of Pennsylvania State College and University Faculties v. State System of Higher Education*, 505 Pa. 369, 479 A.2d 962 (1984). Changes may be made for future employees, but not for past employees, nor even necessarily for current employees. *City of Wilkes-Barre v. City of Wilkes-Barre Police Benevolent Ass'n,* 814 A.2d 285 (Pa. Commw. 2002).

Federal Law

Employee Retirement Income Security Act of 1974 (EISRA)
The reporting and disclosure, coverage, funding, vesting, participating, fiduciary, and others requirements of ERISA to not apply to governmental plans. *ERISA § 4(b)(1), 29 U.S.C. § 1003(b)(1)*.

Internal Revenue Code Qualified Plans
Although ERISA does not mandate that municipalities comply with federal pension requirements, a municipality is still obligated to meet some of those requirements if it wishes to have a "qualified plan" and all the associated tax benefits for its employees. In the past, the federal government has pretty much ignored municipal plans, but the IRS has been sending signals for a few years now that it will begin to scrutinize government plans. With the mish-mash of pension laws in Pennsylvania and the archaic provisions included in them, I suspect that many plans are not technically in compliance with the applicable qualification rules.

A full discussion of the federal qualification standards is beyond the scope of this article. However, since many of the rules which generally apply to pension plans do not apply to or are modified for government plans, a brief summary of some of these rules follows.

Provisions Applicable to Governmental Plans

- Code § 401(a)(1) and (a)(2) requirements that plans must be in writing and that assets must be used exclusively for the benefit of employees and beneficiaries.
- Code § 401(a)(8) rule that forfeitures in a defined benefit plan may not be used to increase benefits.
- Code § 401(a)(17) rule limiting compensation recognized under the plan to $200,000 per year (as adjusted from year to year for changes in the cost of living).
- Code § 401(a)(25) rule requiring defined benefit plans to specify their actuarial assumptions in the plan in a way to preclude employer discretion.
- Code § 401(a)(31) rule requiring plans to make distributions in a direct rollover to an IRA or another retirement plan in certain circumstances.
- Code § 401(m) rules regarding nondiscrimination in employee contributions and employer matching contributions. (Government plans are deemed to have satisfied these requirements for years prior to 1996. *Treas. Regs. § 1.401(m)-1(g)(4)*.) Collectively bargained plans are exempt. *Treas. Regs. § 1.401(m)-1(a)(3)*.

- Code § 503 provisions which deny tax-exempt status to a plan which engages in certain prohibited transactions.

Provisions Applicable to Governmental Plans with Modifications

- The current minimum vesting rules of Code §§ 401(a)(7) and 411 do not apply. Rather, the pre-ERISA Code § 401(a)(7) rule applies: upon termination of a plan, the rights of employees to all benefits accrued and funded, or credited to the employee's accounts, are non-forfeitable.
- Code § 401(a)(9) benefit distribution rules requiring the commencement of benefits by age 70½ or retirement, and regulating the minimum amount of benefits per year and the commencement and payment of benefits after death generally apply to government plans, but a government plan need not actuarially increase benefits to take into account the period after age 70½ in which an employee was not receiving any plan benefits.
- Code §§ 401(a)(16) and 415 maximum benefits/maximum annual additions limitations generally do apply to municipalities. Special rules apply in calculating the maximum benefit for police officers and firefighters when benefits begin before age 62, and for disability and death benefits. *Code § 415(b)(2)(G), (H), (I)*.

Provisions Not Applicable to Governmental Plans

- Code §§ 401(a)(3) and 410 minimum participation and coverage rules.
- Code § 401(a)(4) requirements that plans not discriminate in favor of highly compensated employees.
- Code §§ 401(a)(10) and 416 top heavy plan rules.
- Code §§ 401(a)(11) and 417 qualified joint and survivor annuity rules.
- Code §§ 401(a)(12) and 414(l) plan merger rules.
- Code § 401(a)(13) anti-alienation rules. Although the general qualified domestic relations order (QDRO) rules do not apply because § 401(a)(13) does not apply, distributions from a governmental plan under a domestic relations order may be treated for tax purposes as a QDRO.
- Code § 401(a)(14) benefit commencement rules.
- Code § 401(a)(15) rules prohibiting a reduction of benefits if there is an increase in social security benefits.
- Code § 401(a)(19) rule prohibiting forfeiture of employee contributions when employee contributions are withdrawn by a 50 percent vested employee.
- Code § 401(a)(26) rule requiring each plan to cover the lesser of 50 employees or 40 percent of all employees.
- Code § 401(k) cash or deferred arrangements are prohibited unless adopted before May 6, 1986.
- Code § 412 minimum funding standards.
- Code §§ 4975 and 4980 excise taxes on prohibited transactions and reversions of assets to employers.
- Code §§ 6057, 6058, and 6059 reports and registrations.

Section 457 Deferred Compensation Plans

A section 457 plan is often funded entirely with employee contributions. Employee contributions must be made through payroll deductions, and the employee must authorize the contributions for any given month before the beginning of that month. Individual accounts are established, and the investment of those accounts is often made by the employees (from a limited group of options). The plan allows an employee to defer the payment of taxes on a much larger amount of income saved for retirement than would be available under an IRA. Note: 457 plans are especially popular because 401(k) cash or deferred arrangements are not available to governmental employers. *Code § 401(k)(4)(B)*. Generally, the maximum amount of contributions in any month is the lesser of $12,000 (in 2003, increasing by $1,000 per year to $15,000 in 2006 and thereafter adjusted for changes in the cost of living) or 100 percent of the employee's compensation. However, in the last three years before the employee attains normal retirement age under the plan, the employee can "make up" for contributions not made in earlier years but which would have been permitted for such years (within the maximum limits

applicable to those years). In any case, though, no more than twice the normal maximum dollar amount in effect for a year can be contributed in each of the last 3 years.

Prior to 1996, all contributions and their earnings and investments were treated as the sole property of the municipality, could not be restricted to the provision of benefits under the plan, and had to be subject to the claims of the municipality's general creditors. However, the Small Business Job Protection Act of 1996, P.L. 104-188, now requires all 457 plan assets of government plans to be held in trust. *Code § 457(g)*.

Under recent legislation, benefits from a Section 457 plan may now be rolled over to an IRA or another employer's plan that accepts rollovers (including qualified plans, 403(b) annuity plans, and 457 plans), and participants may elect to make "direct rollovers" to an IRA or such plans to the same extent as under qualified plans. Distributions may not commence until the earlier of separation from service or age 70 1/2 (except in the case of an "unforeseen emergency"), although a plan may provide that distributions will be delayed until at least the normal retirement age. Generally, if an employee has the ability to receive a distribution, it will be treated as having been "made available" to him and will be taxed even if the employee does not actually receive the distribution. Distributions must satisfy the rules of Code § 401(a)(9), which generally require that distributions be made over the life or life expectancy of the participant or the participant and a designated beneficiary (so as to limit the period of tax deferral), and must also be paid in substantially non-increasing amounts (i.e., payments cannot be "back-loaded" to obtain more tax deferral benefits).

Funding and Administration

Administration

For the most part, the Pennsylvania statutes provide very little guidance and impose very few requirements with respect to the administration of municipal pension plans (which includes receipt of contributions, investment of assets [or purchase of annuity contracts], payment of benefits, provision of information, and compliance with reporting requirements). In most cases, management responsibility rests with the municipal governing body, which generally delegates administration to a pension board or committee. In Third Class Cities, specific pension boards are provided under the Code. Obviously, under PMRS, the state provides a board for the administration of the plan. In a plan funded through a trust rather than insurance contracts, trustees are also appointed, and the plan may engage others to assist in the management of the plan, such as attorneys, actuaries (for defined benefit plans), and investment managers. Ultimate responsibility cannot be delegated, however, and so the municipality must oversee the actions of its delegates. Since state aid is so important for most municipal plans, the Department of the Auditor General has filled the void in state law administration standards by conducting periodic audits of municipal plans to insure that the municipality has formally established plan provisions, is properly accumulating, managing, and safeguarding assets, maintaining records, accounting for transactions, utilizing qualified professionals, complying with actuarial reporting and funding requirements, and monitoring the plan's financial records for accuracy and reasonableness.

Funding and Reporting Requirements

In 1984, the General Assembly passed the first comprehensive statute regulating the funding of municipal pension plans in Pennsylvania. The Municipal Pension Plan Funding Standard and Recovery Act, Act 205 of 1984, *53 P.S. § 895.101 et seq*., is designed to insure that municipal plans are properly funded on a current basis, and that unfunded past liabilities are gradually eliminated. It also attempted to insure that state pension aid to municipalities was spent more rationally by permitting municipalities to use state aid for all of their pension plans rather than just their uniformed plans, and by limiting the amount of state aid to the actuarial costs of the plans. Finally, Act 205 established a recovery program for financially distressed municipal pension systems. Act 205 applies to all municipalities, counties, councils of government, and municipality authorities.

Actuarial Studies. One major provision of Act 205 requires municipalities to file actuarial valuation reports for their pension plans every two years. (Financially distressed plans seeking supplemental state assistance must file annual actuarial reports.) These reports provide more detailed actuarial, financial, and demographic information than was generally provided before the Act. Since a defined contribution plan provides benefits based entirely on the amount of contributions made, whereas the amount of contributions necessary to fund the benefits for a defined benefit plan depend on assumptions regarding mortality, salaries, employee turnover, and investment performance, etc., the reports for defined benefit plans require the assistance of an actuary, while those for defined contribution plans do not. *53 P.S. § 895.201 et seq*.

In addition to the biannual reports, a municipality must perform an actuarial cost estimate before adopting any benefit modifications in a pension plan, which must be presented to the governing body before it takes any action. *53 P.S. § 895.305.* An interest arbitration award which does not satisfy the requirements for preparation of an actuarial cost estimate requires the performance of an illegal act and is void to that extent. *City of Erie v. Haas Memorial Lodge #7*, 2002 WL 31432386 (Pa. Commw. 2002).

Minimum Funding. Each year, by the last business day in September, the chief administrative officer of each pension plan must submit a report of the financial requirements of the plan and minimum municipal obligation for the following year to the municipal governing body. *53 P.S. § 895.304*. The minimum municipal obligation for a non-insured defined benefit plan is equal to the "normal cost" of the plan, plus the administrative expenses of the plan, plus an amortization of unfunded past liability, less the anticipated amount of employee contributions, less 10 percent of any plan over-funding. The "normal cost" represents the cost of benefits accruing in the current year, and is determined by multiplying the normal cost percentage set forth in the most recent actuarial report by the payment of the active membership of the plan as of the date the report is provided to the governing body. Unfunded past liability for (a) liabilities existing as the beginning of the 1985 plan year must be amortized over 30 years; (b) initial past liabilities for plans established after 1985 must be amortized over 30 years; (c) changes in actuarial assumptions must be amortized over 20 years; (d) benefit increases for active members must be amortized over 20 years; (e) benefit increases for retired members and other benefit recipients must be amortized over 10 years; (f) actuarial experience gains or losses must be amortized over 15 years (subject to modification in certain circumstances). *53 P.S. §§ 895.302, 895.202(b)(4).* The minimum municipal obligation for a defined contribution plan or a fully-insured defined benefit plan is the municipal portion of the contributions required for the plan. *53 P.S. § 895.303*. The municipality must budget for the entire minimum municipal obligation, although it may also budget for anticipated state aid in a receipts account. However, the minimum municipal obligation must be paid in full regardless of the amount of state aid actually received. *53 P.S. §§ 895.302, 895.303*.

State Aid. The Commonwealth has established a General Municipal Pension System State Aid Program to help fund municipal pension plans. The funds for this program are generated by a tax on foreign fire insurance and casualty insurance company premiums. Since the passage of Act 205, these funds are allocated among municipalities in accordance with a formula which gives each municipality one "unit" for each non-uniformed employee and two "units" for each police officer and paid fire fighter. However, the maximum amount available to any municipality is the pension cost for the year. As a result, a majority of the municipal systems in the state are fully-funded by state aid and do not receive the maximum amount of state aid which would otherwise be available. State aid is only available to cities, boroughs, towns, townships, home rule municipalities which were cities, boroughs, towns, or townships, and Allegheny County; it is not provided to municipality authorities. *53 P.S. § 895.402*.

Financially Distressed Municipal Pension System Recovery Program. In addition to regular state aid, Act 205 established a recovery program for financially distressed plans (as determined under the scoring system in 53 P.S. § 895.503). A "minimally distressed" municipality may aggregate all of its pension trusts into one trust, and increase member contributions as described in 53 P.S. § 895.607(c). In addition, a "moderately distressed" municipality may exceed the municipal contribution limits otherwise established by law, may estab-

lish a revised benefit plan for newly hired employees, increase earned income or property taxes above the maximums which generally apply, and receive Supplemental State Assistance (which expires in 2003). A "severely distressed" municipality must aggregate pension plans into one trust and establish a revised plan for newly hired employees, must prepare, submit, and implement a plan for administrative improvement, may delay the full implementation of the minimum funding standards through 1999, may utilize the other options available to a minimally or moderately distress municipality, and may receive Supplemental State Assistance (which expires in 2003). *53 P.S. § 895.601 et seq*.

Public Employee Pension Forfeiture Act

Notwithstanding the benefits which would are otherwise promised by a municipal pension plan, a public official or public employee who is convicted of, or pleads guilty or no defense to, any one of the crimes designated "crimes related to public office or public employment" forfeits all benefits from a municipal pension, except a return of employee contributions, without interest. Moreover, even that money must first be used by the retirement plan to pay court-order restitution for monetary loss to the government employer arising from the crime related to public office or public employment. *Public Employee Pension Forfeiture Act, 43 P.S. § 1311 et seq.*

The Act was adopted on July 8, 1978. Although its has been held an unconstitutional impairment of the obligation of contract with respect to benefits which accrued and vested prior to its enactment or under an employment "contract" which commenced prior to the enactment of the Act, *see e.g., Miller v. Commonwealth, State Employees Retirement Board*, 50 Pa. Commw. 74, 411 A.2d 1300 (1980), affirmed by equally divided court, 498 Pa. 103, 445 A.2d 88 (1981); *Bellomini v. State Employees' Retirement Board*, 498 Pa. 204, 445 A.2d 737 (1982); *Commonwealth ex rel. Zimmerman v. Officers and Employees Retirement Board,* 501 Pa. 293, 461 A.2d 593 (1983) and 503 Pa. 219, 469 A.2d 141 (1983), a new election, appointment, or change in job classification voluntarily accepted by the public employee constitutes a new contract with an implied consent to the application of the Act, allowing the forfeiture of benefits earned after the "new contract" and also those earned before, *Shiomos v. Commonwealth, State Employees' Retirement Board*, 530 Pa. 481, 626 A.2d 158 (1993); *Apgar v. State Employes' Retirement System*, 655 A.2d 185 (Pa. Commw. 1994). There is no discretion once the triggering conviction or plea occurs. The forfeiture must occur. *Gierschick v. State Employees' Retirement Board,* 733 A.2d 29 (Pa. Commw. 1999), appeal denied, 561 Pa. 702, 751 A.2d 194.

XVIII. Audits and Surcharges

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Since the previous edition of this *Solicitor's Handbook*, our nation has been shocked by events involving major business corporations – such as Enron. Those episodes highlight the need for business to adopt conflict/accounting/auditing standards similar to some of those used by our municipalities. Those statutory standards are designed to protect our citizens from improvident conflicts and/or spending. If similar measures were adopted in the business world it would help protect their employees and investors. Accordingly, as municipal solicitors, we must use and improve our conflict ethics, accounting and auditing procedures to keep our municipalities free of the accounting disease now plaguing our business corporations.

The current Purdon's index under "Audits and Auditors" reveals 3 pages of citations to the various codes and/or legislation regulating the auditing practice of governmental units. They must be searched to find the applicable relevant law.

The Pennsylvania Department of Community and Economic Development has available a publication titled Auditors Guide. It can be obtained from:

> *Governor's Center for Local Government Services*
> *400 North Street, 4th Floor*
> *Commonwealth Keystone Building*
> *Harrisburg, PA 17120-0225*
> *717-783-0176*

The *Auditor's Guide* is a current comprehensive textual compilation of information and statutory references relating to the offices of auditors and controllers in boroughs and townships. Each municipal solicitor should have it available for quick reference.

Auditors

The various municipal codes contain the statutory requirements for auditors and controllers. Accordingly, the appropriate codes must be searched to find the qualifications, terms, compensation etc. applicable to the office. On the questions of conflicts, auditors and controllers may not be elected or appointed to any other municipal office nor should they hold any office in or be employed by the municipal unit being audited. Careful consideration of potential conflicts is a necessity. There are time limitations statutorily set for beginning, completing and advertising audits. Some municipal codes contain procedures for the appointment and employment of independent auditors. Again, each code must be carefully consulted to be certain that all statutory requirements are met.

Legislation also regulates the organization, meeting dates and specific duties of the auditors. Frequently they have other duties placed upon them by statute, such as the fixing of compensation for other persons employed by the municipality. Minute books must be kept and the Sunshine Law requirements apply to the organization meeting and to the meeting when the final audit is presented to the governing body. The actual auditing sessions need not be advertised and are not open to the public.

Audits

In most instances, the annual audit and the annual financial report required by the Department of Community and Economic Development are the same document. All borough and township audits must be submitted on the Annual Audit and Financial Report form provided by the Department.

One of the purposes of municipal accounting is to provide an accurate report of the financial condition of the municipality that is capable of being used for future planning. It is, therefore, essential that all of the funds of the municipality be included in the audit. This encompasses the accounts of district justices and tax collectors so that the amount of fines, costs and taxes paid or due to the municipality can be accurately determined and reported.

When the audit is completed, it is generally required to be filed with the municipality audited, with the Department of Community and Economic Development and with the court of common pleas. Public notice of the completion and/or filing of the audit is customarily advertised and the public is advised of its availability for inspection.

Municipal codes provide the procedure for an appeal from the audit by the municipality, by any officer whose account has been audited or by a registered elector or taxpayer. Frequently bonds are required in order to cover costs that may be incurred by the municipality in the event the appellant fails to obtain a favorable decision.

Surcharges

If the auditors find any errors or omissions that have caused or contributed to the financial loss of the municipality, they have the duty to surcharge the appropriate person(s) for the loss. The surcharge would be contained in their final audit. The amount surcharged must be for the actual loss to the municipality, taking into account what the municipality would have saved if there had been compliance with the relevant legal procedures.

