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NEW CASE SUMMARY

By Josele Cleary, Esq.

The Pennsylvania Supreme Court issued another opinion in the on-going Robinson Township litigation relating to Act 13 of 2012 which added six chapters to Title 58, Oil and Gas, of the Pennsylvania Consolidated Statutes. *Robinson Township v. Commonwealth*, 147 A.3d 536 (Pa. 2016). The Supreme Court in 2013 had struck Sections 3215(b), 3215(d), 3303, and 3304 concerning criteria DEP was to consider when reviewing applications, preempting all municipal regulation of oil and gas operations and limiting the ability to enact ordinances regulating location including, but not limited to, requiring oil and gas operations as permitted uses in all zoning districts. Commonwealth Court on remand held that Sections 3305 through 3309 granting the PUC the power to review ordinances, authorized private actions against ordinances and imposition of attorneys' fees against municipalities could not be severed from Sections 3303 and 3304. 96 A.3d 1104 (Pa. Cmwlth. 2014). The Supreme Court upheld this portion of Commonwealth Court's opinion. The Supreme Court's opinion also addresses other facets of Act 13 which do not directly impact municipalities such as limitation on rights of health care professionals, notifications to owners of private wells, and eminent domain.

RIGHT TO KNOW LAW

In *Pennsylvania State Education Association v. Commonwealth, Department of Community and Economic Development*, 148 A.3d 142 (Pa. 2016), the Supreme Court considered a RTKL request for home addresses of public school employees. The Supreme Court first concluded that prior cases holding that "certain types of information, including home addresses, implicated the right to privacy under Article 1, Section 1, of the Pennsylvania Constitution, and thus required a balancing to determine whether the right to privacy outweighs the public's interest in dissemination" continued to be applicable under the RTKL. *Id.* at 144. The opinion reviews prior Pennsylvania Supreme Court and Commonwealth Court opinions regarding the RTKL and requests for home addresses. The Supreme Court concluded that "constitutionally protected privacy interests must be respected even if no provision of the RTKL speaks to protection of those interests." *Id.* at 156. Because public school employees "continue to have constitutionally protected privacy interests in their home addresses" there must be a balancing test weighing that interest against the public interest. *Id.* at 157. The Supreme Court noted:

> OOR has identified no public benefit or interest in disclosure of perhaps tens of thousands of addresses of public school employees. We likewise perceive no public benefit or interest to disclosure in response to such generic requests for irrelevant personal information of these particular public employees who have undertaken the high calling of educating our children. To the contrary, nothing in the RTKL suggests that it was ever intended to be used as a tool to procure personal information about private citizens or, in the worst sense, to be a generator of mailing lists. Public agencies are not clearing houses of "bulk" personal informa-

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> tion otherwise protected by constitutional privacy rights. While the goal of the legislature to make more, rather than less, information available to public scrutiny is laudable, the constitutional rights of the citizens of this Commonwealth to be left alone remains a significant countervailing force.

Id. at 158. The Supreme Court specifically reminded OOR of its "repeated failure to promulgate adequate regulations to address the almost complete lack of procedural due process for individuals whose personal information is subject to disclosure under the RTKL." *Id*.

Commonwealth Court considered the standard to determine whether a request is sufficiently specific in *State System of Higher Education v. Association of State College and University Faculties*, 142 A.3d 1023 (Pa. Cmwlth. 2016). The RTKL request sought any and all correspondence relating to certain budget and financial reports addressed to or from the current and former university president, provost, deans, and vice president of administration and finance for a five-year period. SSHE requested extensions of time, some of which were granted, and the requests were deemed denied when SSHE did not provide the reports. SSHE submitted affidavits on the amount of the data being sought and would have to be renewed and argued that because the volume was so vast it should be considered overly broad. Commonwealth Court held that because the RTKL request "seeks correspondence from specified officials at identified state universities – a clearly defined subject matter – limits its scope to those correspondence that include attachments of specified reports and provides a finite time period" it was sufficiently specific. *Id*. at 1030. Commonwealth Court reaffirmed that "the fact that a request is burdensome does not deem it overly broad." *Id*. (citation omitted). SSHE argued that it was impossible to review the material to determine whether any exemptions applied within the retired time period, and Commonwealth Court agreed that "[i]f the request is so large that an agency does not have the ability to process the request in a timely manner given the enormous number of records requested" it would undermine the legislative intent of the exemptions in the RTKL. *Id*. at 1031-1032. Commonwealth Court concluded:

> The agency making such a claim has to provide the OOR with a valid estimate of the number of documents being requested, the length of time that people charged with reviewing the request require to conduct this review, and if the request involves documents in electronic format the agency must explain any difficulties it faces when attempting to deliver the documents in that format. Based on the above information, the OOR can then grant any additional time warranted so that the agency can reasonably discern whether any exemptions apply.