If a surcharge is necessary, the auditors should, together with their solicitor, consider providing notice and an opportunity to explain to the involved person(s) prior to the filing and advertising of the audit containing the surcharge. This action could provide some “due process” and could furnish the auditors with and adequate explanation, or even result in voluntary restitution, thereby saving time and funds. A surcharge will not be sustained if restitution was made and the governing body did not suffer a loss. *Appeal of Auditors of Halfmoon Township, Centre County*, 643A,2d. 754, Pa.Cmwlth. 1994.

Surcharges may be imposed upon public officials who have made illegal payments despite their reliance on the advice of legal counsel or good faith beliefs that they were acting properly. *Doughery v. Borough of Meshoppen*, 612 A.2d 595, Pa.Cmwlth. 1992.

Absent fraud and/or collusion, an appeal from a yearly audit is the exclusive means of challenging municipal expenditures. *Bennett v. Mountainview School Board,* 693 A.2d 651, Pa.Cmwlth. 1997. Should either fraud or collusion be suspected, law enforcement authorities must be immediately notified, since probable cause could exist which would warrant the filing of a criminal complaint.

Conclusion

The author, has, intentionally, omitted lengthy references to statutes and cases in the hope that municipal solicitors will refer to the appropriate codes and to the *Auditor’s Guide*. All municipal solicitors should be aware that healthy and responsible municipal government requires sound auditing practices.

XIX. Collecting Municipal Accounts

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Importance of Careful Drafting

Successful collection of municipal accounts depends initially of the proper drafting and enactment of tax ordinances and authority rate resolutions. As an example, the power to collect penalties and interest may depend upon whether the municipal body has provided for these in its ordinance or resolution. See Hecht, Municipal Claims §49.1. Of course, in some cases the applicable municipal code or a statute covers these matters. See the Municipal Claims Act, *53 P.S. §7101 et seq*.; and *Coudriet v. Township of Benzinger*, 467 A.2d 1229, Pa.Cmwlth. 1983. An authority resolution, however, providing for a penalty in the absence of specific statutory authorization has been upheld. *Falls Township Authority v. Penn Park, Inc*. 61 D. &C.2d 533, C.P. Bucks County, 1972. See also *Coudriet v. Township of Benzinger, supra; City of Reading v. Forty-Five Noble Street, Inc.*, 413 A.2d 1153, Pa.Cmwlth. 1980 (penalty of 1percent per month not unreasonable); Hecht, Municipal Claims §49.1. However, a penalty that is deemed excessive could be held invalid. *Commonwealth v. Heggenstaller*, 699 A.2d 767, Pa.Cmwlth. 1997.

An important provision to be carefully drafted is the one requiring payment of attorney fees as part of the claim. This is authorized by an amendment to the Municipal Claims Act in 1996, which contains procedural requirements and conditions that must be set forth in the ordinance. *53 P.S. § 7106(a) (a.1) (a.2) and (a.3)*. These procedures, having been stated, must be followed in the collection process. In another context, the failure of the taxing body to follow the procedural requirements stated in its own ordinance was held to invalidate the claim. *See Cheltenham Township v. Cheltenham Cinema, Inc*., 661 A.2d 23, Pa.Cmwlth. 1995; affirmed, 697 A.2d 258, Pa. 1997.

Collection powers and procedures are governed primarily by the applicable municipal code and the Municipal Claims Act, although other statutes may be applicable as well. See Local Tax Collection Law, *72 P.S. § 5511.1 et seq*.; and Real Estate Tax Sale Law, *72 P.S. § 5860.101 et seq*.

Collection by Municipal Claim

The most common method of collecting claims (other than real estate taxes) is to file a municipal claim under the Municipal Claims Act, followed by foreclosing the lien by the writ of scire facias. The Claims Act states the required contents of the municipal claim. *53 P.S. § 7144*. The Claims Act also sets a ceiling on the rate of interest payable on the claim when it has been filed. However, the amount of the claim, as filed, should include all penalties payable under the ordinance up to the date of the filing of the claim. Those are among the items to be drafted, as mentioned above. Claims are filed with the Prothonotary of the Court of Common Pleas where the property or taxpayer is located. *53 P.S. § 7143*. The Claims Act provides time deadlines for the filing of claims, and it also provides limited protection for claims that are filed late. *53 P.S. § 7432*. However, in any case where there may be a possible bankruptcy, particularly of a large taxpayer or user of utility service, claims should be filed as soon as possible following delinquency, because of the loss of priority for an unfiled claim upon the filing of a petition in bankruptcy. See Chapter XX.

The municipal body may desire to postpone enforcement of its filed claim, in which case the lien will remain indefinitely, subject to revival every 20 years. See *Borough of Ambler v. Regenbogen,* 713 A.2d 145, Pa.Cmwlth. 1998. However, the defendant may force the municipality to proceed by serving a notice upon the claimant to issue a writ of *scire facias* within 15 days after the notice to do so. *53 P.S. §7184*.

The *scire facias* proceeding is an in *rem* action. *Haddington Methodist Episcopal Church v. Philadelphia*, 108 Pa. 466, 1885; 53 P.S. § 7274. As such it binds the property but does not create personal liability of the owner. It is a "statutory appeal" or proceeding to which the rules of civil procedure do not apply. *Shapiro v. Center Township,* 632 A.2d 994, Pa.Cmwlth. 1993. Upon the issuance of a writ of *scire facias*, the defendant has 15 days to file an affidavit of defense. 53 P.S. § 7185. The defendant may raise all defenses available to the claim. *Shapiro v. Center Township*, supra, 632 A.2d at 997. However, in an assessment case, if there has been a prior proceeding before a jury of view, and the property owner has failed to appeal, the defendant may not raise substantive defenses in the *scire facias* proceeding. *Bern Township Authority v. Hartman*, 451 A.2d 567, Pa.Cmwlth. 1982.

The defendant in the proceeding has the burden of overcoming the prima facie case represented by recitation of facts contained in the municipal claim. See *Philadelphia to Use v. Berk*, 288 Pa. 383, 135 A. 635, 1927.

Following the completion of the proceeding, unless the defendant appeals to the Commonwealth Court within 30 days, the judgment in the municipal claim proceeding may be enforced by the procedures for enforcing a judgment under the Pennsylvania Rules of Civil Procedure. See *Rule 3190*; and *Borough of Ambler v. Regenbogen, supra*.

Collection by Action at Law

The second main procedure for collecting municipal claims is by an action at law. This is authorized by some of the municipal codes, as well as the Municipal Claims Act, *53 P.S. § 7251*. One apparent exception is the Third Class City Code, where the applicable section in the Municipal Claims Act was deleted and the similar section in the Code is much narrower. See *McSwain v. City of Farrell,* 624 A.2d 256, Pa.Cmwlth. 1993 (action permitted for home rule city). Actions in assumpsit, of course are in *personam* proceedings, and the Municipal Claims Act provides that the claim may only be brought against property owners for claims arising during the period of their ownership. *McArthur v. City of Philadelphia Tax Review Board,* 541 A.2d 415, 1988. In contrast to the procedure for filing municipal claims, the burden of proof here is on the municipal body to establish the factual basis for its claim. Since there is no personal liability of an estate until the lien has been filed or the judgment has been obtained in an assumpsit action, an authority cannot collect a tapping fee by filing a claim as a creditor in the estate of a decedent. *Lohr Estate,* 3 D.&C.3d 307, 1977. In order to preserve its lien status, the municipal body should file a municipal claim, and it may still proceed with an action at law. An assumpsit action may even be filed after a judgment has been obtained in a *scire facias* proceeding. *City of Harrisburg v. Laukemann,* 471 A.2d 132, Pa.Cmwlth. 1984.

The applicable statute of limitations in an assumpsit action based upon a filed municipal claim is six years from the later of the completion of the improvement in the case of an improvement assessment, or after the claim first becomes payable. *53 P.S. § 7251*; See *Canton Township Sanitary Authority v. Sanders,* 43 D.&C.3d, 128, 1986. Other statutes may have other limitation periods. See Local Tax Enabling Act, *53 P.S. § 6916*.

The Local Tax Collection Law authorizes collection of certain taxes by actions in assumpsit "or other appropriate remedy." *72 P.S. § 5511.21*. The quoted language however, held not to authorize garnishing of a taxpayer's wages. *Chester Upland School District v. Matthews*, 705 A.2d 473, Pa.Cmwlth. 1997.

Underpayment and Overpayment

If by some mistake a municipal body has failed to bill an adequate amount for service, it may recover the underbilling by a suit. *Borough of Mifflinburg v. Heim*, 705 A.2d 456, Pa.Super. 1997. A possible defense of "detrimental reliance" may arise, resulting in estoppel of the municipality. For instance, estoppel may be based upon reliance by the taxpayer on a letter by the solicitor advising that the amount of the tax is less than that later claimed by the municipality. *Carpenter and Carpenter v. City of Johnstown*, 605 A.2d 456, Pa.Cmwlth. 1992. Conversely, if by legal error or mistake there has been an overbilling, a claim for refund may be successful. *Air Products & Chemicals, Inc. v. Board of Assessment Appeals of Lehigh County*, 720 A.2d 790, Pa.Cmwlth. 1998; *Korte v. Marcella*, 11 D.&C.3d 548, C.P. Cumberland County, 1978. There are also at least 3 statutes providing for the refund of overpaid taxes and charges. *53 P.S. § 1261, 53 P.S. § 5566(b) and 53 Pa.C.S. § 8245.*

Termination of Service

A third collection method, applicable solely to utility charges, is the termination of service. However, it has been held that constitutional requirements of due process must be met prior to terminating service. *Memphis Light, Gas, and Water Division v. Craft*, 436 U.S. 1, 98 S.Ct. 1554, 1978. The applicable ordinance or resolution therefore should set forth a procedure for sending two notices and for an opportunity for the user to present defenses.

In the case of a property that is leased, the landlord may be relieved of liability to pay water bills sent to the tenants, if an authority fails to shut off water by 90 days after the bill is overdue. *53 P.S. § 306B.(h.1) and (h.2)*. Comparable provisions are found in certain of the municipal codes. However, this provision can be avoided by refusing to bill tenants directly, because it only applies where the authority has agreed to bill tenants directly.

The Utility Service Tenants Rights Act also protects tenants in multiple occupancy buildings against shutoff of service. *68 P.S. § 399.1 et seq*.

For public health reasons, an attempt to terminate sewage disposal service would probably be subject to injunction. However where a property is also served by a public water system, either municipal or privately owned, the collection of unpaid sewer bills may be enforced by the sewer authority directing the water supplier to terminate water service to the property. *53 P.S. §§ 2261 to 2265*. This is a mandatory provision, so that the water supplier has no discretion in terminating service, if the applicable conditions have been met. *Economy Borough Municipal Authority v. Ambridge Water Authority*, 42 D.&C.3d 301, C.P. Beaver County, 1986. Municipalities or authorities operating utility systems should have a general agreement with the applicable water supplier, setting forth the procedures to be followed for water shut-off. These should include applicable notices to the user, and protection for the water company.

Following are references for additional information.

1. Hecht, *Municipal Claims*, Geo. T. Bisel & Co.
2. "Municipal Liens," Terry J. Williams, Esquire, in Pennsylvania Bar Institute, *Municipal Law Colloquium, 1997*.
3. "Collection of User Charges," George M. Aman III, Esquire, in Pennsylvania Bar Institute, Municipal Law Colloquium, 1997.

XX. Collecting Municipal Accounts in Bankruptcy Situations

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Recently there has been a pronounced increase in bankruptcy filings by entities served by municipalities who then must collect their claims in bankruptcy proceedings. These proceedings cause a number of headaches for the providers of municipal services. Some of the things that follow will attempt to describe the bankruptcy process in more detail and the way it interacts with these providers.

Bankruptcy Chapters and Filings

There are four chapters of the Bankruptcy Code that apply to claims by providers of municipal services. Taken in order, the chapters that apply are Chapters 7, 11, 12 and 13. Each of the chapters is distinctly different from the other, but some of the same provisions of the Bankruptcy Code apply to filings under all chapters.

A Chapter 7 case is what sometimes has been referred to as a "straight bankruptcy." Under Chapter 7, debtors file a set of schedules indicating their assets and liabilities. They also file a separate schedule dealing with exemption claims. All property not covered by the debtor's exemption claim is submitted to the jurisdiction of the trustee-in-bankruptcy for liquidation. Once the trustee has liquidated all assets of the debtor's estate, the proceeds are distributed in accordance with the priority of distribution set forth in several sections of the Bankruptcy Code.

Chapter 11 of the Bankruptcy Code is the reorganization chapter most often used by a business or a corporation. Generally speaking, Chapter 11 is the most complex of all of the chapters in the Bankruptcy Code and involves the most administration of any case in the Code. The United States Trustee's Office administers Chapter 11 cases. The assistant United States Trustee for each district appoints a case administrator. The case administrator holds the initial hearing, determines the makeup of the creditors' committee and monitors carefully the filing of monthly reports and the payment of quarterly fees. Ordinarily, a Chapter 11 debtor has an exclusive period of time to file a plan of reorganization within 4 months of the date of the filing of the petition. Many times, however, the plan is delayed and a high number of Chapter 11 cases eventually end up as Chapter 7 liquidations.

Chapter 12 is a relatively new chapter that came into effect in the mid-1980's as a result of the farm crisis. A Chapter 12 case involves a farm reorganization. In order to be eligible for Chapter 12, the debtor must be a "family farmer" with regular income sufficiently stable to enable the family farmer to make payments under a Chapter 12 plan. The purpose of a Chapter 12 action is generally to allow farmers to redeem their property and at the same time permitting them to remain in possession of the property under a plan of arrangement similar to a Chapter 13 plan of arrangement.

Finally, Chapter 13 is a relatively new chapter, which came about in 1978 to replace the old "wage earners plan." Since the passage of the Bankruptcy Code in 1978, Chapter 13 has been in existence in its new form. Under the new form, a Chapter 13 debtor has the same ability as a Chapter 11 debtor to formulate a plan for creditors. This plan, just like a Chapter 11 plan, requires as a basic item that the plan provide for distribution to a class of creditors an amount which is at least equal to that which the class of creditors would receive if the debtor were in a Chapter 7 liquidation case. Both Chapter 12 and Chapter 13 require rather prompt plan formation. In Chapter 13, the debtors are required to file plans with their petitions or within fifteen days thereafter. Bankruptcy Rule 3015(b). In Chapter 12, the debtor is required to file a plan no later than 90 days after the filing of the petition. *11 U.S.C. §1221*. A Chapter 13 debtor can only be an individual (including husband and wife) having a regular income and secured debts of less than $300,000 and unsecured debts of less than $100,000.

The Automatic Stay

The first thing faced by the creditor with a claim against an entity in bankruptcy is the provision of 11 U.S.C. § 362 known generally as the automatic stay. This section of the Bankruptcy Code provides in general terms that no one is permitted to continue any litigation which was commenced before the case was filed; enforce any property claim against the debtor's property or property of the estate; obtain possession of the property; create, perfect or enforce a lien against the property; collect, assess or recover a claim against the debtor; or set off any claim that one might have against a debtor. The stay is automatic because the statute provides that there is no need for the debtor to apply for protection from creditors. The filing of the petition effectuates the stay "automatically."

Utility Service Shutoff

Section 366 of the Bankruptcy Code provides that a utility, including a provider of municipal utility services, may not refuse to provide service, alter its service, or discontinue its service or in any way discriminate against a debtor just because the debtor has filed a bankruptcy case. The section thereafter states that the utility may discontinue service, alter service, refuse service or change service, if a debtor fails to provide adequate assurance of payment in the form of a deposit or other security for service within twenty days after the date of filing the debtor's bankruptcy case. The Act also provides that if there is a dispute over what constitutes reasonable assurance of payment, one cannot terminate service until there is a court hearing on the dispute.

Under this section, it is the right of the utility to cut off service if the debtor has provided no assurance of payment within twenty days after the filing of the petition. However, this is a drastic remedy and should not be resorted to by any utility, particularly if the utility has a payment record from the debtor that shows adequate performance in the past. As a practical matter, many bankruptcy lawyers will write to the utility and indicate that the letter they are providing to the utility is intended to provide "adequate assurance of payment" by pointing out the debtor's payment record in the past. If the utility disputes this letter as being adequate assurance, it may then request a hearing from the Bankruptcy Court. The ability to alter, refuse or discontinue service if adequate assurance is not provided is a power that is an exception to the general automatic stay.

Filing Claims

In Chapters 7, 11, 12 and 13, it is most important that a utility creditor file a proof of claim with the Bankruptcy Court. A claim that is filed with the Bankruptcy Court is deemed to be an allowed claim unless it is objected to. If the claim is objected to, the court then is required to have a hearing on it. Claim forms can be obtained by writing to the Clerk of the Bankruptcy Court at P.O. Box 908, Harrisburg, PA 17108 and requesting a form. It is important in all cases to attach a copy of the debtor's balance as shown in the records

of the utility to the proof of claim and to use the correct bankruptcy number of the case. Also, it is good practice to send the clerk an extra copy of the claim with a postage paid envelope, asking the clerk to return the copy of the claim with a filed stamp on it.

Using the Section 341 Meeting

Under Section 341 of the Bankruptcy Code it is the duty of the United States Trustee to convene and preside at a meeting of creditors within a reasonable time after the bankruptcy case is filed. The Bankruptcy Rules require that this meeting of creditors shall be held not more than 40 days after the order of relief (that is, the date of the filing of the case). In a Chapter 12 case, it must be not more than 35 days after the order for relief. An order for relief is entered the day that the petition is filed.

If the place where the hearing is held is not too distant from the utility, it makes good sense for the utility to attend the hearing. A wealth of information can be learned at the hearing that might not be available through an examination of the debtor's filing. Note as well, that under state law, a municipal authority/municipality has the ability to shut off the water supply to the property. Under Section 366, this may be a remedy that may be used by the municipal authority/municipality providing sewerage services.

Status of Municipal Liens in Bankruptcy Cases

There are three things that follow from state law for bankruptcy matters with respect to municipal liens in Pennsylvania. First, probably there is no priority status given to claims for unpaid water or sewer charges that have not been entered against the debtor as a municipal lien before the date of the filing of the debtor's bankruptcy case. (See, however, the last sentence of this section). Regardless of whether a claim has judgment lien status or not before filing, the second question is what is the status of services that are provided after the filing. How does the public body stand with respect to its claim after filing if the debtor has not paid the charges?