Id. at 1032.

Judge Simpson of Commonwealth Court considered the Criminal History Records Information Act in ruling upon a petition to enforce an order requiring Pennsylvania State Police to present records for an in-camera review. *Office of Open Records v. Pennsylvania State Police*, 146 A.3d 814 (Pa. Cmwlth. 2016). OOR had ordered PSP to submit certain records including motor vehicle camera video and videos which PSP had obtained from third parties as part of an investigation. Judge Simpson noted that the court had addressed motor vehicle film in *Pennsylvania State Police v. Grove*, 119 A.3d 1102 (Pa. Cmwlth. 2015), and the Supreme Court had granted PSP's petition for allowance of appeal. Judge Simpson therefore held the request for the PSP motor vehicle cameras in abeyance. Judge Simpson denied the request for surveillance video recorded by a casino's security system which PSP obtained as part of an investigation into a criminal offense. Judge Simpson reaffirmed that OOR is not a criminal justice agency and investigative information shall not be disseminated to persons or entities which are not a criminal justice agency or part of a criminal justice agency. See 18 Pa. C.S. §9106(c)(4).

A panel of Commonwealth Court reached a similar decision in *Pennsylvania State Police v. Kim*, 150 A.3d 155 (Pa. Cmwlth. 2016), where requester sought a surveillance video which PSP had seized as part of its investigation of traffic violations which resulted in

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a motor vehicle crash. The casino made the video as part of its routine surveillance and PSP obtained the video showing the car driving through a stop sign into traffic. Requester was an injured passenger. There was "no dispute that PSP gathered the Video when assembling its criminal investigation" so "the Video is also exempt under CHRIA as investigative information." *Id.* at 160.

Commonwealth Court reaffirmed that receipt and transmission of pornographic emails did not constitute a transaction or activity of the employer of the sender or receiver and, therefore, the emails were not public records as that term is defined in the RTKL. *Pennsylvania Office of Attorney General v. Bumsted*, 134 A.3d 1204 (Pa. Cmwlth. 2016). Requester sought emails or email attachments that contained pornographic images sent by former and current employees to other current and former employees which had been reviewed by a special deputy. The Office of the Attorney General refused the request for several grounds including they were not public records and if they were pornographic they were exempt from disclosure under the non-criminal investigation exemption. Requester appealed, and OOR granted the appeal. Commonwealth Court reversed, citing its prior decision in *Pennsylvania Office of the Attorney General v. Philadelphia Inquirer*, 127 A.3d 57 (Pa. Cmwlth. 2015), reaffirming that the "emails are not 'public records' simply because they were sent, received and copied using OAG email addresses." *Id.* at 1209. Commonwealth Court also agreed that even if they were public records they were exempt as being part of the non-criminal investigation of employees being conducted by the special deputy.

In *Pennsylvanians for Union Reform v. Pennsylvania Department of State*, 138 A.3d 727 (Pa. Cmwlth. 2016), the court considered the interrelationship between the RTKL and the Pennsylvania Voter Registration Act and Department of State regulations which have different access provisions than the RTKL. The court reaffirmed that "[b]ecause the RTKL specifically provides that the RTKL does not apply where access to records is otherwise provided by law," a requester cannot select which law it desires to proceed under. *Id. at* 728. Requestor specifically stated in its request that it was proceeding under the RTKL and not under any other law seeking voter registration and candidate information in a manipulable electronic database medium as well as information on specific citizens. The Department informed requester it would provide the voter list when requester completed the necessary form which affirmed the records would not be used for purposes unrelated to elections, political activities and law enforcement and pay the fees. The court reaffirmed that because the Voter Registration Act and regulations set for comprehensive regulations, the Department could respond to a request under the RTKL by requiring the requester to comply with the Voter Registration Act and regulations.

Handwritten notes of unsolicited telephone calls from private individuals made by a county commissioner which she did not share with other county commissioners were not records under the RTKL. *Clearfield County v. Bigler Boyz Enviro, Inc.*, 144 A.3d 258 (Pa. Cmwlth. 2016). Requester sought records after the board of county commissioners declined to appoint requestor as the hazardous material response team vendor. Representatives of requester made the proposal at a public meeting and at the following public meeting there was a motion to do this which died for a lack of a second. Between the two meetings the commissioner received two unsolicited telephone calls and had made hand written notes. Requester sought all records relating to the consideration of it as hazardous material response team vendor, and the county declined to produce documents made by individual commissioners concerning contacts from citizens. Because the commissioner's "notes were not 'produced with the authority of' the County or later 'ratified, adopted or confirmed by' the County. . . those notes are not 'of the local agency,' and they cannot be deemed public 'records' within the meaning of the RTKL." *Id. at* 264.

Where a RTKL request on its face clearly seeks information in connection with an investigation, the fact that the agency does not file an affidavit stating that the record is part of an investigation does not automatically make the record public. *Pennsylvania*

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Game Commission v. Fennell, 149 A.3d 101 (Pa. Cmwlth. 2016). Requester sought the complaint and all records of an investigation concerning a hunting tree stand too close to requester's neighbor's house. The agency response was that the records were part of a noncriminal investigation and, after the appeal to OOR the agency only filed an unsworn position statement. After OOR ordered the records be provided, the agency appealed. Commonwealth Court stated that the RTKL provides that the record on appeal includes the request and the agency's response. Because the request itself made it clear it sought a complaint submitted to an agency and investigative materials, OOR should have denied the appeal.

In *Smith Butz, LLC v. Pennsylvania Department of Environmental Protection*, 142 A.3d 941 (Pa. Cmwlth. 2016), Commonwealth Court held DEP could properly deny the RTKL for all records associated with a notice of violation issued on a certain date where, although DEP had made an inspection and found violations on that date, no notice of violation had been issued. The DEP response to the RTKL request was a statement that it did not have any such records, and requester appealed. DEP submitted an affidavit that no formal notice of violation had been issued, and requester filed documents indicating that the subject property had been inspected on that date. Commonwealth Court affirmed that DEP was "only required, however, to search for and provide the records which are requested." *Id.* at 945 (citation and internal quote omitted).

ZONING AND PLANNING

Nonconforming Use Issues

Commonwealth Court considered the rights of a nonconforming use in *Dunbar v. Zoning Hearing Board of the City of Bethlehem*, 144 A.3d 219 (Pa. Cmwlth. 2016). Applicant operated a deli as a lawful nonconforming use and sought a special exception to convert to a restaurant and dimensional variances to expand from 540 square feet to 1080 square feet. The area was in a residential district one block from a college with other restaurants in the vicinity. After the zoning hearing board approved the application, objectors appealed. The opinion reviews the testimony and findings of the zoning hearing board, including that expansion was needed to address ADA requirements. The dimensional variance to allow an expansion greater than 50% was warranted under the doctrine of natural expansion as well as *Hertzberg v. Zoning Board of Adjustment of the City of Pittsburgh*, 721 A.2d 43 (Pa. 1998).

The effect of a certificate of nonconformance was discussed in *Hunterstown Ruritan Club v. Strabane Township Zoning Hearing Board* 143 A.3d 538 (Pa. Cmwlth. 2016). The zoning officer issued a certificate of nonconformance in 2012 identifying the nonconforming use as go-kart racing on Saturdays only. The landowner did not appeal the issuance of the certificate, but the certificate also did not inform the landowner of the right to appeal. Eventually the landowner filed an application seeking approval to also have races on Sundays and presented evidence that some races had occurred on Sunday's which neighbors disputed. The "grant or denial of a nonconforming use certificate has no bearing on an individual's property rights. The issuance of a nonconforming use certificate does not grant a landowner any additional property rights, and the absence of a certificate does not deprive landowner of his right to continue a nonconforming use." *Id.* at 546-547 (citations omitted; footnote omitted). The township could not rely on the certificate because "the failure to appeal from the terms a certificate of nonconformance results only in a procedural disadvantage and not in a restriction or limitation of constitutionally protected property right." *Id. at* 547.

Procedure

Commonwealth Court considered a request to quash an appeal as premature in *EDF Renewable Energy v. Foster Township Zoning Hearing Board*, 150 A.3d 538 (Pa. Cmwlth. 2016). The zoning hearing board rendered an oral decision on December 3 which applicant appealed on January 2, stating it was appealing the December 3 decision. The zoning hearing board issued a written decision dated January 2 which was mailed January 5. Applicant filed a "supplemental" notice of appeal on January 5 citing the written decision. The court held that because the supplemental notice of appeal was filed after January 5 and within the 30-day appeal period, the "second notice of appeal" cured

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any jurisdictional defect. *Id.* at 545.

In *Hill v. Zoning Hearing Board of Nether Providence Township*, 134 A.3d 1187 (Pa. Cmwlth. 2016), the court considered an untimely petition to intervene in a land use appeal. Where objectors were recognized as parties by the zoning hearing board, heard the oral vote denying the application, but never received notice of the written decision or the applicant's appeal of the written decision, "a remand is necessary for the trial court to determine whether the ZHB's failure to comply with 'the mandate of the statute,' . . . constitutes extraordinary cause justifying the grant of Objectors' untimely petition to intervene. In so doing, the trial court must determine whether the ZHB's failure to provide the required notice *caused* the untimely filing of Objectors' petition to intervene." *Id.* at 1201 (footnote omitted; emphasis in original).