In a case involving Chapter 13 of the Bankruptcy Code, Judge Woodside of the U.S. Bankruptcy Court for the Middle District of Pennsylvania answered some questions concerning the claims of the City of Harrisburg as a provider of municipal services. *In re: Geraldine K. Anderson*, No. 1-89-01002, M.D. Pa., 1991. In this case, the city had docketed municipal utility liens before the filing, and it also had concurrent municipal claims which had not been reduced and docketed until after the filing of the case. The court held as follows. If a lien is filed before the case has been filed, that lien is entitled to be treated as a secured claim under the Bankruptcy Code and in Chapter 13. If the lien is for postpetition services it is an administrative claim that, under Section 507 of the Bankruptcy Code is entitled to a first priority expense position. The judge also stated that if services were provided before the petition filing and not made the subject of a municipal lien, they would be unsecured claims entitled to no priority in the case. This demonstrates why the municipal solicitor should keep up to date with filing claims, in order to obtain a secured status in any bankruptcy case. Postpetition services would not, ordinarily, be provided on credit terms and only after the debtor has provided a deposit or other security for services. *11 U.S.C. §366*. In the absence of a bankruptcy a different result may occur because the Municipal Claims Act provides that the municipal claims are declared to be a lien on property on the date the charge is imposed and have priority to be paid before any other obligation. *53 P.S. § 7106(a)*.

Municipal Claims Law Changes

The Bankruptcy Code recognizes three kinds of liens, judicial, statutory and consensual. *11 U.S.C. § 101(36), (37), and (53)*. The Third Circuit has decided that a municipal lien for municipal services (water, sewer, sidewalks, curbing and the like) normally falls under the definition of a statutory lien. *Graffen v. City of Phila-*

delphia, 98 F.2d 91, 96, 3d Cir., 1992. The unanswered question, however, is whether the newly amended provisions of the municipal claim law, *53 P.S. § 7106,* operate in a manner which may result in the necessity of providing notice of one sort or another of the existence of a municipal lien different than that which may have been required heretofore. The subject section begins by stating:

All municipal claims which may hereafter be lawfully imposed or assessed on any property in this Commonwealth, and all such claims heretofore lawfully imposed or assessed within six months before the passage of this act [February 7, 1996] and not yet liened, in the manner and to the extent hereinafter set forth, shall be and they are hereby ***declared to be a lien on said property***, together with all charges, expenses and fees incurred in the collection of any delinquent account, including reasonable attorney's fees under subsection (a.1), added thereto for failure to pay promptly; and said liens shall arise when lawfully imposed and assessed and shall have priority to and be fully paid and satisfied out of the proceeds of any judicial sale of said property, before any other obligation, judgment, claim, lien, or estate with which the said property may be charged, or for which it may become liable, save and except only the costs of the sale and of the writ upon which it is made, and the taxes imposed or assessed upon said property. (Emphasis supplied).

The General Assembly enacted a second portion of this statute which details the need to provide notice to a property owner at any time that a municipality intends to impose attorney's fees upon a property as a part of the lien procedure. It would appear from the language of the statute that the imposition of the lien, which is statutorily "declared to be a lien on said property" would not give rise to the need to provide additional notice except for the new language dealing with adding attorney's fees. However, in an unpublished opinion by the United States Bankruptcy Court in the Western District of Pennsylvania, *In re Mayfield Foundry, Inc*., *Bkcy*. 96-24182 dated February 11, 1997, Bankruptcy Judge M. Bruce McCullough, took the position that the generation of the lien pursuant to § 7106(a) does not, by itself, also result in the perfection of a municipal lien. According to Judge McCullough claims for taxes, water rent, lighting rates, power rates and sewer rates must be filed in the Court of Common Pleas following the procedure of 53 P.S. § 7143 and, by following such procedures, the claim becomes a perfected claim. There is another decision from the same court which parallels the *Mayfield* decision, *In re Taylor* 17 B.R. 586, 589, Bkcy. W.D. Pa. 1982. The *Mayfield* court found that the debtor possessed the ability to avoid a water services claim by bringing a motion requesting such relief in the Bankruptcy Court or by obtaining such relief through a plan of reorganization. Further, the court found that once the bankruptcy was filed there was no way to perfect the lien.

While it does not appear logical to state on the one hand that the General Assembly has made a statutory declaration that municipal claims are liens on property (statutory liens) and, at the same time, to find that perfection of a lien cannot take place without the filing of a claim to recover on the lien (§ 7143), nonetheless, it would probably be good procedure and practice for a municipal solicitor to take all of those steps required to "perfect" a municipal statutory lien. Undoubtedly, this will increase the costs of collection but, because of the change in the lien statute, those costs, including reasonable fees, can be asserted as claims against the subject property.

XXI. Municipal Authorities

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History and Nature of Authorities

The concept of the municipal authority has been widely utilized in Pennsylvania for over 50 years, having been adapted for Pennsylvania in 1935 from similar entities authorized in other states and the Federal government. Although some of the largest projects in the state are operated by authorities, numerically the great preponderance of authorities operate small water and sewer systems. In the smaller municipalities, where staffs are quite small, the authority structure provides a method of involving business people and civic volunteers as board members in the management of a public enterprise.

The nature of an authority perhaps may be understood by contrasting it with such entities as boroughs and townships. Authorities are "special purpose" government corporations, with no general police powers, and no taxing powers. An authority is not an agent of the municipality which created it, and for certain purposes may be considered an agent of the Commonwealth. The courts have held that, for some purposes, authorities are entities of the state, and not of the incorporating municipality. *Commonwealth v. Erie Metropolitan Transit Authority*, 444 Pa. 345 (1971), and cases cited therein. Sometimes the status of authorities under other statutes is unclear where they use general language. If more precise terms are used in a statute, then the Statutory Construction Act may help. Thus, an Authority is not a "political subdivision," or a "municipality." *1 Pa. C.S.A. §1991*. However, it is a "local authority." It is also a "local agency," for purposes of governmental immunity. *42 Pa. C.S.A. §8501*.

An authority may be formed by a municipality, school district or county or by more than one, as a joint authority. The most commonly used enabling statute has been the Municipality Authorities Act of 1945. That Act originally found in 53 Purdons Statutes, beginning with §301, was amended and codified as Chapter 56 of the Pennsylvania Consolidated Statutes by Act 22 of 2001 (referred to herein as the "Authorities Act"). The drafting of the codification Act created some technical problems that were corrected by Act 110 of 2001. The few significant changes, including those which were enacted just prior to the codification, are discussed at the applicable points later in this chapter. A separate statute specifically authorizing the creation of parking authorities (the Parking Authority Law) was similarly codified at 53 Pa. C.S. Chapter 55. Parking authorities may also be created under the 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, namely for five-year terms, on a staggered basis. Moreover they may not be removed except by judicial proceedings. *53 Pa. C.S. §5610* (references to Sections of the Act herein may be cited merely be section number). Under the applicable provision of the Constitution this would require evidence of substantial misconduct. *Pa. Constitution, Article VI, Section 7*; and *Commonwealth v. Large*, 715 A2d. 1226 (*Pa. Cmwlth. Ct. 1998*). (Township commissioner removed after conviction for false swearing in proceeding under the Ethics Act). Although the incorporating municipality may limit, by ordinance or by the articles of incorporation, the projects that an authority may undertake *53 Pa. C.S. §5607(c)*, it may not interfere in the daily operations of the authority.

See Yezorio v. North Fayette County Municipal Authority, 193 *Pa. Super*. 271, 164 A2d. 129 (1960); *Shannon v. Ashton, 75 D&C 2d. 318 (Northampton County 1975*).

While the independence of authorities is important, it should not be overemphasized. In the event of serious conflict between an authority and its incorporating municipality, the municipality has the final word. It may direct, by legislative action, that the authority turn over all of its assets to the incorporating municipality, upon assumption by the municipality of the indebtedness and other obligations of the authority. *53 Pa. C.S. §5622.* This provision has been upheld when a "takeover" has been contested. *Forward Township Sanitary Authority v. Township of Forward*, 654 A.2d. 170 (Pa. Cmwlth. Ct. 1995); *Sullivan v. County of Bucks,* 92 Pa. Cmwlth. Ct. 213, 499 A2d. 678, 692 (f.n. 29) (1985). 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 and then convey the project to the municipality. *Township of Forks v. Forks Township Municipal Authority*, 759 A2d. 47 (Pa. Commwlth. Ct. 2000). However, following such a "takeover" the acquiring municipality must segregate the funds received and use them only for the same purposes as those of the authority. *53 Pa. C.S. §5622(d)*.

Formation of Authorities

To form an authority under the Authorities Act, the incorporating municipality must publish notice of a hearing thirty days prior to the hearing. *53 Pa. C.S. §5603(a)*. After the hearing the municipality may enact an ordinance approving the articles of incorporation and appointing the first board members of the authority. *53 Pa. C.S. §5603(b).* Following a second published notice, the articles are filed with the Department of State in Harrisburg, which will issue a certificate of incorporation, starting 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 to the articles. *53 Pa. C.S. §5607(d)*.

The incorporating ordinance may specify the authorized projects or purposes of the Authority. *§5607(c)*. Unless so limited, the Authority may engage in any of the projects permitted under the Act, subject to later action of the municipality expanding or limiting the projects. *§5607(c)*.

An authority may be formed by more than one municipality, in which case each municipality must appoint at least one board member, but the total for each municipality need not be equal. Additional member municipalities may be added by amendment to the articles, but only upon approval by all of the existing municipal members. *53 Pa C.S. §5604(d)*.

A municipality may agree that it will appoint to the Board of its authority a person residing in another municipality served by the authority, as described below, but that does not convert the authority into a joint authority. One difference between having board members from another municipality and having a joint authority is that when a joint authority terminates or is dissolved, its assets revert to joint ownership by its member municipalities.

Immediately after being incorporated, an authority should adopt bylaws, as authorized by the Act. *53 Pa. C.S. §5607(d)(7)*. One important bylaw 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. This can contain useful details, but its scope of coverage probably may not exceed that which is provided in the former Political Subdivision Tort Claims Act. *42 Pa. C.S.A. §8548*. The Authority should also promptly obtain insurance. This may include health insurance for its employees, but not its board members. *53 Pa. C.S. §5607(d)(20)(ii)*.

Authority Board

The authority board may consist of five members, or any greater number set forth in the articles of incorporation. Each board member must be a taxpayer or business operator or be a citizen of a municipality which appoints him, or of a municipality into which the authority's projects extend. However, as provided in the above-mentioned amendments, a majority of the board members must be residents of the incorporating municipality. *53 Pa. C.S. §5610(b)(1)*.

It has been held that a member of a municipal governing board may serve also on an authority board. *Comm. v. Lucas, 632 A2d.* 868 (Pa. Sup. Ct. 1993); Township of *Crescent v. Crescent South Heights Municipal Authority, (Allegh. County, 1977)* 11 D&C 3rd. 705, Aff'd. per cur. 482 Pa. 170, 393 A2d. 434 (1978). However, a member of council in a third class city may not serve on the board of an Authority created by it. *53 P.S. §36001*.

Terms of board members expire the first Monday in January, to coincide with the organization of municipal governing bodies, following the municipal elections. *53 Pa. C.S. §5610(a)*. Appointments made prior to the existence of a vacancy are void. *Ross Township v. Menhorn, 588 A2d. 347 (Pa. Cmwlth. Ct. 1991)*. Vacancies on the Board of an authority are filled by appointment by the municipality that appointed the board member who created the vacancy. *53 Pa. C.S. §5610(d)*. Confusion has been caused by the phrase "municipal authorities" in that section. The term "municipal authority" is a defined term, meaning the governing body of a municipality. *53 Pa. C.S. §5602*.

Authority board members (except for school authorities) may be paid compensation for services as such, but the incorporating municipality must approve such compensation. *53 Pa. C.S. §5610(d)*. Such compensation may not be changed during a term of office. *§5610(d)*. The incorporating municipality as such need not approve compensation of an officer or employees for services. *53 Pa. C.S. §5607(d)(8)*. However, see below for a case where attempted circumvention of municipal approval was not successful.

A quorum of the Board is "a majority of the Board." *53 Pa. C.S. §5610(e)*. Where there are vacancies, the quorum probably should be a majority of those then in office rather than of the full board. See *Siteman v. City of Allentown*, 695 A2d. 888 (Pa. Cmwlth. Ct. 1997); *Tessitor v. DEP,* 682 A2d. 434 (Pa. Commwlth. Ct. 1996).

The Authorities Act prohibits an authority board member from being a party to, or having an interest in, any contract of the authority. *53 Pa. C.S. §5614(e)*. This restriction is broader than the restriction on this subject that is found in the Ethics Act. *(65 P.S. §401 to §413.)*

As provided in the above-mentioned amendments, the appointing municipality may remove a board member who fails to attend three consecutive meetings of the board, unless excused by the board. *53 Pa. C.S. §5610(f)*.

Officers and Employees

Among the powers of authority boards is the power to appoint officers and employees, and fix their compensation. *53 Pa. C.S. §5607(d)(8)*. These powers are limited, however, by general law, as well as by provisions of the Pennsylvania Constitution. Authority employees are not covered by Civil Service, but authorities are covered by the Public Employee Bargaining Law.

The Board has the power to appoint one of its members as an officer, and as an employee. *53 Pa. C.S. §5610(e)*. Under the Ethics Act, a board member may not vote 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. The Ethics Commission ruled adversely in one case where each board member of a large board had an officer's title and was paid, ostensibly as an officer, but each was paid

the same amount, without the approval of the incorporating municipality. The Court upheld the Commission where the compensation bore no relationship to the services rendered. *Rebottini v. State Ethics Commission,* 634 A2d. 743 (Pa. Cmwlth. Ct. 1993).

Employment agreements for authority employees extending over a period of time (even less than one year) have been held to be invalid. *Stumpp v. Stroudsburg Municipal Authority,* 540 Pa. 391, 658 A2d. 333 (1995), *Bolduc v. Lower Paxton Township,* 618 A2d. 1188 (Pa. Cmwlth. Ct. 1992).

Authority employees who handle money should be covered by a surety bond, even though the Authorities Act specifically requires this only for treasurers of school authorities. *53 Pa. C.S. §5610(c)*.

Operations

Although, as mentioned above, authorities are largely independent from the incorporating municipalities in the operation of their facility, the municipalities do have the power to influence decisions by certain approvals and indirect measures. For instance, it is often desired to have the authority bonds guaranteed by the incorporating municipality. In that event, the municipality may suggest certain matters be inserted into the Guaranty Agreement or another agreement for the benefit of the municipality.

In the field of sewer service the Sewage Facilities Act requires each municipality to have a sewage facilities plan. *35 P.S. §750.1 to §750.20a*. In most plans the applicable authority is designated as the agent of the municipality responsible to implement the plan. Therefore, the authority is bound by the plan and should not install sewers except as provided in it.

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, because the operations constitute proprietary functions, which may be delegated, as distinguished from governmental functions which cannot. That understanding of the law has been clarified by a recent Commonwealth Court case upholding the validity of a contract between a water authority and a private management company for management services extending over a 13-year period. *Boyle v. Municipal Authority of Westmoreland County,* 796 A2d. 389 (Pa. Commwlth. Ct. 2002). The Court said that, among other things, authorities may only act in a proprietary capacity, and therefore could not be involved in delegating governmental functions in violation of constitutional provisions.

Area of Operation; Eminent Domain

In the absence of any charter or contractual restriction, historically there was no limitation upon the geographical area within which an authority may operate. Two new limitations were added by an amendment late in 2000, which were carried over into the codified version of the Act. The first prohibits an authority 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. *53 Pa. C.S. §5607(b)*. The word "solely" was inserted because the amendment was intended to prohibit a business type of activity wholly unrelated to the municipal projects of the authority.

The Authorities Act also contains a provision prohibiting an Authority from engaging in any activities which "shall duplicate or compete with existing enterprises serving the same purposes." *53 Pa. C.S. §5607(b)*. 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. *Lower Bucks Joint Municipal Authority v. Bristol Township Water Authority,* 586 A2d. 512 (Cmwlth. Ct. 1991). The noncompetition clause has been held inapplicable however, where an authority

which had been purchasing water from one authority, in bulk, without a long-term agreement, determined to change its supplier and buy from a different authority. *Beaver Falls Municipal Authority v. Municipal Authority of the Borough of Conway,* 689 A2d., 379; (Pa. Cmwlth. Ct. 1997), appeal denied 704 A2d. 639*; See Highridge Water Authority v. Lower Indiana County Municipal Authority,* 689 A2d. 374 (Pa. Cmwlth. Ct. 1997). 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 tortuous interference with a contract. *Beaver Falls Municipal Authority v. Borough of Conway,* 34 C.D., 2000 (Memorandum Opinion, not reported).

The Authorities Act grants to an authority the power of eminent domain, which is not restricted to the boundaries of the incorporating municipality. *53 Pa. C.S. §5615*.

Mandatory Connection

An important element of the financial security of an authority is municipal action requiring that properties which can be served by the authority's system be connected to, and uses it. 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, which can be 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. *See McCluskey v. Washington Township,* 700 A2d. 573 (Pa. Cmwlth. Ct. 1997); *and see Township of East Hanover v. Chesapeake Estates Partnership,* 701 A2d. 313 (Pa. Cmwlth. Ct. 1997) (involving a privately owned treatment plant). An attack on such an ordinance based on constitutional theories was unsuccessful, as reported in a recent case. *Citizens for Personal Water Rights v. Borough of Hughesville, 815 A.2d 15, (Pa. Cmmwlth. 2002), petition pending for allowance of appeal by Supreme Court No.25 MAL 2003, Allocatur Docket. However, a municipality may not enact a mandatory connection ordinance which excludes properties in a part of the community. Vernon Township Water Authority v. Vernon Township,* 734 A2d. 935 (Pa. Cmwlth. Ct. 1999).

Governmental Regulation

An operating authority is not subject to the jurisdiction of the Pennsylvania Public Utility Commission, regardless of whether its service extends beyond the boundaries of the incorporating municipality. *Borough of Sewickley Water Authority v. Mollica,* 544 A2d. 1122 (Pa. Commwlth. Ct. 1988). 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. *East Hempfield Township v. City of Lancaster,* 441 Pa. 406, 273 A2d. 333 (1971). 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. *Borough of Phoenixville v. PUC,* 3 Cmwlth. Ct. 56, 280 A2d. 471 (1971).

If an authority intends to acquire a system which is already subject to P.U.C. regulation, the acquisition may not be completed without approval by the municipality where the system is located. *53 Pa. C.S. §5613*. Also, approval by the P.U.C. is required, indirectly, by issuing its certificate of abandonment to the prior owner of the system. *Borough of Media v. PUC, 500 Pa. 325,* 456 A2d. 540 (1983).

Authorities are subject to zoning, subdivision, and other regulations of each municipality in which they operate. *Wilkinsburg Penn Joint Water Authority v. Churchill Borough,* 417 Pa. 93, 207 A2d. 905 (1965). Authorities must also obtain all state and federal permits.