Validity Challenges

Commonwealth Court considered a challenge asserting that an ordinance totally excluded apartments or, in the alternative, failed to provide for a fair share of multifamily housing in *KS Development Company, L.P. v. Lower Nazareth Township*, 149 A.3d 105 (Pa. Cmwlth. 2016). Apartments were allowed in a zoning district subject to regulations challenger considered onerous, allegedly rendering their development economically infeasible. Commonwealth Court reaffirmed that "if an ordinance provides for a particular use but applies additional restrictions on the use that have the effect of excluding or making provision of the use illusory, then the ordinance is de facto exclusionary." *Id.* at 113. The court agreed in part that the fair share analysis was not the only way to challenge an ordinance as being de facto exclusionary:

> A de facto challenge to an ordinance regulating a residential use may be based on either the amount of land made available for a class of residential uses, or on the inability to develop the residential use on land provided in a sufficient amount for that class of use because of unduly restrictive conditions on development, or on both bases. The difficulty in de facto exclusionary challenges when both arguments are presented is that the evidence for each often runs together, may at times intersect, and therefore the challenges may be improperly cojoined.

Id. at 114 (citation omitted). Commonwealth Court reaffirmed that "land used for active agricultural and agricultural-related purposes is properly considered to be developed land for purposes of the second prong of the *Surrick [v. Zoning Hearing Board of the Township of Upper Providence*, 382 A.2d 105 (Pa. 1978)] test." *Id.* at 115. Challenger did not carry its burden on the fair share analysis because it failed to present evidence the municipality was underdeveloped. It also failed on its economic infeasibility challenge because although it

> produced evidence showing that developing *apartment complexes* in accordance with the Ordinance was economically infeasible, this was not KS Development's burden. Instead, in order to carry its burden to demonstrate that the Ordinance is unconstitutional because it is de facto exclusionary, KS Development had to demonstrate that the development of *apartments* was economically infeasible.

Id. at 116 (emphasis in original).

An ordinance which amended the text of a zoning ordinance to add a wide variety of high density residential uses to the industrial district, together with dimensional, screening, and similar requirements to implement a comprehensive plan and meet fair share requirements, "represents a comprehensive zoning scheme which . . . is a zoning map change which required the Township to post and mail notice of the December 10, 2013 hearing in accordance with the MPC." *Embreeville Redevelopment, L.P. v. Board of Supervisors of West Bradford Township*, 134 A.3d 1122, 1129 (Pa. Cmwlth. 2016) (citation omitted). Because the township advertised it to meet requirements for a text amendment, the ordinance was procedurally invalid.

Variances

In *Dunn v. Middletown Township Zoning Hearing Board*, 143 A.3d 494 (Pa. Cmwlth. 2016), the court reviewed standards for the granting of lot width and density

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variances and held that a zoning hearing board cannot grant such variances without any evidence of hardship. "Where no hardship is shown, or where the asserted hardship amounts to a landowner's desire to increase profitability or maximize development potential, the unnecessary hardship criterion required to obtain a variance is not satisfied even under the relaxed standards set forth in *Hertzberg*." *Id*. at 501. The landowner desired to demolish a vacant single family dwelling, subdivide the lot, and develop two dwellings which would require variances from the minimum lot width for both lots and the maximum density. Landowner presented testimony that the existing dwelling was in poor condition and the two proposed dwellings would be "high-end" single family dwellings. Objectors appealed the granting of the variances, and the opinion reviews standards for granting of variances and the evidence presented. Because the lot could be used for a single family dwelling, any hardship was self-inflicted and the requested lot width and density variances could not be the minimum necessary to afford relief. The opinion also examined a claim that the zoning ordinance was ambiguous because the maximum density was 1.2 dwelling units per acre while the minimum lot area was 30,000 square feet, rejecting the position that as long as the minimum lot area was satisfied the maximum density could be exceeded. Commonwealth Court also rejected a claim that the lot width variances were de minimis; two approximately 15% deviations to create two lots was not de minimis.

The standards for a "temporary" variance are the same as that standards for any other variance. *Coyle v. City of Lebanon Zoning Hearing Board*, 135 A.3d 240 (Pa. Cmwlth. 2016). The opinion also reaffirms that the de minimis doctrine does not apply to use variances, whether temporary or permanent.