Tapping Fees; Rates and Charges

Authorities are permitted to charge rates for the services they render. *53 Pa. C.S.§5607(d)(9)*. Authorities are also permitted to impose initial charges for the right to connect to the system, including tapping fees, connection fees, and customer facilities fees. *53 Pa. C.S. §55607(d)(24)*. By a lengthy amendment, Act 203 of 1990, a detailed procedure was established for setting the initial fees, and a formula for the maximum amount. In the leading case on computation of tapping fees, it was 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. *West v. Hampton Township Sanitary Authority, 661 A2d.* 459 (Pa. Cmwlth. Ct. 1995). Since sewer systems must necessarily treat not only sewage but also infiltration, the allocated portion of that 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 to him a portion of the tapping fee revenue received when others connect their properties directly to the line. *Pa. C.S. §5607(d)(31)*.

Although the Authorities Act specifies that rates are to be "uniform" *(53 Pa. C.S. §5607(d)(9))*, this has been interpreted as not prohibiting the establishment of rate districts, based upon the differing costs of service in various geographic areas. *Vener v. Municipal Sewer and Water Authority of Cranberry Township,* 289 A2d. 586 (Pa. Cmwlth. Ct. 1972). Also, multiple user classifications related to differing costs of service for different types of properties are also permitted. A perennial issue is whether a particular type of user has been properly classified. The authority has usually prevailed in litigating these issues. As an example, units in a trailer park were held to be residential units for tapping fee purposes. *Smith v. Athens Township Authority,* 685 A2d. 651 (Pa. Cmwlth. Ct. 1996). Under case law, rate structures may be established to reflect the value of service available, in addition to the amount used. *Patton Ferguson Joint Authority v. Hawbaker,* 322 A2d. 783 (Pa. Cmwlth. Ct. 1974).

Note: As this edition of the *Solicitor's Handbook* was being updated in March 2003, the Pennsylvania General Assembly was considering House Bill 51, which would establish new uniform costs for tapping fees.

Bulk Service Contracts

The requirement for rates to be "reasonable and uniform" does not apply, however, to charges established pursuant to an agreement. *Municipal Authority of the City of Monongahela v. Carroll Township Authority* 555 A2d. 264 (Pa. Cmwlth. 1989). Authorities have the power to make contracts under the Authorities Act, §5607(d)(13) and (14). 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. See *White Rock Sewage Corporation v. Township of Monroe,* 465 A2d. 102 (Pa. Cmwlth Ct. 1983).

The power to enter into contracts applies also to contracts between authorities and privately owned public utilities. *Northampton, Bucks County, Municipal Authority v. Bucks County Water and Sewer Authority*, 508 A2d. 605 (Pa. Commwlth. Ct. 1986). Such contracts must be filed by the public utility with the PUC. *66 Pa. C.S. §507*. However, that does not give PUC jurisdiction over subsequent conflicts about the agreement. *White Rock Sewage Company v. PUC,* 578 A2d. 984 (Pa. Commwlth. Ct. 1990).

As part of the amendments in 2000, the legislature created 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. *53 Pa. C.S. §5607(d)(24)(iv).* 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. Apparently, the power to determine the rates for service under contracts continues to be unregulated.

When an authority contracts with a school district to supply bulk service, it should be aware of the possibility that the action of the school district could be considered to be governmental, thus permitting it to escape from a contract, if it decides later not to build the school. *Lobolita Inc. v. North Pocono School District,* 562 Pa. 380, 755 A2d. 1287.

Financing

Authorities have power to borrow money, issue securities and provide pledges of revenue, securing such obligations. *53 Pa. C.S. §5607(d)(12) and (14); §5608*. Like all other governmental entities, under the Pennsylvania Constitution, authorities do not have the power to mortgage their real property. *Pennsylvania Constitution, Article III, Section 31,* see *Beam v. Borough of Ephrata,* 149 A2d. 431, 395 Pa. 348 (1959). Borrowing by an authority is not subject to the Local Government Unit Debt Act. *53 Pa. C.S.A. §8001 to §8271.* 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. *Pa. C.S. §5607(d)(16)*. 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, audited by independent accountants. *53 Pa. C.S. §5612*. 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 the Department of Community and Economic Development, and a summary must be published in a local newspaper. The Act also contains provisions regulating the types of investments that may be made with authority money. *53 Pa. C.S. §5611*.

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. As an example, the "Separation Act," requiring the use of separate contracts for general construction, electrical, plumbing, etc., applies to authorities. *53 P.S. §1003 and 71 P.S. §1618.* See *Mechanical Contractors' Association of Eastern Pennsylvania v. Southeastern Pennsylvania Transportation Authority,* 654 A2d. 119, (Pa. Cmwlth. Ct. 1995).

Another general statute containing provisions applicable to authorities is the Municipalities Planning Code. One provision in that Code requires authorities to give notice of extensions to the applicable planning agency. *53 P.S. §10303(a)(4)*. A more recent amendment requires authorities intending to expand service to a new development to notify the municipality where the development is located and provide it with an opportunity to submit comments on the proposed expansion. *53 P.S. §10 608.1(a) and 10 608.1(e)*.

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. *53 P.S. §2261*. (See Chapter XXX, Municipal Water Supply)

On the other hand, some statutes regulating sewer systems of municipalities do not apply to authorities. An example of this is the Sewer Rental Act. *53 P.S. §2231 et. seq*.

Additional Information

Further information may be obtained from:

1. The Pennsylvania Department of Community and Economic Development, particularly its pamphlet entitled *Municipal Authorities in Pennsylvania*.
2. The Pennsylvania Municipal Authorities Association, particularly its pamphlet reprinting the Authorities Act and summarizing numerous related statutes

XXII. 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 §§ 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 serve 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;
- 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 Open Meeting Law, commonly referred to as 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] nor the zoning hearing board.[12]

In addition to acting on subdivision and land development submissions, the planning commission is required to review the municipality's official sewage facilities plan required by 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 Resources (DER).[14] DER 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 individuals 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; and
- a statement indicating the relationship of the existing and proposed development of the municipality to the existing and proposed development and plans in contiguous municipalities, the county, and regional trends.

The comprehensive plan may 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 comments.[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]

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] However, 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]

Obviously, preparing all of the required surveys 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. With improvements in technology and information available to municipalities, some municipalities are considering revising and updating 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 the community at large. These community representatives continually informed their respective constituencies about the

planning process, and provided feedback to the committee. Early in the process, the township distributed a community attitudes survey to all township residents. The committee held public meetings at diverse locations around the township to facilitate attendance by the public. 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 holding a public hearing. After that hearing, the planning commission sent the completed plan to the governing body for consideration and adoption. The net result was that the public was involved and supported the process from its inception and the completed plan received little public criticism.

Additional Resources

Further information may be obtained from the Pennsylvania Department of Community and Economic Development, particularly its publications entitled *The Planning Commission* (Planning Series #2) and *The Comprehensive Plan* (Planning Series #3).

References

1. 53 P.S. § 10101 *et seq*.
2. MPC § 107.
3. MPC § 202.
4. MPC § 206.
5. MPC § 209.1(a).
6. MPC § 209.1(b).
7. 65 P.S. 271 *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).
9. MPC § 708.
10. MPC § 501.
11. *Todrin v. Board of Supervisors 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. MPC § 210.
17. MPC § 211.
18. MPC § 617.3(c).
19. MPC § 209.1(a)(a).
20. MPC § 301(a).
21. MPC § 301(b).
22. MPC § 301.1.
23. MPC § 301.2.
24. MPC § 301.3.
25. MPC § 302.
26. MPC § 303.
27. MPC § 303(c); *Todrin v. Board of Supervisors of Charlestown Tp*., 27 Pa.Cmwlth. 583, 367 A.2d 332, 1976.

XXIII. Zoning

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Zoning ordinances are created by municipalities in accordance with legislative enabling acts. The Pennsylvania Municipalities Planning Code (MPC)[1] 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.

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.[3] Once enacted, however, zoning ordinance provisions will be strictly construed against the municipality to allow landowners the broadest possible use of their property.[4]

The responsibility for enacting, or refusing to enact zoning ordinances, lies exclusively with the local municipal leaders.[5] Zoning and rezoning is a purely legislative function which the courts lack the authority to order.[6] Likewise, where local municipalities have enacted zoning ordinances, the county in which the municipality is situated lacks the authority to direct the local municipality to alter its zoning ordinances.[7]

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 and open spaces.[8] The various zoning districts within the municipality must be described by a map made part of the zoning ordinance.[9]

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.[10] An additionally important purpose of zoning, and one which is constitutionally required, is to provide for all basic forms of housing within each municipality.[11]

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.[12] The vote must be taken within 90 days after the conclusion of the hearing and within 30 days after enactment, a copy of the zoning ordinance must be forwarded to the county planning agency.[13] 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.[14]

Confiscatory Zoning

All zoning involves the governmental appropriation of some private property rights without compensation,[15] but a zoning ordinance which creates a "taking" of real property is constitutionally invalid.[16] An owner is not entitled to relief, however, unless the affected property rights have been unreasonably restricted. 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.[17] 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. 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.[18]

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.[19] A de facto exclusion is created where the ordinance states that the use is permitted, but when applied, the ordinance serves to prohibit it.[20] 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. Although challenges to zoning ordinances are usually based upon excluded residential uses, legitimate commercial uses are also protected. Municipalities, however, need not make provision for every possible planning variation or combination of commercial uses.[21]

Zoning ordinances, like other legislative enactments, are presumed valid and constitutional, and the burden of proving otherwise is on the challenger.[22] 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.[23]

A landowner seeking to challenge the validity of a zoning ordinance or map 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.[24] 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.[25] A validity challenge may also be made to the municipal zoning hearing board.[26] Although the court on appeal may not order the enactment of the curative amendment,[27] it has broad power to provide relief,[28] including the power to order the municipality to issue building and related permits necessary for the completion of the planned development.[29]

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 if the applicant demonstrates that the contemplated use is one which the municipality has previously authorized as a use permitted by special exception and which will not create an unusual burden on the public health, safety or welfare.[30] 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.[31]

The establishment of a variance requires the applicant to demonstrate 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.[32] These traditional requirements for a variance however, may be avoided where the relief sought is so minor as to be de minimus.[33]

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 nonconformity must legally have existed prior to zoning or been permitted under a former zoning ordinance.[34]

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.[35] 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,[36] 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.[37] A vested right can also be established without the issuance of a permit where active municipal acquiescence is so significant in the creation and continuance of the prohibited use, that the municipality will be estopped from later contesting it.[38]

Additional Information

Further information regarding Pennsylvania zoning law may be found in the following treatises.

1. R. Anderson, *Law of Zoning in Pennsylvania*, 1982 and Supp., 1992.
2. R. Ryan, *Pennsylvania Zoning Law and Practice*, 2nd Edition, 1981 and Supp., 1992.

References

1. 53 P.S. § 10101 et seq.
2. 53 P.S. § 10103; *Randolph Vine Associates v. Zoning Board of Adjustment of Philadelphia*, 573 A.2d 255, 132 Pa.Cmwlth. 452, 1990, appeal denied, 588 A.2d 512; *North Point Breeze Coalition v. City of Pittsburgh*, 431 A.2d 398, 60 Pa.Cmwlth. 298, 1981.
3. *Forks Township Board of Supervisors v. George Calantoni and Sons, Inc.*, 297 A.2d 164, 6 Pa.Cmwlth. 521, 1972.
4. 53 P.S. § 10603.1; *Upper Salford Township v. Collins,* 669 A.2d 335, 542 Pa. 608, 1995.
5. 53 P.S. § 10601; *Minshall v. Board of Supervisors of Ferguson Township, Centre County*, 413 A.2d 1165, 50 Pa.Cmwlth. 541, 1980.
6. *Clover Hill Farms, Inc. v. Lehigh Township Board of Supervisors*, 289 A.2d 778, 5 Pa.Cmwlth. 239, 1972.
7. 53 P.S. § 10602; *Commonwealth v. Bucks County*, 302 A.2d 897, 8 Pa.Cmwlth. 295, 1973.
8. 53 P.S. § 10603.
9. 53 P.S. § 10605.
10. 53 P.S. § 10604.
11. *Appeal of M.A. Kravitz Co., Inc*., 460 A.2d 1075, 501 Pa. 200, 1983; *Hand R. Builders, Inc. v. The Borough Council of the Borough of Norwood*, 555 A.2d 948, 124 Pa.Cmwlth. 88, 1989.
12. 53 P.S. § 10607.
13. 53 P.S. § 10608.
14. 53 P.S. § 10609.
15. *Village of Euclid v. Ambler Realty Co*., 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303, 1926.
16. *Ward's Appeal*, 137 A. 630, 289 Pa. 458, 1927.
17. *Dolan v. City of Tigard,* 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304, 1994; *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798, 1992.
18. *BAC, Inc. v. Board of Supervisors of Millcreek Township*, 633 A.2d 144, 534 Pa. 381, 1993; *Fernley v. Board of Supervisors of Schuylkill Township*, 502 A.2d 585, 509 Pa. 413, 1985.
19. *Kratzer v. Board of Supervisors of Fermanagh Township,* 611 A.2d 809, 148 Pa.Cmwlth. 454, 1992.
20. *Fernley v. Board of Supervisors of Schuylkill Township, supra; Cutler v. Newtown Township Zoning Hearing Board*, 367 A.2d 772, 27 Pa.Cmwlth. 430, 1976.
21. *East Marlborough Township v. Jensen*, 590 A.2d 1321, 139 Pa.Cmwlth. 297, 1991; *Cambridge Land Co. v. Township of Marshall*, 560 A.2d 253, 126 Pa.Cmwlth. 437, 1989; *Sultanik v. Board of Supervisors of Worcester Township*, 488 A.2d 1197, 88 Pa.Cmwlth. 214, 1985.
22. *Stahl v. Upper Southampton Township Zoning Hearing Board*, 606 A.2d 960, 146 Pa.Cmwlth. 659, 1992, appeal denied 621 A.2d 584.
23. *Township Supervisors of Adams Township v. West,* 469 A.2d 701, 70 Pa.Cmwlth. 254, 1983.
24. *Ellick v. Board of Supervisors of Worcester Township*, 333 A.2d 239, 17 Pa.Cmwlth. 404, 1975.
25. 53 P.S. § 10609.1.
26. 53 P.S. § 10916.1.
27. *Board of Commissioners of McCandless Township v. Beho Development Co., Inc*., 332 A.2d 848, 16 Pa.Cmwlth. 448, 1975.
28. 53 P.S. § 1106-A.
29. Application of Friday, 381 A.2d 504, 33 Pa.Cmwlth. 256, 1978.
30. 53 P.S. § 10912.1; *Borough of West Mifflin v. Zoning Hearing Board of the Borough of West Mifflin*, 452 A.2d 98, 69 Pa.Cmwlth. 604, 1982; *Heck v. Zoning Hearing Board of Harvey's Lake Borough*, 397 A.2d 15, 39 Pa.Cmwlth. 570, 1979.
31. 53 P.S. § 10603(c)(2); *White Advertising Metro, Inc. v. Zoning Hearing Board of Susquehanna Township*, 453 A.2d 29, 70 Pa.Cmwlth. 308, 1982.
32. 53 P.S. § 10910.2
33. *Leonard v. Zoning Hearing Board of the City of Bethlehem*, 583 A.2d 11, 136 Pa.Cmwlth. 182, 1990, appeal denied 604 A.2d 1032.
34. *Hanna v. Board of Adjustment*, 183 A.2d 539, 408 Pa. 306, 1962.
35. *Bruno v. Zoning Board of Adjustment of the City of Philadelphia,* 664 A.2d 1077, Pa.Cmwlth., 1995; *Roseberry Life Insurance Company v. Zoning Hearing Board of the City of McKeesport*, 664 A.2d 688, Pa.Cmwlth., 1995, appeal denied 674 A.2d 1078.
36. *Minnick v. Zoning Hearing Board, Town of McCandless*, 455 A.2d 243, 71 Pa.Cmwlth. 333, 1983.
37. *Petrosky v. Zoning Hearing Board of Upper Chichester Township*, 402 A.2d 1385, 485 Pa. 501, 1979.
38. *Mucy v. Fallowfield Township Zoning Hearing Board*, 609 A.2d 591, 147 Pa.Cmwlth. 644, 1992.

XXV. Zoning Hearing Boards

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What follows is not 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 knowledgeable municipal 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

Required Forum. Each municipality that has enacted a zoning ordinance must create a zoning hearing board. *MPC 901, 53 P.S. 10901*.

Quasi-Judicial Nature. Zoning hearing boards are quasi-judicial bodies. *In re Leopardi*, 90 Pa. Cmwlth. 616 (1985), reversed in part 516 Pa. 115, 532 A.2d 311 (1986)[1]; *Urbano v. Meneses*, 288 Pa. Super. 103 (1981); *Appeal of Emanuel Baptist Church*, 26 Pa. Cmwlth. 427 (1976); *Enck v. Lititz Borough*, 64 Lancaster L. R. 465 (1975); *Omnipoint Communications, Inc., et. al., v. Zoning Hearing Board of East Pennsboro Township*, 4 F. Supp 2d 366 [E. D., Pa.]. As such they must not only be unbiased, but also avoid even the appearance of bias. *McVay, Executor, et al v. Zoning Hearing Board of New Bethlehem Borough*, 91 Pa. Cmwlth. 287, 496 A.2d 1328 (1985). Ex-parte contact with any party or his representative is forbidden. *MPC 908(8), 53 P. S. 10908(8)*.

Municipal officials, dedicated to the best interests of their bailiwick, but perhaps not familiar with niceties of a judicial-like discipline, sometimes attempt to intervene privately with board members, or its solicitor, to influence the outcome of a matter the board must decide. Municipal solicitors can sometimes help their clients understand the delicate position occupied by the members of the zoning hearing board and, thus, avoid these sorts of uncomfortable situations. See, however, the last paragraph of Chapter VII.

Members. The board may consist of either 3 or 5 members, at the discretion of the governing body, with 3 year or 5 year terms of office staggered so as to expire in a prescribed fashion. *MPC 903(a), 53 P.S. 10903(a)*. Appointing authority is vested in the governing body. *MPC 903(a), 53 P.S. 10903(a)*. It may also appoint up to 3 alternate members. *MPC 903(b), 53 P.S. 10903(b)*. Even though not seated, alternates may participate in all proceedings, except the vote. *MPC 903(b), 53 P.S. 10903(b)*. Such involvement can provide valuable preparatory experience.

Members and alternates must be residents of the municipality. *MPC 903(a) and (b), 53 P.S. 10903(a) and (b)*.