Subdivision and Land Development Issues

Commonwealth Court considered issues where a developer failed to correctly construct a street, the municipality did not require financial security before allowing the plan to be released, and the street had not been offered for dedication in *Township of Salem v. Miller Penn Development, LLC*, 142 A.3d 912 (Pa. Cmwlth. 2016). The developer asserted the statute of limitations as a defense because the street had been completed in 2001 and suit filed in 2010. Commonwealth Court agreed with the township that under the doctrine of nullum tempus occurrit regi the statute of limitations did not apply. This "doctrine does not apply to all suits by local governments, but does extend to local governments where they are enforcing strictly public rights." *Id.* at 918. Even though there was a developer's agreement and, therefore, a contract, "[e]nsuring the adequate construction of streets is a purely public purpose within a municipality's obligations to its citizens, not a mere voluntary contractual undertaking." *Id.* The opinion also reviews MPC Section 511 reaffirming that it "grants municipalities the right to recover the cost of improvements even when there is no bond or security." *Id.* at 919. MPC 511 does not authorize an action for specific performance or to require posting of security; it authorizes only pursuing appropriate legal and equitable actions. Thus, any action was subject to standard equity requirements and, because the costs of fixing defects in streets could be compensated monetarily specific performance was not warranted. The opinion also discusses the evidence presented to determine the amount of damages.

Commonwealth Court considered issues relating to a private easement in *Appeal of AMA/ American Marketing Association, Inc.*, 142 A.3d 923 (Pa. Cmwlth. 2016). The use at issue, a transit-oriented development, was permitted as a conditional use and the governing body simultaneously considered the conditional use application and land development plan. The zoning ordinance required the submission of a plan showing, among other items, all easements. The subdivision and land development ordinance similarly required that land development plans show all areas subject to existing easements. Objector had a private easement over the subject property which was not shown on the plan and, when the conditional use was granted and the plan approved, objector filed an appeal solely on that basis. There had been testimony that the easement existed but did not have a metes and bounds description and could not be accurately located on a sealed plan. The testimony concerning the existence of the easement and why it could not be

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shown on the plan was sufficient to meet zoning ordinance and subdivision and land development ordinance requirements. "[T]o the extent the Objector's assertions relate to its concerns over the protection of its easement rights, the protection of a private easement is a title concern, not a zoning or land development concern." *Id.* at 940 (citation and internal quote omitted). Applicant sought the imposition of sanctions on the basis that because the sole issue on appeal from both approvals was the failure to include the easement on the plan, the appeal was frivolous. Footnote 4 of the opinion analyzed this claim and concluded that "although Objector's appeals lacked merit, the appeals are not frivolous so as to justify the imposition of counsel fees". *Id.* at 930. Commonwealth Court also held that even if the appeal had been frivolous, applicant's request for delay damages including the increased cost to develop would be denied because delay damages "are only those damages directly attributable to the cost of defending against the frivolous appeal, not costs that may be incurred as a result of a party not continuing with an undertaking because of the uncertainty that an appeal, no matter how frivolous, may engender." *Id.* (citation and internal quotation omitted).

In *BR Associates v. Board of Commissioners of the Township of Upper St. Clair*, 136 A.3d 548 (Pa. Cmwlth. 2016), the court considered an objector's appeal from an approval of a land development plan. The governing body had held a hearing on the plan, and the court held that objections to the plan which objector's counsel did not raise at the hearing were waived. To the extent that the objector presented engineering testimony asserting that the design did not meet storm water management requirements, the governing body had the right to weigh credibility between the objector's engineer and the applicant's engineer. The certification signed by the applicant's engineer that the plan complied with the applicable ordinances was substantial evidence supporting the board's determination. The board properly approved the plan conditioned upon the applicant obtaining DEP review and approval of certain items. Finally, the court held that the dispute as to whether the applicant had the right to install storm water management facilities within an easement was a private land rights issue for the courts. The applicant had presented its deed with an easement permitting installation of utility lines. "Whether this encompasses the installation and maintenance of stormwater facilities is an issue that must be decided by the courts, not a local government body in a land use proceeding." *Id.* at 563.

Enforcement

Commonwealth Court reaffirmed that the failure to file an appeal from an enforcement notice constitutes a conclusive determination that the conduct identified in the enforcement notice violates the zoning ordinance. *Lower Mount Bethel Township v. Gacki*, 150 A.3d 575 (Pa. Cmwlth. 2016). Landowners installed a retaining wall and backfill in the floodplain without obtaining any permits or approvals. The township issued an enforcement notice which was ignored, filed a enforcement action before the magisterial district judge and, after landowners appealed that judgment, filed a complaint seeking fines, an injunction, and attorneys' fees. Landowners asserted that the structures were in the river and therefore the township had no jurisdiction. The township filed a motion for judgment on the pleadings, and Commonwealth Court held that judgment on the pleadings was proper because the failure to appeal the enforcement notice eliminated any issues of fact. Commonwealth Court also noted that because the township's boundary was the center of the river, it did not matter whether the retaining wall was in the floodplain or in the river. The permanent injunction requiring removal of the retaining wall and backfill was proper as was the award of over $20,000 in attorneys' fees.

Miscellaneous

Where a zoning ordinance defines agriculture to include and enterprise actively engaged in commercial production and preparation for market or use of livestock and livestock products, the operators of a farm raising chickens could add a processing facility for the chickens raised on the property. *Balady Farms, LLC v. Paradise Township Zoning Hearing Board*, 148 A.3d 496 (Pa. Cmwlth. 2016). The ordinance at issue defined

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livestock to include poultry. The farm at issue was approximately 23 acres and at any one time had approximately 28,000 chickens on the property. The operator desired to convert an existing storage building to the processing operation, and the processing would be limited to chickens raised on that facility. The opinion discusses construction of zoning ordinances and distinguishes *Tinicum Township v. Nowicki*, 99 A.3d 586 (Pa. Cmwlth. 2014), which held that a mulching operation on a three acre property where raw materials were transported to the property, ground into mulch, and transported off the property was not an agricultural operation. The opinion also states that its interpretation of agriculture is in accordance with Chapter 3 of the Agriculture Code, commonly referred to as ACRE, and the Right to Farm Act.

If a zoning ordinance does not contain a provision addressing adjacent undersized lots of record owned by the same entity, the municipality cannot deny approvals on the grounds that the adjacent undersized lots have merged. *Loughran v. Valley View Developers, Inc.*, 145 A.3d 815 (Pa. Cmwlth. 2016). Applicant sought side yard and lot area variances to construct a dwelling on the undeveloped lot which the zoning hearing board granted and objector appealed. On remand, the zoning hearing board concluded that the lots had merged, and equitable owner appealed. After reviewing cases concerning merging of lots, the court concluded:

> In sum, analysis by the courts of the effect of merger provisions adopted by local governing bodies on adjoining lots held in common ownership when one of the lots is rendered nonconforming by a subsequent zoning ordinance has given rise to a merger of lots doctrine. However, this body of law has no application in the absence of a merger of lots provision in the zoning ordinance adopted by the local governing body in the jurisdiction where the lots are located. The common law may not be employed to restrict the use of nonconforming lots; any restriction is purely statutory and is a matter committed to the legislative discretion of the local governing bodies by the MPC.

Id. at 823.

Commonwealth Court considered whether a funeral home or a crematory was the principal use of a property in *River's Edge Funeral Chapel and Crematory, Inc. v. Zoning Hearing Board of Tullytown Borough*, 150 A.3d 132 (Pa. Cmwlth. 2016). The opinion contains a discussion of the type of evidence presented and its relevance. The establishment would be located in an industrial district, and a prior applicant had previously had an application denied because the crematory would be the principal use of the property and a crematory was not permitted in that district. The applicant presented evidence of hiring a licensed funeral director and a plan showing that the crematory would be 12 percent of the building's area. Locating the funeral home in an industrial district was justified because the use was permitted and because it would make funeral services more economical. The prior rejected application could not be used to support the conclusion that the principal use was a crematory.

EMINENT DOMAIN

A township had no obligation to repair a foot bridge over a creek that had been destroyed by Tropical Storm Lee, and its failure to do so did not constitute a de facto taking of a business. *York Road Realty Co., LP v. Cheltenham Township*, 136 A.3d 1047 (Pa. Cmwlth. 2016). Landowner operated a skating rink which had limited parking and access to the public street through a parking lot of a different landowner. The rink's patrons before Tropical Storm Lee parked in a township park across a creek and used the foot bridge to get to the skating rink. After the foot bridge was destroyed, business decreased and landowner argued the failure to reconstruct the foot bridge was a de facto taking because it eliminated the "sole reliable means of accessing the" skating rink tract. *Id.* at 1051. Commonwealth Court agreed with the lower court that there had been no de facto taking, quoting from the lower court's opinion that because the skating rink's "patrons cannot use the public parking lot in Wall Park, the status quo has changed, but no enforceable property right belonging to [landowner] has been affected. At best, [landowner] was

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the beneficiary of gratuitous parking in the Wall Park parking lot as a matter of custom". *Id.* at 1053. Commonwealth Court noted that patrons could still park in the parking lot and walk to the skating rink, although it was a longer path.