They may hold no other office there. *MPC 903(a) and (b), 53 P.S. 10903(a) and (b)*.

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. *MPC 907, 53 P.S. 10907*.

Board members must file the Statement of Financial Interest prescribed by the State Ethics Commission under the Public Official and Employees Ethics Law, *Act 170 of 1978*, as codified in 1998, *65 Pa. C. S. A. # 1104*.

It has been held that members of a zoning hearing board enjoy judicial immunity from suit. *Urbano v. Meneses*, 288 Pa. Super. 103 (1981). Further, when they act in good faith and reasonably believe their decision is authorized by law, 42 Pa. C. S. #8546 shields them from liability, even if they reach a wrong legal conclusion. *Delate v. Kolle*, et al, 667 A.2d 1218 (1995), 1995 Pa. Commw. LEXIS 535, *Petition For Allowance Of Appeal denied* 544 Pa. 677, 678 A.2d 367 (05/30/96).

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 first cause. *MPC 905, 53 P.S. 10905*; *Borough of Blawnox v. Olszewski*, 505 Pa. 176 (1984).

Procedural Rules. Procedural rules and forms consistent with applicable laws and ordinances may be adopted by the board. *MPC 906(c), 53 P.S. 10906(c)*.

Perhaps the most important aspect of this power is the establishment of application forms. Obsolete, hand-me-down applications, that do not accommodate the complete panorama of matters over which zoning hearing boards have jurisdiction, or seem to authorize matters that may not be heard or do not require adequate information about the matter in question, are still used in some municipalities. The resulting need to prepare ad hoc applications for types of matters not covered, or to attempt to decipher precisely what relief is sought, or needed, or to deal with matters that are not properly before the board, waste taxpayer and property owner time, effort and money. A municipal solicitor who becomes aware of the problem and sees an appropriate opportunity to suggest to the governing body that they authorize the board to have appropriate forms prepared can substantially enhance the administration of the zoning ordinance. Included with the forms should be written instructions pointing out the importance of a clear and complete statement of what relief is sought and why the applicant is entitled to it, emphasizing that the outcome will depend upon evidence being presented at the hearing that satisfies the relevant legal requirements and even suggesting that retention of knowledgeable counsel be considered.

Officers. Unspecified officers, usually at least a Chairman and a Secretary, and perhaps a Vice-Chairman, are to be elected by the board from among its number. *MPC 906(a), 53 P.S. 10906(a)*.

Joint Boards. Though not common in the author's experience, joint zoning hearing boards may be created by two or more municipalities. *MPC 904, 53 P.S. 10904*. However, municipalities adopting a joint zoning ordinance must either create a joint board to administer the entire joint ordinance, or provide for individual boards to administer the ordinance as to properties within each participating municipality. *MPC 815-A, 53 P.S. 10815-A*.

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. *MPC 617.3(c) and 907, 53 P.S. 10617.3(c) and 10907*.

Avoidance of bias and the appearance of bias, essential to due process, have prompted the courts and the legislature to bar the municipal solicitor from also serving as the zoning board solicitor. *Horn v. Township of Hilltown,* 461 Pa. 745 (1975)*; MPC 617.3(c), 53 P.S. 10917.3(c)*. Further, the not uncommon practice of the governing body dictating the choice of the board's solicitor has been held to be without basis. *Zoning Hearing Board of The City of Uniontown v. City Council of The City of Uniontown*, 720 A.2d 166, 1998 Pa. Commw. LEXIS 699, *appeal dismissed as improvidently granted*, 560 Pa. 565, 764 A.2d 116 (2000). 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. And again, the municipal solicitor can sometimes be instrumental in acquainting his or her clients with the limitations of the zoning hearing board solicitor's ability to listen to the ex-parte expression of their questions, or concerns, and to respond. See also *B., supra.*

Usually, the stenographers are the only help, other than the solicitor, employed by a zoning board, with the municipal office personnel and/or the zoning officer attending to administrative functions.

The governing body sets the limits on the amount the Board may spend on legal, secretarial, consultant and clerical services. *MPC 907, 53 P.S. 10907; Zoning Hearing Board of The City of Uniontown v. City Council of The City of Uniontown*, supra.

Application Fees. Reasonable fees to be charged applicants may prescribed by the governing body to defray board member compensation, notice costs and administrative overhead. *MPC 617.3 (e), 53 P.S. 10617.3 (e)*. However, reimbursement for the fees of the board's solicitor, engineering, architectural, consulting or expert witness costs may not be recovered. *MPC 617(e) & 908(1.1), 53 P.S. 10617(e) & 10908(1.1)*.

Special provisions distribute the burden of the stenographer's fees. The appearance fee is to be shared equally by the applicant and the Board. Generally, the cost of preparing the original transcript is paid by the party who requests it. However, one who appeals from a zoning board decision must bear that burden. Additional copies are also to be paid for by the requesting party. *MPC 908(7), 53 P.S. 10908(7)*.

Consideration should be given to instructing the stenographer that he or she should have firm arrangements with the party who is obliged to pay for the preparation of the transcript, regarding payment, before transcribing the testimony. Otherwise, the steno might look to the municipality, or the solicitor, or whoever else arranged for the steno to be present at the hearing, if the obligated party does not honor their obligation. Also, as the transcript is part of the board's record, the steno should file it with the board, not with the party obliged to pay.

Dismissal of an application to a zoning hearing board for failure to pay the required filing fee was sustained in *Golla et al. v. Hopewell Township Zoning Hearing Board*, 69 Pa. Cmwlth. 377 (1982).

Records. Each zoning hearing board must keep records of its business, which records are the property of the municipality. *MPC 906(c), 53 P.S. 10906(c)*.

Board Functions

Exclusive Jurisdiction. Zoning hearing boards are invested with "exclusive jurisdiction to hear and render final adjudications" in nine (9) separate categories of matters arising under land use ordinances. *MPC 909.1(a), 53 P.S. 10909.1(a)*.

Types Of Matters. In the writer's experience, the most frequently heard categories, in descending order of frequency, are:

- Requests for special exceptions under the zoning ordinance. *MPC 909.1(a)(6); MPC 912.1.*
- Applications for variances from the terms of the zoning ordinance. *MPC 909.1(a)(5); MPC 910.2*.
- Appeals from determinations of the zoning officer. *MPC 909.1(a)(3)*. 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. *MPC 909.1(a)(1)*. An exception to the exclusivity rule, these challenges may also be brought as a request to the governing body for a Curative Amendment. *MPC 609.1; MPC 916.1(a)(2)*.
- Challenges to the validity of a land use ordinance based on procedural deficiencies in the enactment

process. Where no zoning hearing board has been established, these challenges are to be taken directly to court. *MPC 909.1(a) (2), 53 P.S.10909.1(a)(2).* See *Land Acquisition Services, Inc., et al. v. Clarion County*, 146 Pa. Cmwlth. 293, 605 A.2d 465 (1992).

The other matters over which zoning boards are given jurisdiction arise under ordinance provisions dealing with flood plain 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. *MPC 909.1(a)(4), (5),(6),(7),8) and (9); 53 P.S. 10 909.1(a)(4),(5),(6),(7),(8) and (9).*

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. *Dunlap v. Larkin*, 342 Super. 594 (1985); *Sobara v. City of Pittsburgh,* 80 Pa. Cmwlth. 425 (1984); *Harris v. Oil Service, Inc*., 78 Pa. Cmwlth. 510 (1983); *Township of Reserve v. Zoning Hearing Board of Reserve Township*, 78 Pa. Cmwlth. 496 (1983); *Zagar et al. Appeal*, 74 Pa. Cmwlth. 270 (1983); *Baker v. Chartiers Township*, et al, 163 Pa. Cmwlth. 574, 641 A.2d 688 (1994).

"Interpretations." Requests to "interpret" a zoning ordinance *outside of the context of any of the types of matter that the legislature has entrusted to zoning hearing boards* are occasionally received, sometimes based upon a purported authorization in the application form, or in the zoning ordinance. Amounting to a "purely advisory opinion," a function that the legislature has not granted, zoning boards lack jurisdiction to address such requests. *Hopkins v. North Hopewell Township Zoning Hearing Board*, 154 Pa. Cmwlth. 376, 623 A.2d 938 (1993); *H.R. Miller Co., Inc. v. Bitler*, 21 Pa. Cmwlth. 466 (1975). The upgrading of obsolete, or misleading, application forms or ordinance provisions is another area where a suggestion to the governing body by a municipal solicitor, who has recognized the presence of such an "out of step" aspect of the community's regimen, might bring about a revision that will lead to an improvement in the administration of the zoning ordinance.

Enforcement. Zoning hearing boards, which exist solely as adjudicative bodies, have no enforcement powers, even as to their own previously issued decisions. *Evans et al. v. Lehman Township Zoning Hearing Board*, 91 Pa. Cmwlth. 106 (1985); *In re Leopardi*, 516 Pa. 115, 532 A.2d 311 (1987).

Reconsideration Of Decisions. Zoning hearing boards lack the power to reconsider their decisions. *Grand Central Sanitary Landfill, Inc. v. Zoning Hearing Board of Plainfield Township*, 155 Pa. Cmwlth. 273, 625 A.2d 115 (1993).

Appeal Period

Generally. Appeals to the zoning hearing board must generally be taken within 30 days after the action appealed from or challenged. *MPC 914.1, 53 P.S. 10914.1; MPC 909.1(a) (2), 53 P.S. 10909.1(a)(2)*.

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. *Association of Concerned Citizens of Butler Valley v. Butler Township Board of Supervisors*, 135 Pa. Cmwlth. 262 (1990); *Hermitage v. Zoning Hearing Board of the City of Hermitage, et al,* 149 Pa. Cmwlth.488, 613 A.2d 612 (1992). However, the landowner can move forward the commencement of the period for filing a challenge by utilizing the Preliminary Opinion provisions of *MPC 916.2, 53 P.S. 10916.2*. In validity challenges based on procedural defects in enactment, the 30-day appeal period begins on the effective date. *MPC 909.1(a)(2), 53 P.S. 10909.1(a)(2)*.

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. *MPC 914.1(a), 53 P.S. 10914.1(a)*. An objector filing an untimely appeal of zoning officer's issuance of a permit has burden of

proof as to when he received notice. *Schoepple v. Lower Saucon Township Zoning Hearing Board*, 154 Pa. Cmwlth. 658 (1993). 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. *Haaf v. Zoning Hearing Board of Weisenberg Township*, 155 Pa. Cmwlth. 608 (1993).

Stay of Proceedings. The filing of various specified types of applications with the zoning hearing board will result in an automatic stay of the matter which is subject to the application during the pendency of the board's proceedings. *MPC 915.1, 53 P. S. 10915.1*. 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. *MPC 915.1, 53 P. S. 10915.1*.

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. *MPC 1003-A (2), 53 P. S. # 11003-A(2)*.

Hearings

Public Notice. Hearings must be preceded by "public notice," which shall "i) state time and place of hearing and particular nature of the matter to be considered;" and "ii) be published once each week for two successive weeks in a newspaper of general circulation in the municipality". *MPC 107, 53 P.S. 1007; MPC 908(1), 53 P.S.10908(1)*. 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." *MPC 107, 53 P.S.10107*. 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 before the second publication. *1 Pa. C.S. 1909*.

Public notice in case of a validity challenge must include notice that the ordinance is being challenged and state when and where relevant material may be examined. *MPC 916.1(e), 53 P.S. 10916.1(e)*.

Individual Recipients. Written notice is to be given to the applicant, the zoning officer and any other persons designated by ordinance. *MPC 908(1), 53 P.S. 10908(1)*. 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. *MPC 908(1), 53 P.S. 10908(1)*.

Posting. Posting of the written notice at a conspicuous place on the subject tract at least one week prior to the hearing is also required. *MPC 908 (1), 53 P.S. 10908 (1)*; *Eaton v. Zoning Hearing Board of the Borough of Wellsboro*, 80 Pa. Cmwlth. 392 (1984.

Mandatory. As notice requirements are mandatory, a failure to comply may result in the board's decision being declared a nullity. *Eaton v. Zoning Hearing Board of the Borough of Wellsboro*, 80 Pa. Cmwlth. 392 (1984); *Appeal of Richard E. Connors*, 71 Pa. Cmwlth. 213 (1983); *G.J.C., Inc. v. Zoning Hearing Board of South Whitehall Township*, 39 Lehigh L.J. 171, 18 D & C 3rd 310 (1981)

Description of Relief Sought. Layman-completed application forms often mis-characterize 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." *Schumaker et al. Appeal*, 111 Pa. Cmwlth. 330 (1987), at 336.

Objectors, who might have been misled by the inaccurate portrayal of the type matter before the board, must be given a fair opportunity to present relevant evidence. *Schumaker*, supra, 111 Pa. Cmwlth., at 338. If the mistake is discovered during the hearing, the application may be amended and the hearing proceed, to be followed by a second hearing if necessary to allow unprepared opponents to prepare to present newly relevant testimony. *Schumaker*, supra, 111 Pa. Cmwlth., at 338. If not detected until the board's post-hearing deliberations, notice and an opportunity to be heard on the fresh legal theory must be afforded the objectors who appeared at the first hearing. *Schumaker*, supra, at 338, 111 Pa. Cmwlth.

Timing. Hearings must be held within 60 days of the receipt of the applicant's application, unless extended in

writing by the applicant. *MPC 908(1.2); 53 P.S. 10908(1.2)*. While MPC 916.1(d); 53 P.S. 10916.1(d), which deals with substantive validity challenges, does not repeat the "in writing" requirement, the overarching nature of MPC 908(1.2) would seem to carry over that standard into it. Act No. 43 of 2002, amended MPC 908(1.2), effective May 9, 2002, to explicitly state that it is only the first hearing which must be held within sixty 60 days. [2]

Decisions must be rendered within 45 days of the last hearing, unless extended in writing by the applicant. *MPC 908(9) 53 P.S. 10908(9)*.

In a strange new twist, Act No. 43 amended MPC 908(1.2) to require the applicant to complete the presentation of his case within 100 days of the first hearing. Further, the board or hearing officer must assure that the applicant receives at least 7 hours of hearing. Objectors must complete the presentation of their opposition within 100 days 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.[3]

Except in the case of a substantive validity challenge under MPC 916.1 53 P.S. 10916.1, a "deemed approval' of the application will result where a zoning board fails to meet the 45 day decisional deadline, or fails, in the words of Act 43, "*to commence, conduct or complete the required hearing as provided in subsection (1.2)*" unless the applicant has agreed to an extension in writing or on the record. *MPC 908(9), 53 P.S. 10908(9), as amended by Act No. 43.*[4] 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, *MPC 916.1(f)(1), 53 P.S. 10916.1 (f)(1)*, or fails to render a timely decision unless the time has been extended by mutual consent by the landowner and the municipality. *MPC 916.1(f)(4), 53 P.S. 10916.1(f)(4)*.

Parties.

Appellants

- *Landowners*. The landowner affected may file validity challenges, on substantive or procedural grounds, as well as appeal from adverse decisions of the zoning officer, municipal engineer, or the official administering transferable development rights. *MPC 10913.3.*
- *Municipal Officials*. An officer or agency of the municipality may make challenges to land use ordinances, both on substantive and procedural grounds, as well as appeal various sorts of determinations by the zoning officer, before the board. *MPC 913.3, 53 P.S. 10913.3*.

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. *MPC 10908(3)*. 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. At least if the board does not require the filing of a written appearance [as it is authorized to by the cited section], 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. *Orie v. Zoning Hearing Board of Borough of Beaver,* 767 A.2d. 623; 2001 Pa. Commw. LEXIS 18; *Gateside-Queensgate Company v. Delaware Petroleum Company*, 134 Pa. Cmwlth. 603, 580 A.2d 443 (1990). It is incumbent on the board to explain, on the record, any steps a citizen must take to protect her or her rights. *Orie v. Zoning Hearing Board of Borough of Beaver*, supra, at 624, 767 A.2d. Municipal boundaries are irrelevant in determining the question of standing. *Miller v. Upper Allen Township Zoning Hearing Board*, 112 Pa. Cmwlth. 274, 535 A.2d 1195 (1987).
- *The Municipality*. The municipality is a party to every hearing before the zoning hearing board in a

proceeding initiated by another party and this is true even though it does not actually participate. *MPC 908(3), 53 P.S. 10908(3)*. Status as a party sets the stage for a municipality to appeal to court from a decision with which it disagrees. *West Manchester Township v. The Zoning Hearing Board Of West Manchester Township*, 44 Pa. Cmwlth. 252, 403 A.2d 234 (1979), as well as for intervention in an appeal to the court of common pleas taken by another. *MPC 11004-A, 53 P. S. # 11004-A*. The importance of municipal intervention in an appeal to court is discussed below under the title "After the Board's Decision."

It is not uncommon for municipal officials to appear at a zoning hearing board hearing and state their concerns about a pending application, without presenting any evidence to support their position. Because of the board's obligation to decide the case in accord with the law and evidence brought before it, this sort of deficiency sometimes leaves board members unable to respond to what they otherwise believe to be a sound argument. If local officials are seriously interested in the outcome, the municipal solicitor should be authorized to appear and present the sort of evidence and legal authority that will sustain a decision.

Conduct of the Hearing. Oaths may be administered and subpoenas issued by the Chairman. *MPC 908(4), 53 P.S. 10908(4)*. Sometimes the solicitor, and even the stenographer [who may be a notary public], is asked to do so, though it is, at least, questionable whether testimony of a witness so "sworn" is actually made under oath.

Representation by counsel, as well as an opportunity to present evidence and argument and cross-examine adverse witnesses, is authorized. *MPC 908(5), 53 P.S. 10908(5)*.

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. *MPC 908(6), 53 P.S. 10908(6)*. Parenthetically, this informality is sometimes 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. *SCRUB v. Zoning Board of Adjustment,* 713 A.2d 135, 1998 LEXIS 470; *In Re: Appeal of Grace Building Co., Inc.*, 39 Pa. Cmwlth. 552, 395 A.2d 1049 (1979); *Borough of Glenfield v. C & E Motors, Inc*., 22 Pa. Cmwlth. 115, 347 A.2d 732 (1975).

The board must keep a stenographic record of the proceedings. *MPC 908(7), 53 P.S. 10908(7)*. 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. *Colarossi v. Clarks Green Zoning Board*, 154 Pa. Cmwlth. 217, 623 A.2d 424 (1993), at page 428, 623 A2d. The requirement may be waived, however. *Shamah v. Hellam Township Zoning Hearing Board*, 167 Pa. Cmwlth. 610, 1994 Pa. Commw. LEXIS 556. Common practice calls for the stenographic notes to be transcribed only in the event of an appeal, as a cost saving measure. This might be short sighted, at least in cases where findings are not necessary because there is no opposition and the application is granted. 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. *MPC 908(8), 53 P.S. 10908(8)*.

Quorum. The quorum necessary for a hearing or board action is not less than a majority of all of the members of the board. *MPC 906(a), 53 P.S. 10906(a)*. Where 2 members of a 3 member board, who remained after the resignation of the third prior to the hearing, held the hearing and rendered the decision, the matter was heard and decided by a majority of a duly constituted board. *Dieterly v. Zoning Board of Cheltenham Township*, 166 Pa Cmwlth. 370, 646 A.2d 672 (1994).

Alternates may be used to provide a quorum. Curiously, and not always recognized, this is the limit of the authority for their employment. *MPC 906(b), 53 P.S. 10906(b)*. There appears to be no sensible reason why *MPC 906(b)* should not be amended to allow the seating of alternates in order to fill out a complete panel, as well. Alternates are to be seated, in rotation according to declining seniority on a case-by-case basis, as designated by the chairman. *MPC 906(b), 53 P.S. 10906(b)*.

Hearing Officer. The board is authorized to designate one of its number as a hearing officer to conduct any hearing. *MPC 906(a), 53 P.S. 10906(a); MPC 908(2), 53 P.S. 10908(2)*. Note that Act 2 of 2002, effective April 13, 2002, amended MPC 908(2) so as to broaden the board's possible choices of a hearing officer to include "an independent attorney". 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. *MPC 908(9), 53 P.S. 10908(9)*.

Reality. A zoning hearing board hearing has been characterized as "something of a cross between a town meeting and a judicial hearing." *Ryan, Pennsylvania Zoning Law and Practice, #9.4.14*. 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, having been told by the zoning officer or other local official that they need a special exception or a variance from the zoning hearing board, but without any further warning, sometimes file unintelligible application forms and then appear at the hearing completely unprepared to address the evidentiary and legal matters that the board must decide. Exhibiting ABNIMBY ("Anywhere But Not In My Back Yard.") symptoms, objectors, particularly when unrepresented, will frequently burden the board with great volumes of repetitious testimony and argument that is of little help in resolving the matter before it.

A zoning officer, usually the first person the applicant encounters, who is knowledgeable and recognizes how far he can go in introducing a neophyte into the mysteries of zoning law without exceeding the limits of his own knowledge and getting himself (and the municipality) in trouble for giving incorrect or misleading advice, will often make the difference between an applicant who presents a coherent case and one whose presentation is "all over the lot." Often, the best advice he can give is "see a lawyer." And, as suggested above, clearly worded application forms, accompanied by instructions making clear that the decision will be based on legal principles and the evidence and suggesting that an attorney be consulted, can be helpful.

Lacking judicial powers and the deference people normally accord judges, the board and its solicitor often face a difficult task in keeping objectors within some bounds as to relevancy and redundancy and their (the objectors' and their own) tempers under control. However, the writer believes that in zoning board hearings, as with all local governmental proceedings, the best policy is to lean over backwards to allow everyone to speak his or her mind. Citizens will frequently accept an adverse decision, perhaps grudgingly, but without further appeal, if they believe that they have been fully heard and their position actually considered. The opportunity to attempt to persuade decision-makers is part of the "glue" that prevents American society from splintering into the violent factions seen in many places around the world.

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. *MPC 908(9), 53 P.S. 10908(9)*. The consequence of a failure to comply with this requirement is that the application being deemed to have been approved. *MPC 908(9), 53 P.S. 10908(9)*. 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.

However, in the case of a substantive validity challenge, a deemed denial of the challenge results from the zoning hearing board's failure meet the decisional deadline, unless the time is extended by mutual consent of the landowner and the municipality. *MPC 916.1(c)(7) and (f)(4), 53 P.S. 10916.1(c)(7) and (f)(4)*.

Form & Contents. Zoning hearing board decisions must be in writing. *MPC 908(9), 53 P.S.10908(9).* Where the relief sought is denied, or where the application is contested, findings of fact and conclusions based thereon must accompany the decision. *MPC 908(9), 53 P.S. 10908(9)*. General conclusory statements are to be accompanied by findings of fact that support them. *Zoning Hearing Board of Upper Darby Township v. Konyk*, 5 Pa. Cmwlth. 466 (1975). Citations of authority on which a conclusion is based, and an explanation of the rationale, are also required. *MPC 10908(9), 53 P.S. 10908(9)*. However, MPC 908(9) 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. *Piecknick v. South Strabane Township Zoning Hearing Board*, 147 Pa. Cmwlth. 308, 607 A.2d 829 (1992). Contrast this with the consequences of a decision on an application for approval of a subdivision or land development plan that does not conform to the format prescribed by MPC 508(3).

Consideration should be given to the use of pre-prepared decisional forms, with blank spaces, in cases where findings and conclusions are not required. However, 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. *MPC 916.1(c)(5).*

Delivery. A copy of the decision is to be mailed or delivered personally to the applicant not later than the day following its date. *MPC 908 (10), 53 P.S. 10908 (10)*. All other persons who filed their names and addresses with the board merely receive notice of the decision and where it may be examined. *MPC 908(10), 53 P.S. 10908(10)*.

Sunshine Law

A zoning hearing board is an "agency" and subject to the Sunshine Law. *65 Pa. C. S. A. 701, et seq; Piecknick v. South Strabane Township Zoning Hearing Board*, 147 Pa. Cmwlth. 308, 607 A2d 829 (1992); *Glennon v. Zoning Hearing Board of Lower Milford Township*, 108 Pa. Cmwlth. 371 (1987); *Pae v. Hilltown Township Zoning Hearing Board*, 35 Pa. Cmwlth. 229 (1978). Thus, "[o]fficial action and deliberations by a quorum of the members" must "take place at a meeting open to the public". *65 Pa. C. S. A. 704*. The Court of Common Pleas is authorized, "in its discretion," to invalidate official action taken at a meeting that did not meet the requirements of the Law. *65 Pa. C. S. A. 713*. Participation in a meeting with the intent and purpose of violating the Law subjects an agency member to a $100 fine upon conviction. *65 Pa. C. S. A. 714*. Attorney fees and costs may be imposed against an agency found to have willfully or wantonly disregarded a provision of the Law. *65 Pa. C. S. A. 714.1*.

A violation of the Sunshine Law will not provoke a deemed approval. *Appeal of Emanuel Baptist Church*, 26 Pa. Cmwlth. 427, 364 A.2d 536 (1976); *Enck v. Anderson*, 25 Pa. Cmwlth. 318, 360 A.2d 802 (1976). However, the Commonwealth Court has exercised the authority granted by the Sunshine Law to invalidate a zoning hearing board decision which it determined had been arrived at during an executive session. In *Kennedy v. Upper Milford Township Zoning Hearing Board*, 779 A.2d 1257; 2001 Pa. Commw. LEXIS 511, the board recessed after a public hearing on a request by the Turnpike Commission for permission to construct a 200 foot high communications tower. On reconvening, the chairman stated, "I'm going to make a motion to the [ZHB] and we'll vote that we do not approve the 200 foot tower that was proposed, but that we approve a compromise [180-foot tower]". The board, without further discussion, approved the compromise. Although the lower court said the board admitted that deliberations took place during the recess, it found no evidence of any official action and refused to invalidate the board's decision. On appeal, Judge Friedman saw the chairman's words "we'll vote" as an indication that the public vote had been predetermined during the recess,

saying that he could not have otherwise known how the board would vote.[5] She held that the lower court abused its discretion when it failed to invalidate the board's decision.

Zoning hearing boards must take note of Judge Friedman's rejection of the view, previously held by many, including this writer, that the reference to "*quasi-judicial deliberations,*"[6] which appears at the end of *65 Pa. C.S.A. 708(a)(5)*, authorizes zoning hearing boards to hold executive sessions. Her opinion makes clear that the italicized words are not a stand-alone ground for private discussions, but are tied to the preceding reference to discussions of privileged or confidential matters, which were not involved in the Kennedy case. She pointed to the absence of a period of public discussion and debate, prior to the board's vote, as distinguishing Kennedy from other cases where a Sunshine Law infraction was cured by subsequent ratification at a public meeting. She also noted and seemed to rely on the requirement for a public comment period before the taking of official action which is contained in *65 Pa. C.S.A. 710.1(a)*.

What guidance shall zoning hearing boards and their solicitors take from the Kennedy opinion?

1. Do not hold executive sessions, at least not prior to voting on the decision at a duly convened public hearing.
2. If an executive session is held prior to the public vote, open the hearing for further public comment and debate before taking a vote later in the hearing, with a view to curing the infraction. Whether this would prevent the imposition of a fine on the participating members, and avoid the imposition of attorney fees and costs on the board is not clear.
3. If comfortable with the degree of certainty about the outcome, take a vote following the evidentiary portion of the hearing but prior to adjournment. Follow this with a written decision containing findings and conclusions within the 45-day decisional period. It appears that, if they desire, the members could meet privately to discuss the proposed findings and conclusions, because the formal action, the vote, which is the focus of the Sunshine Law requirement, would have already been taken at a public meeting. *Piecknick v. South Strabane Township Zoning Hearing Board*, supra, at 317, 147 Pa. Cmwlth.; *Pae v. Hilltown Township Zoning Hearing Board*, 35 Pa. Cmwlth. 229 (1978), at 234.
4. If not comfortable with the degree of certainty about the outcome at the end of the evidentiary portion of the hearing, direct the solicitor to prepare a suggested decision containing findings and conclusions and circulate it among the members for each to review and provide their own individual feedback to the solicitor. The solicitor might then be able to make appropriate changes. The board should not hold an executive session to discuss the proposed decision. Rather the written decision should be brought up for discussion and a vote at a duly convened public meeting within the 45-day decisional period.

In the writer's view, the choice between alternatives 3 and 4 above leaves the board members in a clumsy position, at least in difficult cases. The problem with alternative 3 is that the outcome of a case sometimes changes during the process of drafting a decision. This could result in the inability to support the voted-on outcome with a proper written decision. On the other hand, the fragmented, un-collegial, input in the drafting of the written decision, allowed by alternative 4, seems less than ideal and the funneling of board members' individual thoughts through the solicitor might be deemed a subterfuge to avoid the Sunshine Law. In the writer's view, the Sunshine Law should be amended to allow zoning hearing boards, which are required to explain themselves in a writing that is the basis for court review, to hold executive sessions after the evidentiary hearing while preparing the written decision that would be rendered at a duly convened public meeting.

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. *West Manchester Township v. The Zoning Hearing Board Of West Manchester Township*, 44 Pa. Cmwlth. 252, 403 A2d 234 [1979].

It may also intervene in an appeal to the Court of Common Pleas taken by another. *MPC 11004-A, 53 P. S. 11004-A*. Within 30 days of the filing of the appeal, intervention is as of course. *MPC 11004-A, 53 P.S. 11004-A.*

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. *Brendel, et al. v. Zoning Enforcement Officer of the Borough of Ridgeway*, 780 A.2d 750, 2001 Pa. Commw. LEWXIS 453; *The Zoning Hearing Board of The City Of Erie v. Burrows,* 136 Pa. Cmwlth. 689, 584 A2d 1072 (1990). 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. *Brendel, et al. v. Zoning Enforcement Officer of the Borough of Ridgeway*, supra; *The Zoning Hearing Board of The City Of Erie v. Burrows*, supra. Thus, the municipality should consider intervening before 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. *MPC 1103-A(b), 53 P.S. 11003-A(b)*. Generally the board's solicitor, whose letter of transmittal should include an itemized list of the items that are included, attends this to.

References

1. Though the Supreme Court, in reversing, said that "zoning boards are not judicial but administrative bodies", page 119, 516 Pa., this is not inconsistent with the notion that such boards are quasi-judicial in nature. See *Omnipoint Communications, Inc., et. al., v. Zoning Hearing Board of East Pennsboro Township*, 4 F. Supp. 2d 366 [E. D., Pa.](1998), which cites the Supreme Court's Leopardi opinion for the latter proposition.
2. MPC 916.1(d); 53 P.S. 10916.1(d), which expressly refers to the commencement of the hearing within that same time period, a remains unchanged, but is to the same effect.
3. The writer's experience does not suggest the need for such legislative micro-management.
4. The legislative call for a deemed approval as a result of a parties' failure to meet the deadlines for the completion seems likely to cause unintended and undesirable results. In complicated or protracted cases, zoning boards will have to manage their calendars carefully.
5. Given the looseness with which the writer has frequently heard lay zoning hearing board members [and sometimes their solicitors] speak during hearings, the writer is skeptical that this is an indication the chairman was saying anything more than "I'm going to make a motion that we vote that we do not approve, etc."; or that it provides sufficient basis to overrule the lower court which found no evidence that the board had decided the outcome during the recess.
6. Zoning hearing boards act in a quasi-judicial capacity when they act on an application for a zoning permit. *Urbano v. Meneses*, 288 Pa. Super. 103 (1981)
7. And normally do not come up in zoning hearing board hearings.
8. Such reliance may well have been misplaced, as the 65 Pa. C.S.A. 710.1 (a) public comment requirement applies only to "the board or council of a political subdivision or of an authority created by a political subdivision". This might well be a more limited group than the municipal bodies which fall within the 65 Pa. C. S. A. 703 definition of" "Agency." The definition, "[t]he body authorized to take official action of all of the following: any board, council authority or commission of any political subdivision of the commonwealth," clearly covers a broad class of local bodies, including zoning hearing boards. On the other hand, "[t]he board or council" of Section 710.1(a) seems to point to the governing body of the political subdivision or authority. Perhaps this distinction is un-intended. But it also might be explainable on the grounds that, by their nature, zoning hearing boards hear what parties with standing have to say on the issues before them. If applied to zoning hearing board proceedings, the wording of the Section 710.1(a) requirement for citizen and taxpayer comment appears so broad as to do away with the rules that limit participation before such boards to persons who have standing.

XXVI. 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), *53 P.S. 10101 et seq*. 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 of the MPC defines "subdivision" as:

> The division or redivision 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 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"].

Municipal Regulation

It is Section 501 of the MPC[2] 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.[3] 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.[4] 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 any may designate the county planning agency as the body for review and approval of plats.[5] 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 pursuant to "public notice" as defined in the MPC. 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. 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 not county planning agency, to the county governing body.

County Regulation

Section 502 of the MPC[6] 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.[7] 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.[8] 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.[9]

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.[10] 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 allows a governing body to appear and comment before a contiguous municipality considering a proposed subdivision, change of land use or land development.[11]

Plan Subdivision Procedures

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.[12] Mandatory sketch plan submission prior to preliminary plan submission has been permitted, but is generally not advisable because failure to faithfully follow due process procedures can result in a deemed approval conferring vested rights.

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. 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.[13]

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 by a professional of the same profession or discipline as the consultant whose fees are being disputed.[14]

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.

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.[15]

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.[16] 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.[17] Failure to render a decision and communicate it to the applicant within the 90-day period may result in a deemed approval.[18]

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 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. Failure to so communicate the decision will result in a deemed approval.[19]

The 90-day time limit for action also applies when a final court order remands an application to a municipality.

Securing Completion of Public Improvements

As a prerequisite to final approval, Section 509(a) of the MPC[20] 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 improvements 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.[21]

Types of Security

Section 509(c) of the MPC[22] 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.

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.[23] 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.[24] 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.[25]

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.[26] 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.[27]

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 improvements for up to 18 months following acceptance.[28] The required security is the same type as that required for installation of the improvements and cannot exceed 15 percent of the cost of installation of the improvements.

Final Release from Improvement Bond

Completion of all improvements is a prerequisite to release from the improvement bond.[29] 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.[30] 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.[31] 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.[32]

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."[33] Such fees must be based on a schedule set by ordinance or resolution and cannot exceed customary fees charged to the municipality.

Municipality's 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."[34]

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.[35] 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.[36]

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.[37]

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.[38]

References

1. 53 P.S. 10107.
2. 53 P.S. 10501.
3. 53 P.S. 10501.
4. 53 P.S. 10501.
5. 53 P.S. 10502(c).
6. 53 P.S. 10502.
7. 53 P.S. 10502(b).
8. 53 P.S. 10502(b).
9. 53 P.S. 10502(c).
10. 53 P.S. 10502.1.
11. 53 P.S. 10502.1
12. 53 P.S. 10503(1).
13. 53 P.S. 10503(1).
14. 53 P.S. 10503(1).
15. 53 P.S. 10508(3).
16. 53 P.S. 10508.
17. 53 P.S. 10508.
18. 53 P.S. 10508(3).
19. 53 P.S. 10508(3).
20. 53 P.S. 10509(a).
21. 53 P.S. 10509(a).
22. 53 P.S. 10509(c).
23. 53 P.S. 10509(g).
24. 53 P.S. 10509(f).
25. 53 P.S. 10509(h).
26. 53 P.S. 10509(e).
27. 53 P.S. 10509(f).
28. 53 P.S. 10509(k).
29. 53 P.S. 10510(a).
30. 53 P.S. 10510(b).
31. 53 P.S. 10510(c).
32. 53 P.S. 10510(d) and (e).
33. 53 P.S. 10510(g).
34. 53 P.S. 10511.
35. Ibid.
36. 53 P.S. 10515.1(a).
37. 53 P.S. 10515.1(b).
38. 53 P.S. 10515.3.

XXVII. Sewage Facilities Planning And On-Lot Sewage Disposal

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The Pennsylvania Sewage Facilities Act, commonly known as Act 537, 35 P.S. § 750.1 *et seq*., 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 insure proper sewage disposal. The Department of Environmental Protection ("Department") 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 the Department before it becomes effective.

Second, the municipality must amend 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, 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, 35 P.S. § 750.5, requires municipalities to adopt an official sewage facilities plan and to update that plan as required or when ordered by the Department. There are extensive regulations for the preparation and contents of the Act 537 Plan set forth in Chapter 71 of the Department's regulations. Unless a municipality is totally served by public wastewater treatment facilities which 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 public sewer service areas, and other information requested by the Department. The present

usage of public sewer collection 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 insure compatibility. For example, zoning which permits high-density residential development in an area that will not be served by public sewer systems 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 10 year planning period. *35 P.S. § 750.5(d)*. 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 action required during the 10 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 public sewer service into the area designated on its comprehensive plan and/or zoning map for high-density development. A municipality which is predominantly rural may not propose any public 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 insure 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 insure that the Plan cannot be used as a basis for an exclusionary zoning challenge or contain statements implying that the municipality will not provide additional public 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 insure that any alternative chosen is within the power of the municipality to implement.