A landowner seeking damages from a governmental entity which had previously condemned additional right-of-way and a temporary construction easement (for which landowner received compensation and settled the condemnation action) could not reopen the condemnation action to determine damages for destruction of property during construction. *In re: Condemnation by the Commonwealth, Department of Transportation*, 137 A.3d 666 (Pa. Cmwlth. 2016). Landowner filed a petition in 2015 to reopen the 2011 eminent domain action seeking compensation for damages to cement walls, curbs, asphalt, gates, fencing, and exterior of the building which the contractor did not restore when it vacated the temporary construction easement. Commonwealth Court concluded that the allegations did not relate to occupation of property or impairment of access so there was no de facto taking. The damage was "incidental" not reflecting intention, and they were caused by a third party that did not have the power of eminent domain. The damages sought were not just compensation or consequential damages under Sections 702 or 714 of the Eminent Domain Code. Therefore, there was no right to reopen the condemnation action. The court declined to address whether the landowner could proceed in a trespass action and whether, to the extent damages were recoverable, the proper party was the contractor.

In *Township of Millcreek v. Angela Cres Trust*, 142 A.3d 948 (Pa. Cmwlth. 2016), the court considered calculation of attorneys' fees and engineering fees for an eminent domain action where in a prior decision Commonwealth Court held that the township did not have authority to condemn property for the purpose of creating a new storm water channel and the township eventually relinquished the property. The trust sought approximately $3.6 million and the court affirmed the lower court's award of approximately $680,000. The trust had opposed the condemnation as well as the project itself, litigating in the Environmental Hearing Board. Commonwealth Court agreed that the Eminent Domain Code allowed recovery only for fees incurred in fighting a condemnation, not related litigation to stop the project itself. The trial court was not required to do a line by line analysis of the invoices to disallow costs in determining what was a reasonable fee. The opinion noted that one time entry was for $33,000 for six lawyers and a paralegal "to attend a meeting that may, or may not, have been about the condemnation, as opposed to one of the other litigation matters." *Id.* at 958. The opinion discusses the various challenges the trust made to the disallowance of the fees and how to analyze a fee request.

GOVERNMENTAL IMMUNITY

Commonwealth Court considered the street exception to immunity in *Angell v. Dereno*, 134 A.3d 1173 (Pa. Cmwlth. 2016). Plaintiff sued the driver of the vehicle which hit her son, killing him, as well as two municipalities asserting that the intersection of two streets near the municipal boundary created a dangerous condition. The street on which the vehicles were traveling was narrow, and the municipalities allowed parking along one side. Plaintiff presented affidavits from persons living on the street concerning narrowness, the crest of a hill, and problems with parked cars as well as an expert report opining that the narrow roadway, on-street parking and limited sight distance over the hill created a dangerous condition which should have been addressed by warning signs and a four-way stop intersection. The trial court granted summary judgment in favor of the two municipalities accepting their argument that the accident was the result of defendant driving on the wrong side of the street and not the condition of the roadway. Commonwealth Court reversed determining there was a fact question for the jury to determine whether the road was safe as a two lane road especially in light of defendant's statements that he believed he was on his own side of the road but given the narrowness and the lack of lane demarcation it was difficult to determine. The complaints to the municipalities made by neighbors were sufficient to demonstrate the municipalities had notice of the alleged dangerous condition. There were thus material questions of fact for a jury.

In *Sobat v. Borough of Midland*, 141 A.3d 618 (Pa. Cmwlth.

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2013), Commonwealth Court agreed that a claim asserting that the alleged negligence of borough employees informing plaintiff that a grinder pump could not be installed and a new lateral would have to be installed does not fall within the utility exception to immunity. Commonwealth Court stated that the claim "is founded upon the alleged negligent misrepresentation of the Borough, through its employees" and the damages sought were "in the nature of reimbursement of expenses related to that second excavation" performed because of the incorrect information. Id. at 624. This was not a dangerous condition of the sewer system because the "defect alleged must originate from the Borough's property itself and not merely from the conduct of the Borough's employees." *Id.* at 626.

Where a water authority inspector parked a truck at least partially within the cartway of a public street and left the vehicle with the motor running to perform an inspection, the vehicle was not in operation and the water authority was immune. *Balentine v. Chester Water Authority,* 140 A.3d 69 (Pa. Cmwlth. 2016). Another vehicle had rear-ended the truck which was pushed forward resulting in a fatal injury. Nevertheless, Commonwealth Court rejected the claim that the accident fell within the motor vehicle immunity exception. The court also rejected a claim that because the vehicle was parked in the traffic lane it was a traffic control signal. The Pennsylvania Supreme Court granted a petition for allowance of appeal to consider whether "Commonwealth Court erred in holding that the involuntary movement of a vehicle does not constitute operation of a vehicle for purposes of the vehicle liability exception to governmental immunity" under the Tort Claims Act.