A public comment period of at least 30 days must be advertised in accordance with the Department's regulations. See 25 *Pa. Code § 71.31(c)*. Comments must be solicited from the municipal and county planning commissions. *25 Pa. Code § 71.31(b)*. 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 insure an opportunity for citizens to be heard.

An Act 537 Plan must be adopted by resolution of the governing body of the municipality, and the Department'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. *25 Pa. Code § 71.31(f)*. It is vitally important that the solicitor review the implementation schedule to insure that it is reasonable. It is also recommended that the implementation schedule be set forth in months or years after approval of the plan by the Department rather than by specific dates because the Department may require time-consuming revisions to the Act 537 Plan.

After the municipality approves an Act 537 Plan, it is forwarded to the Department for its review and approval. The Department has the ultimate responsibility to approve or disapprove Act 537 Plans. *35 P.S. § 750.5*. After changes requested by the Department are made, the Department 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, the Department has the power to compel the municipality to implement its Act 537 Plan by instituting a ban on all further sewage permits within the municipality, *35 P.S. § 750.7(b)(4)*, and, ultimately, requesting the courts to impose fines.

Revisions to an Act 537 Plan (Planning Modules for Land Development)

Once a municipality has adopted its Act 537 Plan, the Act and Department's regulations require that the Plan be amended to address development not indicated within the Plan. See *35 P.S. § 750.5(a.1)*. 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 public sanitary sewage or which is included within the Act 537 Plan as an area into which public sanitary sewage 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 public 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. *35 P.S. § 750.5(a.1); 25 Pa. Code § 71.53(b)*. The module is not complete until the county and municipal planning commission have submitted their reviews or until such agencies have had the module for 60 days. *25 Pa. Code § 71.53(d)(2)*. 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. *25 Pa. Code § 71.53(d)(6)*. The module is not complete until there is proof of this publication. *Id.*

Solicitors in municipalities that are not totally served by a sanitary 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 the Department'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 the Department'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, *37 Pa.C.S. § 507*. 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 the Department 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, 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." *Oley Township v. Department of Environmental Protection,* 710 A.2d 1228, at 1230, Pa.Cmwlth. 1998. If a governing body denies a planning module, the developer has a right to appeal to the Department. See *35 P.S. § 750.5(b); 25 Pa. Code § 71.14*. There is no right to appeal the denial of a module to the court of common pleas under the Local Agency Law since Section 5 of the Sewage Facilities Act makes DEP the agency which is ultimately given the power to approve or deny the module regardless of the municipality's actions.

On-Lot Sewage Facilities

Permits to authorize the installation of an on-lot sewage facility are issued by the municipality's sewage enforcement officer ("SEO"). Act 537 requires municipalities to employ certified sewage enforcement officers. *35 P.S. § 750.8(b)(1)*. The Department certifies sewage enforcement officers in accordance with Chapter 72 of its regulations. A single person may serve as sewage enforcement officer 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. *35 P.S. § 750.7c*.

In order 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 the Department'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. *35 P.S. § 750.8(b)(5).* 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. *35 P.S. § 750.8(b)(5)(iii)*.

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. *35 P.S. § 750.7(b)(2.1)*. The SEO is required to inspect the installation of the system before finalizing the permit. *35 P.S. § 750.7(b)(3)*.

Applications for alternative sewage systems are processed differently depending on whether there is a "delegated agency." See *35 P.S. § 750.7(b)(2.2), (2.3)*.

Section 16(a) of Act 537 authorizes Local Agency Law appeals from determination of sewage enforcement officers regarding permits. *35 P.S. § 750.16(a)*. Thus, a solicitor may be faced with an appeal from a determination of a sewage enforcement officer 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 the Department's regulations. See *25 Pa. Code § 72.28 et seq*.

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 the Department's regulations. Therefore, if the sewage enforcement officer 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, the Department'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. *25 Pa. Code §§ 71.72, 71.73*. Act 537 places ultimate responsibility upon municipalities by requiring that the municipality take action to assure maintenance. See, e.g. *35 P.S. §§ 750.7b(a)(2)(ii)* (soil mottling); *§ 750.7c(4)* (individual residential spray irrigation systems).

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 the Department's regulations at Section 71.73, *25 Pa. Code § 71.73*, many municipalities have voluntarily or under compulsion by the Department enacted ordinances requiring that landowners maintain on-lot sewage disposal systems in accordance with certain scheduling. 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 the Department 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 the Department'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 the Department's regulations. See *25 Pa. Code § 71.63*. 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 the Department's regulations. The Department has sample ordinances, and municipal solicitors should carefully review such samples and the Department's regulations if a municipality is requested to authorize installation of holding tanks and/or privies. In addition, the solicitor should insure 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.

Additional Information

Further information may be obtained from:

1. The Pennsylvania Department of Environmental Protection.
2. Pennsylvania State Association of Township Supervisors.
3. The Municipal Engineer and/or Sewage Enforcement Officer.

XXVII. Municipal Solid Waste/Recycling

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Authority and Responsibility

The locations and facilities used for disposal of municipal waste, and for waste handling and processing 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.

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. The 2000 Census added 42 more municipalities to the list of those subject to mandatory recycling.

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.

Flow Control

Municipal waste management plans may include waste flow restrictions directing various local wastestreams to specific facilities or identifying available disposal facilities.[3] 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 establishes 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.

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 12, 1987, but not before. It is a credit toward host payments under any other agreement, but does not limit payments by private agreement.

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.

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. 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.

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 appeal4.

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.

Trash Collection Exclusions

In reviewing the claim of 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[5]. 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.[6]

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

- *Environmental Assessment Process – Phase I Review* (I.D. No. 254-2100-101), dated February 7, 1997 (establishing procedures DEP's regional offices will follow in reviewing municipal waste permit applications to evaluate potential harms and benefits).

- *Local Municipality Involvement Process* (I.D. No. 254-2100-100), dated February 7, 1997 (describes process for involving municipalities in reviewing new or existing municipal waste disposal or processing permit applications).

- *Municipal Waste Facility Review – Traffic Analysis* (I.D. No. 2540-2100-102), dated February 7, 1997.

- *Process for Evaluating Daily Volume* (I.D. No. 254-2100-103), dated February 7, 1997.

- Draft *Guidelines for the Development of County Municipal Waste Management Plan Revisions* (I.D. No. 254-2212-504) (contains guidance to counties on how to develop flow control provisions likely to withstand a Commerce Clause challenge). Available on DEP's website (www.dep.state.pa.us) or by calling 717-783-2388.

Web Resources

DEP's website contains extensive resources. The best way to access them is through the home page: www.dep.state.pa.us. 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.

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 reg - ulations, 25 Pa. Code Chapters 271-285.
2. 25 Pa. Code Chapters 271, 272, 273, 277, 279, 283, and 285.
3. See *Harvey & Harvey, Inc. v. County of Chester*, 68 F.3d 788, 3rd Cir. 1995, cert. denied; *Tri-County Industries, Inc. v. Mercer County et al.*, 116 S.Ct. 1265, 1996.
4. *Giordano and Twp. of Robeson v. DEP and Browning-Ferris Industries, New Morgan Landfill Company, 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. Tri-County Industries, Inc., et al. v. DEP, 2003 Pa. Commw. LEXIS 85 (Feb. 10, 2003).
5. *Ramsgate Court Townhome Association, et al. v. West Chester Borough*, 313 F.3d 157, 2002 U.S. App LEXIS 25847 (3d Cir. 2002).
6. *Philadelphian Owners Association et al. v. City of Philadelphia; Freedley Court Apartment Associates et al. v. Borough of Norristown,* 2003 U.S. App LEXIS 2014 (3d Cir. 2/4/2003).

XXIX. Stormwater Management

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The federal Clean Water Act[1] seeks to improve the quality of rivers, streams, lakes and their surface water by requiring "point source" discharges of "pollutants" into such waters to have a discharge permit, and by funding various programs to deal with "nonpoint sources." Stormwater, which was considered a low environmental priority in the 70's and early 80's, 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]

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]

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 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 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 determined the need for specifically legislating a permit program for stormwater discharges and 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 impact, increasing the relative significance of stormwater pollution.

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.

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 approved permit.

In practice, DEP is committed under its own laws to regulating point sources, but is phasing 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] with these 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 serving a population of 250,000 or more" (subsection 402(p)(2)(c)), and "a discharge from a municipal separate storm sewer 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 *Comprehensive Stormwater Management Program,* below.

Current Applicability

EPA regulations currently define a municipal separate storm sewer system (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.

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, and
- pollution prevention through good housekeeping practices for municipally operated systems.[16]

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.[17]

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 non-compliance 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). Those permit requirements are also subject to federal, state or citizen enforcement. Waters of the United States used to carry stormwater may not be regarded as discharges in certain cases, but as conveyances instead.

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.[18] These plans may be revised in conjunction with meeting the EPA-mandated stormwater permit requirements.

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 were 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.
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.

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: http://www.epa.gov. The NDPES web site is located at: http://cfpub.epa.gov/npdes/home.cfm?program_id=45

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 you may either go to DEP's home page at http://www.dep.state.pa.us, and find the Direct Link search box, type in stormwater and click on go, or you may go to the following web address:
http://www.dep.state.pa.us/dep/deputate/watermgt/wc/subjects/stormwatermanagement.htm

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. 1326(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 the 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 (December 8, 1999). The rules were issued pursuant to 33 U.S.C. §1342(p)(6). The U.S. Circuit Court of Appeals for the 9th 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. USEPA,* 2003 U.S App. LEXIS 497 (January 14, 2003).

15. Title 40, Code of Federal Regulations, Part 122, Section 122.26(b)(8); 40 CFR 122.26(b)(8).
16. See also, EPA rules at 40 CFR §122.34, and DEP protocol (mentioned in Relevant Documents and Web Sites).
17. 40 CFR §122.33(c).
18. See 32 P.S. §§680.1 to 680.17.

XXX. Municipal Water Supply

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Municipalities have the power to own and operate water supply systems.[1] Alternative methods of providing service include creating a municipal authority under the Municipality Authorities Act (see Chapter XXI), or contracting with an adjoining municipality or authority or accepting service by a private company. The choice will depend upon several legal and practical factors discussed below.

PUC Jurisdiction

Matters involving rates and service by a municipality are subject to regulation by the Public Utility Commission (PUC), to the extent that a municipality supplies water directly to the public (as compared to sales to other municipalities for resale) beyond its municipal boundaries. A municipal authority is not subject to PUC jurisdiction regardless of where it serves.[2] This is helpful to the authority, but removes protections for outside users. Therefore, where a municipality is to receive service from a neighboring authority it may wish to obtain a long term contract from the supplying authority that the authority rates will be uniform, or will reflect the actual cost of service to different customer classes or zones.

Demographic and geographic factors specific to boroughs complicate the process of operating a water system under the direct ownership of a municipality. Many boroughs have static or declining populations, and narrowly circumscribed boundaries. To maintain economic viability for their water and sewer systems over an extended period, it is advisable for them to expand their customer and revenue base outside the boundaries. Operating under the jurisdiction of the PUC can become cumbersome and costly for the municipality receiving the service and occasionally for the municipality providing it. In a recent case, a city was allowed to recoup, by its charges to outside users, its legal and other expenses involved in a contested rate increase, even though the expenses represented 44 percent of the total rate increase.[3] Thus, indirectly the outside users who contest rate increases before the PUC will ultimately pay not only the fees of their lawyers, but those of the municipality also.

Alternatively, service can be provided indirectly by intermunicipal agreements, which avoids PUC jurisdiction. However, this only applies where there is a separately owned and operated distribution system in each municipality where service is provided. This approach is widely used, although it involves duplication of costs and inefficiencies.

Use of Roads and Acquisition of Property

Owners of municipal water systems often must acquire land outside the municipal boundaries for wells, reservoirs or other facilities. The municipal codes generally authorize municipalities to acquire property by eminent domain, but in some cases the power to acquire property for water projects outside their boundaries is not clear.[4]

Townships have specific authorization to occupy "public highways" for purposes of laying their lines, with approval by the county or the State where those entities own the roads.[5]

Zoning and Land Development Regulation

The power of municipalities to control land use through the zoning and land development review process creates a larger problem for municipal systems. Municipalities who seek to limit growth have often impeded extraterritorial expansion of neighboring municipal systems, either by withholding approval for construction or attempting to regulate operations. Generally a municipality is subject to the zoning regulations of another municipality in which it owns land.[6] However, municipal regulation can sometimes be overcome by reference to state preemption.[7] The legal problem of zoning regulation is the same where a system is operated by an authority, but it may be alleviated as a practical matter by creating a joint authority.

Debt Limits

The municipality can avoid possible encroachments upon its borrowing limits if borrowing for water projects is done by an authority, so long as the municipality does not guarantee the debt of the authority. Alternatively, the municipality may own and operate the system directly, and also avoid encroaching upon its borrowing limits, if it establishes rates which are high enough to cover both operating expenses and debt service for the system.[8] If a municipality guarantees the debt of an authority, the authority's debt will be charged against the municipality's borrowing limits, unless the authority sets its rates at a level which avoids the necessity for the municipality to subsidize the authority. See Chapter 14.

Municipal Control

Some municipalities have continued to own and operate their systems directly in order to maintain direct control of rates and operations. In contrast, municipal control over an authority is limited to the appointment of one authority board member each year. The authority will have control of rates, service improvements, new connections, sources of water supply and other operational matters. If the direct ownership is intended to provide a subsidy to the municipality's general fund from water revenues collected from outside users, the permitted level of such subsidy will be subject to review by the PUC, as mentioned above.

Alternative Structures

As mentioned above, municipalities have the right to contract with private water companies to provide service to their residents.[9] Recently, contracts of this type have arisen as part of a sale of an existing municipal system to a private company. The private company must consider obtaining a certificate of public convenience from the PUC, if it will own the facilities to serve the public.

Environmental Regulation and Future Trends

Smaller municipalities may find large water companies, large municipalities, municipal authorities or joint municipal authorities to be a better source of water supply for several reasons:

1. Increasingly stringent water quality regulation by the federal and state governments increase costs, and those costs may be disproportionately high for providers with small customer bases. The federal Safe Drinking Water Act[10] authorizes the Environmental Protection Agency to impose health standards on potable water supplied by local municipalities, public utilities and others. "Maximum Contaminant Level Goals ("MCLGs) set by EPA are designed to protect the health of the public, including an adequate margin of safety. EPA also publishes a Maximum Contaminant Level (MCL) that recognizes technological and economic considerations, and is binding on public water suppliers. EPA also publishes "secondary" quality standards which consider aesthetics, such as odor and taste.

2. Water systems serving 10,000 or more people must report to their customers annually on the quality of water supplied. EPA requires that the report identify any exceedance of the federal MCLGs. Smaller systems can report by publication in a newspaper.

3. Two major EPA initiatives under the Safe Drinking Water Act will impact many water suppliers significantly. For surface water sources, a new rule on treatment methods that considers the effects of trace byproducts is underway, entitled Long-Term 2 Enhanced Surface Water Treatment Rule (LT2ESWTR). EPA announced the results of its rule-making in LT1ESWTR, which focused on cryptosporidium, the protozoan that became famous when it attacked the Scranton area. LT1ESWTR tightened filtration requirements. Part of the drive comes from EPA's rule-making on disinfection byproducts, and the effort to avoid excessive chemical treatment of drinking water. The second EPA initiative is the development of new rules for those public water systems that use groundwater. The rules will focus on viruses, as well as fecal contamination.

4. Access to water supplies in many areas of Pennsylvania is regulated by interstate water basin commissions, which limit the locations from which either surface or ground water can be withdrawn, and the quantity of water which can be withdrawn. Large utilities with extensive systems can provide water over long distances – a task which smaller municipalities may find prohibitively expensive.

5. If the municipality secures service from a supplier that is interconnected with other systems and water sources, this may provide better security against drought or other supply disruptions.

6. Pennsylvania DEP has been encouraging the development of regional systems by means of a small water system regionalization grant program. "Small systems" are those serving fewer than 3,300 persons.[11] This program, however, has thus far resulted in relatively few new regionalized systems.

Initial Charges

Municipal authorities and municipalities may impose tapping, connection and similar fees to help recover the cost of constructing or extending water supply facilities. These fees can only be imposed after consulting engineers have completed for the municipality the complex calculations required by Act 203 of 1990, which consisted of amendments to the Municipality Authorities Act. These provisions apply to municipal systems by a cross-reference provision in the Municipalities Planning Code.[12] The permitted amount of such fees is regulated by the formula set forth in that statute. The requirements and formula are the same for water and sewer, and for municipalities as well as authorities. See Chapter 21

When private developers construct or extend water systems, they are entitled to be reimbursed for some of their costs by other users who connect to the extended system within 10 years after it is dedicated to the municipal authority.[13] The same is true when the authority or municipality constructs a system at the expense of a private developer.[14]

Certain capital costs may also be recovered by the use of assessments. The types of costs are limited to the cost of distribution systems. The only advantage of assessments is that they may be imposed on unimproved land. However, municipalities may impose assessments for water lines only by the front-foot method, not the "benefit" method.[15] This limitation does not apply to authorities.

Mandatory Connection

In those instances where some residents of a community desire to be supplied with public water, but others do not, the uncertainty of the size of the customer base may inhibit efforts to develop a public water system. To assist in obtaining financial viability for municipal water systems, some municipalities have found it advisable to enact an ordinance requiring property owners to connect to the system. The Codes permit the enactment of such ordinances where the system is owned by the municipality and also in cases where it is owned by an authority.[16] Some municipalities have tried to create exemptions for certain areas of the municipality or certain types of users. A recent decision casts doubt upon the validity of such exemptions.[17] Some property owners have even contested the constitutional validity of mandatory connection ordinances. Such attacks have been rejected over the years, including one case where a mandatory connection ordinance in New Jersey was upheld by a Federal Appeals Court.[18] That opinion was recently followed by a Pennsylvania Court. See Chapter XXI.

Water Shutoff

Generally, municipalities and municipal authorities are entitled to cooperation from each other with respect to shutting off water service when a sewer service provider has not been paid.[19] The benefits of a water shut-off on account of unpaid sewer bills are available to any municipality or to an authority organized by a second class county, second class, second class A and third class city, any borough and any first or second class township. Either because of an oversight, or for some unknown policy reason, sewer authorities created by any county other than a second class county cannot compel a water supplier to discontinue service when sewer bills are unpaid.

References

1. See, e.g. the Borough Code, 53 P.S. § 47401; the Third Class City Code, 53 P.S. § 38501; the First Class Township Code, 53 P.S. § 56514; and the Second Class Township Code, 53 P.S. § 67601.
2. From time to time legislation is introduced in the Legislature that would limit or abolish this freedom.
3. *City of Lancaster Sewer Fund v. PUC*, 793 A2d. 978 (Pa. Commwlth. Ct. 2002).
4. Compare favorable language for Third Class Cities *53 P.S. §38505* and Boroughs *53 P.S. §47411*, with *53 P.S. §56901* for First Class Townships). Authorities have the power of eminent domain, not limited as to area.
5. See, e.g., 53 P.S. § 67601(b) as to Second Class Townships.
6. *Summary of Pa. Jurisprudence* §16.22
7. *See State College Borough Water Authority v. Board of Supervisors of Halfmoon Township*, 659 A2d. 640 (Pa. Commwlth. Ct. 1995) (zoning power preempted by regulations of Susquehanna River Basin Commission); *Butler Township v. DER*, 513 A2d. 508 (Pa. Commwlth. 1986) (DEP order for siting of treatment plant preempted provisions of local zoning).
8. Local Government Unit Debt Act, 53 Pa. C.S.A. § 8025. 16. See *Catholic Cemeteries, Inc. v. Pine Township,* 794 A2d. 435 (Pa. Commwlth. Ct. 2002)
9. See, e.g., Second Class Township Code, 53 P.S. § 67601.
10. 42 U.S.C. §§ 300f to 300j-26. *Regulations of EPA appear at 40 C.F.R. Parts to 149*.
11. 35 P.S. § 724.3.
12. 53 P.S. §10507-A.
13. 53 P.S. §5607(d)(31).
14. 53 P.S. §10507-A(c).

15. 53 P.S. §47408
16. 53 P.S. §§47461, 57707 and 67603.
17. *Vernon Township Water Authority v. Vernon Township,* 734 A.2d 935 (Pa. Commwlth 1999).
18. Stern v. Halligan, 158 F3rd. 729. (3rd. Cir. 1998).
19. See, e.g. Second Class Township Code, 53 P.S. § 67603, First Class Township Code, 53 P.S. § 57707 and the Borough Code, 53 P.S. § 47461.

XXXI. Pennsylvania Road Law and Related Issues

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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 second class townships, 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. The board may also provide for the widening, straightening or improvement of a state highway, with the consent of the Department of Transportation. *53 P.S. § 7304*. 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. *53 P.S. § 67304(d)*. A recent Commonwealth Court decision held that a school district could not block a township from taking a portion of the school district's property for construction of a needed roadway where no school structure had yet been built upon the subject tract, and the township's proposed road would not prevent the construction of school facilities in the future. *In re: Condemnation Proceedings by Township of Lower Macungie, Lehigh County*, 717 A.2d 1105, 1998 Pa. Cmwlth. LEXIS 762 (1998).

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 21 years. Such a road is considered a public road having a right-of-way of 33 feet even though there is no public record of the laying out or dedication for public use of the road. *53 P.S. § 67307.*

Second Class Townships

The board of supervisors of a second class township may also, by resolution, accept any land dedicated by deed to the township to be used as a road, street or alley. 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. *53 P.S. § 67316*. The other way a road becomes a municipal road is by the use of eminent domain proceedings. The second class township code grants second class townships the authority to acquire property by eminent domain for roads, drainage and sewer facilities. *53 P.S. § 65101 et seq*.

Boroughs

Pursuant to the borough code, boroughs also have rights to take over a street which has been in "constant" use by the public for a period in excess of 21 years. *53 P.S. § 46702(3)*. Boroughs also have the power to open streets by ordinance *(53 P.S. § 46731)* 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. *53 P.S. § 46702*. Where a borough already has title to the land, it can, in its discretion, open a street without consent of abutting property owners. *Heller v. Borough of Williamsburg*, 47 Pa. Cmwlth. Ct. 642, 408 A.2d 1172 (1979). When a particular roadway is a

"street" and not a "highway" under Section 111 of the borough code, (*53 P.S. § 45111*) a borough has the power and right to condemn property for the widening of such roadway. I*n re: Taking of Bethany Property*, 37 D.&C. 3rd 613 (1984) (Allegheny County) affirmed 92 Pa. Cmwlth. Ct. 200, 491 A.2d 6 (1985).

First Class Townships

First class townships have no comparable "adverse possession" use provision contained in the second class township code or the borough code. Pursuant to *53 P.S. § 57005*, the board of township commissioners may enact, ordain, survey, layout, open, widen, straighten, vacate and relay all streets within the township. 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 recorded in the Court of Common Pleas. *53 P.S. § 57008*. Citizens of the township are given 30 days to file exceptions to the report. *53 P.S. § 57009*. First class townships can also accept a deeded offer of dedication *(53 P.S. § 57020)* or exercise eminent domain rights. *53 P.S. § 56901*.

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 or the offer can come with the tender of the formal deed, which must also be formally accepted.

Private Streets

Public rights in private streets can be established by condemnation. *36 P.S. § 2731*. The Private Road Act, which provides for taking of a private road on private property to benefit other property, does not violate the State Constitution "Takings Clause," and does not unconstitutionally provide for taking of private property for private use. *In re: Private Road in East Rockhill Township, Bucks County, Pennsylvania*, 165 Pa. Cmwlth. Ct. 240, 645 A.2d 313 (1994), appeal denied 539 Pa. 698, 653 A.2d 1235. *In Appeal of Heim*, 151 Pa. Cmwlth. Ct. 438, 617 A.2d 74 (1992), 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. The Court noted that when a municipality failed to open a dedicated street in a plan within 21 years, the owners of the property within plan retained private rights of easement by implication over the unopened streets. 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.

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. *Quicksall v. City of Philadelphia,* 177 Pa. 301, 35 A. 609 (1896). 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. *Stozenski v.*

Borough Forty Fort, 456 Pa. 5, 317 A.2d 602 (1974). 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. *Bieber v. Zellner*, 421 Pa. 444, 220 A.2d 17 (1966).

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 21 years or more, public rights are presumed. *Donohugh v. Lister*, 205 Pa. 464 (1903). The "public" nature of the use may be difficult to prove. See *Waksmunski v. Delginis*, 391 Pa. Super. 37, 570 A.2d 88 (1990), where regular access to road by five families was declared to be insufficient to establish a public use. Use must be "unequivocal." *Milford Borough v. Burnett*, 288 Pa. 434, 136 A. 669 (1927), *Tri-City Broadcasting Co. v. Howell*, 429 Pa. 424, 240 A.2d 556 (1968). Without documentation, however, there is always a questions 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 33 foot wide street width begins? See *Hunter v. Bowman*, 159 Pa. Cmwlth. Ct. 222, 633 A.2d 655 (1993), appeal denied 537 Pa. 643, 644 A.2d 165, which permitted Paradise Township, Monroe County, to cut down trees within 15 of the centerline even in the face of evidence that the centerline moved from time to time (where abutters did not attempt to show the extent of the movement). 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. See *ALR Annotation*, 32 A.L.R. 2d 953 (1953); *Commonwealth v. Royce*, 152 Pa. 88, 25 A.162 (1892); *Milford Borough, supra*. 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 in the sidewalk area of the right-of-way. See *RKO Stanley Warner Theatres, Inc. v. Mellon National Bank and Trust Company*, 436 F.2d 1297 (3d Cir. 1970); *Kay Realty Corp. v. Elster,* 24 D.&C. 2d 693 (1960).

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 21 years requires the consent of ½ of all abutters for public rights to be re-established *(53 P.S. § 46724)*. See *Lillo v Moore supra*, 704 A.2d 149 (Pa. Super. 1997). The General Road Law calls for a similar result in unincorporated villages and towns (53 P.S. § 1961). In Second Class Townships, roads laid out by a municipality but physically unopened for only 5 years lose all of their public attributes *(53 P.S. § 67309)*. In First Class Townships, a 5 year hiatus in the municipal process produces a similar result (53 P.S. § 57013). 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. *Carradorini Appeal*, 189 Pa. Super. 624, 152 A.2d 789 (1959). Public rights can also be extinguished by ordinance through the road vacation process spelled out in each municipal code. Boroughs-*53 P.S. § 46741*; Second Class Townships-*53 P.S. § 67304*; First Class Townships-*53 P.S. § 57005*.

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. *Rahn v. Hess,* 378 Pa. 264 106 A.2d 461 (1954); *Jones v. Sedwick*, 383 Pa. 120, 117 A.2d 709 (1955). As noted by the Pennsylvania Supreme Court in *Nord v. Devault Contracting Co*., 460 Pa. 647, 334 A.2d 276 (1970); 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". The presumption is a strong one, and is only rebutable 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. *Paul v. Carver*, 26 Pa. 223 (1856). 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. See *Carroll Township Annexation Case*, 208 Pa. Super. 187, 222 A.2d 612 (1966) and 36 P.S. § 2131. The abutter's title extends from the heavens to the center of the earth. *Stuart v. Gimbel Bros*., 285 Pa. 102, 131 A. 728 (1926). The rule is different, however, if the street is not dedicated. In that event, title is not presumed to run to the centerline; *Hoover v. Frickanisce*, 169 Pa. Super. 443, 82 A.2d 570 (1951). 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. *Wilson v. Peerless Co*., 240 Pa. 473, 87 A. 705 (1913).

The subdivider's rights are "divested" by operation of law, upon the laying out of the street. *Rahn v. Hess, supra*. The subdivider's rights are divested even if the abutter's lots are only laid out to the edge of the cartway, not to the centerline. *Elliott v. H. B. Alexander & Son, Inc*., 41 Pa. Cmwlth. Ct. 184, 399 A.2d 1130 (1979).

A recorded plan showing streets imbues all lot owners with land abutting streets with easements over the entire road system shown on the plan; *Potis v. Coon*, 341 Pa. Super. 443, 496 A.2d 1188 (1985). 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. J.W. Bruce and J.W. Ely, Jr., *The Law of Easements and Licenses in Land*, Rev'd Ed (1996) at § 4.05(1). 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. *Vogel v. Haas*, 456 Pa. 585, 322 A.2d 107 (1974). 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", *General Road Law, 36 P.S. § 1883*.

Unlike public rights, private rights are not lost through non-use; *Travaglia v. Weinel*, 191 Pa. Super. 323, 156 A.2d 597 (1959); *Estojak v. Mazsa*, 522 Pa. 353, 562 A.2d 271 (1989), nor abandonment of public rights by street vacation. Although non-use will not deprive persons of private rights in Pennsylvania's roadways, those rights can always be extinguished through adverse possession; *Edgeworth Borough v. Lilly*, 129 Pa. Cmwlth. Ct. 361, 565 A.2d 852 (1989). Private rights can also be extinguished in vacated public streets if those asserting rights do not do so within statutorily mandated time constraints. See *53 P.S. § 1948*.

Laying Out, Opening, Widening and Vacating Roads

The Process. Each municipal code calls out a formal process for laying out, opening, widening and vacating roads. For instance, in the borough code laying out streets is set forth in 53 P.S. § 46721, opening in 53 P.S. § 46731 and vacating in 53 P.S. § 46741. Second class township provisions are in 53 P.S. § 67304 and for first class townships, these provisions are in 53 P.S. § 57005. The criteria to act differ, depending upon the type of municipality involved. For example, first class township boards of commissioners must find that a vacation is "necessary for the public convenience" if fewer than a majority in interest of abutting property owners petition for the vacation. *53 P.S. § 57005.* Borough councils, on the other hand, have no "necessity" requirement, but are precluding from vacating a street if doing so will deprive the property owners street access. *53 P.S. § 46741*. 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. *In re: City of Altoona*, 479 Pa. 252, 388 A.2d 313 (1978). 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. *Carroll Township Annexation Case, supra*. If the street was never dedicated, or was unopened, the abutters claim is only to the near edge of the road. *Fidelity-Philadelphia Trust Co. v. Forster*, 346 Pa. 59, 29 A.2d 496 (1943); *Henderson v. Young*, 260 Pa. 334, 103 A. 719 (1918). In any case, the abutters retain an implied easement in the bed of the vacated street; *Fidelity-Philadelphia Trust Co. v. Forester, supra.*

Rails to Trails

The Pennsylvania Rails to Trails Act, 32 P.S. § 5611-5622, was enacted with an effective date of March 18, 1991. This Act created a Pennsylvania Rails to Trails Program within the Department of Environmental Resources, now under the Department of Conservation and Natural Resources, to "acquire, operate, maintain and develop available railroad rights-of-way for public recreational trail use" 32 P.S. § 5613 and directed the Department of Conservation and Natural Resources to cooperate with PENNDOT in order to avoid competing for the same corridors. *32 P.S. § 5019*.

An interesting issue arises as to whether the trail can be classified as a road or highway within the Municipalities Planning Code. In the case of *County of Montgomery v. Foehl*, a 1998 Montgomery County case, Judge Bertin rejected an argument by the county that a railroad is a public highway and that recreational trail is a public highway use and that a recreational trail was a public highway use. In that case, Montgomery County acquired approximately 16 miles of railroad right-of-way known as the Perkiomen Branch from the Reading Trustees by quit claim deed. Unfortunately, the county sat on its hands for 20 years and did not develop this right-of-way. Numerous encroachments and conflicting uses had developed over the years and, to make matters worse, virtually all of the right-of-way had been originally acquired on condemnation releases, which, under Pennsylvania law, revert to adjacent land owners upon the cessation of the use of the right-of-way for railroad purposes. Rejecting arguments by the trail proponents that the original right-of-way acquired was a public roadway and that subsequent use of the railroad right-of-way for recreational trail purposes fell within the scope of the original interest acquired by the railroad company, the Court held that the railroad right-of-way had been abandoned and the interest acquired by the railroad was for railroad purposes only. Montgomery County is appealing this decision to the Commonwealth Court and no decision has been rendered.

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 for assignment of crossing maintenance and construction responsibilities. Before this legislation was enacted, PUC had taken the position that if a non-profit corporation acquired an abandon railroaded right-of-way for recreational trail purposes, the PUC had no authority to assign responsibility for any grade separated crossings to the non-profit corporation and, therefore, those crossings had to be removed in the absence of any other jurisdictional entity volunteering to assume those responsibilities. The statute avoids a difficult condemnation and valuation question. If the crossing belonged to a non-jurisdictional entity, the PUC order to remove the crossing structure would constitute a taking of property for which compensation is required. Under Pennsylvania law there is no fair market value for crossing structures and the appropriate valuation, is the replacement cost of a new structure.

Pursuant to a moratorium issued by the PUC on October 23, 1997 (scheduled to expire on June of 1999), it has stayed any orders removing grade separating crossings which are involved in trail projects to enable those projects to be evaluated in accordance with a new joint rails-to-trails policy developed by the Department of Transportation and the Department of Conservation and Natural Resources.

Over the last several years, there have been numerous legal, legislative and administrative developments in the rails-to-trails area and with the availability of federal funds under the Transportation Efficiency Act, many trail projects are receiving the resources they need to develop a statewide network of recreational trails and bike paths which will be sure to impact local municipalities in the future years.

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 second class townships have a presumptive width of 33 feet, as declared by legislative fiat in 1933. *53 P.S. § 67307*. This statute reads as follows:

> Every road not of record which has been used for public travel and maintained and kept in repair by the township for a period of at least twenty-one (21) years is a public road having a right-of-way of thirty-three (33) feet even though there is no public record of the laying out or dedication to public use of the road.

It is at least questionable whether a municipality has the right to use the portion of the 33 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 33 feet to 125 feet, alleys 15 feet or greater. *53 P.S. § 67306.* In first class townships, there are no distinctions set forth, but public streets may not be less than 24 feet in width. *53 P.S. § 57012*. Under general road law, streets are 33 feet or greater, alleys 15 feet or greater. *36 Pa. § 1901*. 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 gaff will cost your municipality the full amount of the objector's counsel fees under 42 U.S.C. § 1988. See *Blanche Road Corporation v. Bensalem Township*, 57 F.3d 253 (3d Cir. 1995). 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. *Carradorani Appeal, supra.* 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.

References

Road Law and Related Issues; Blake C. Marles, Esquire, and Marc S. Drier in PBI Municipal Law Colloquium, 1997 at p. 478.

XXXII. 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] In January 1998 (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.[3]

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.[4] 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.[5] 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."[6] 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.[7] 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.[8] 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 remediations 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.[9] 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 remediations 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.[10] 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.

Financial Assistance

Act 2[11] and its companion statute, the Industrial Sites Environmental Assessment Act, "Act 4,"[12] 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*. [13]

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 enactment of Act 6 in 2000[14] expanded the availability of funds and eligibility for use of funds to inventory, assess and remediate sites under Act 4. The Department of Community and Economic Development administers these grant programs.

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.[15]

Federal law also has changed to allow remedial costs incurred in brownfields development to be deducted as expenses rather than capitalized. This is explained further at the DEP "Land Recycling" web page, and in the fact sheets listed in the "Introduction" section of that web page and the following section on "Financial Incentives."[16]

Contacts

Go to the DEP web site at www.dep.state.pa.us and type "Land Recycling" in the Direct Links box, or call 717-783-7816. Questions and comments may be directed to Tom Fidler, Program Manager, at tfidler@state.pa.us.

DEP Regional Environmental Cleanup Program Managers:

Southeast Region, Bruce Beitler – (610) 832-5950
Northeast Region, Joseph A. Brogna – (570) 826-2511
Southcentral Region, Anthony Rathfon – (717) 705-4860
Northcentral Region, Michael C. Welch – (570) 321-6525
Southwest Region, John J. Matviya – (412) 442-5811
Northwest Region, Craig Lobins – (814) 332-6613

For information on grants from the DCED Industrial Sites Cleanup Program, contact the DCED Grants Office at (717) 787-7120, or go to the DCED web site at www.inventpa.com.

References

1. 35 P.S. § 6026. 101 et seq.
2. 25 Pa.Code Chapter 250.
3. 35 P.S. § 6026.306.
4. 35 P.S. § 6026.302.
5. 35 P.S. § 6026.303.
6. 35 P.S. § 6026.304.
7. 35 P.S. § 6026.305.
8. 35 P.S. §§ 6026.302(e), 303(h), 304(n), 305(c).
9. 35 P.S. §§ 304(o), 305(c)(2).
10. 35 P.S. § 6026.501.
11. 35 P.S. § 6026.702.
12. 35 P.S. § 6028.1 et seq.
13. The Technical Guidance Manual was last revised on June 8, 2002. It is available through the DEP website at http://www.dep.state.pa.us. 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.
14. P.L. 20, No. 6 (March 17, 2000).
15. See Economic Development Agency, Fiduciary (Act 3) and Lender Environmental Liability Protection Act, 35 P.S. § 6027.1 et seq.
16. If you have trouble with the directLINK description in footnote 13, use the internet address: http://www.dep.state.pa.us/dep/deputatel/airwaste/wm/landrecy/default.htm.

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