The determination of a bus driver to park a bus length behind the designated but stop, even if in violation of work rules or negligent, was not within the motor vehicle exception to immunity. *Robertson v. Port Authority of Allegheny County*, 144 A.3d 980 (Pa. Cmwlth. 2016). There was also no liability because the plaintiff tripped over an obstruction in the area near the bus stop while the bus was pulling away. "The fact that the bus was in motion with the Plaintiff tripped… likewise does not bring his claim within the motor vehicle exception. The motor vehicle exception does not apply to injuries simply because they occur while a Commonwealth agency vehicle is in motion." *Id. at* 985.

LOCAL AGENCY LAW

Where a municipality has a formal rotation of towing companies it calls to respond to motor vehicle accidents, the suspension from the towing rotation can be an adjudication under the Local Agency Law which requires a hearing and grants the right to appeal. *DeLuca v. Hazleton Police Department*, 144 A.3d 266 (Pa. Cmwlth. 2016). The Hazleton Police Department had a written towing requirements policy, and the police chief by letter informed the company and its owner that it was suspended for three years because of Facebook postings which accused the mayor of being a criminal and accepting bribes and, therefore, was conduct that tended to demean the department. After counsel for the towing company requested rescission of the suspension or a hearing, the department issued a revised notice of suspension citing specific sections of the policy and again noting Facebook posts and stating any suit asserting free speech rights would be met with a counter claim for deformation and attorney fees. The towing company appealed and asserted business loss and reputation loss. The court determined that the towing company met the criteria in *Guthrie v. Borough of Wilkinsburg*, 478 A.2d 1279 (Pa. 1984), for the department's action to be a government action implicating a liberty interest and triggering due process rights. The suspension was a concrete alteration of the towing company's relationship with the department and the initial suspension notice and revised notice involved allegations of misconduct. Therefore, under the local Agency Law the towing company was entitled to a hearing and an appeal.

In *Smith v. City of Philadelphia*, 147 A.3d 25 (Pa. Cmwlth. 2016), the court considered an appeal from the Bureau of Administrative Adjudication of the Office of the Director of Finance for the City of Philadelphia relating to impoundment of vehicle. The Rules of Appellate Procedure are not applicable to a local agency law appeal. The lower court had discretion to waive the failure of the appellant to file a brief with the court of common pleas because the issues

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which the appellant raised at oral argument were the same that he raised before the Bureau of Administrative Adjudication. It was error for the court of common pleas to make its ruling based on matters stated in oral argument. The Bureau of Administrative Adjudication had not allowed the appellant the opportunity to raise the issue of whether, in light of the alleged identity theft, he was the actual registered owner of the vehicles and liable for the parking tickets and penalties. "Therefore, common please should have either held a de novo hearing or remanded the matter to the BAA for fact-finding. Such hearing, if conducted by common pleas, would necessarily include the swearing-in of witnesses, the presentation of evidence, and allowing for such evidence to be tested by cross-examination." *Id.* at 34 (footnote omitted). Because this was not done, a remand was necessary with the lower court to make the decision whether it would conduct the hearing or remand to the Bureau of Administrative Adjudication for the hearing.

MUNICIPAL OFFICIALS

In an opinion announcing the judgment of the court, the Pennsylvania Supreme Court considered the appeal of former member of the State House of Representatives Michael Veon from his conviction for violations of the Ethics Act. *Commonwealth v. Veon*, 150 A.3d 435 (Pa. 2016). The court considered whether "the trial court improperly expanded the definition of 'private pecuniary interest' to include 'intangible political gain,' thereby threatening the constitutional rights of all elected officials". *Id.* at 442. In a portion of the opinion in which five justices joined, the court concluded:

> Based on the plain language of Section 1102, we hold that, to prove "pecuniary benefit" as used in the conflict of interest statute, the prosecution must show some private financial gain. Consequently, the trial court erred when it instructed the jury that Section 1102 may be violated where the only benefit to Mr. Veon was political in nature.

Id. at 448.

POLICE AND LABOR RELATIONS

The Pennsylvania Supreme Court in *Johnson v. Lansdale Borough*, 146 A.3d 696 (Pa. 2016), considered the interrelationship between provisions of the Borough Code governing appeals from determinations of a civil service commission and the Local Agency Law. Officer Johnson was terminated, appealed to the civil service commission, and the civil service commission affirmed the discharge. He then appealed to the court of common pleas which reversed portions of the civil service commission decision, reversed the discharge, and modified the discipline to a 30-day suspension. On appeal Commonwealth Court directed the parties to brief the standard of review from a civil service commission decision. After reviewing prior opinions, Section 1191(c) of the Borough Code and the Local Agency Law, the Supreme Court stated that it would "adopt the deferential standard of appellate review set forth in Section 754(b) of the Local Agency Law under circumstances where the trial court accepted no new evidence on appeal." *Id.* at 713.

Whether a police officer honorably discharged for inability to perform duties as a result of physical disability was entitled to a disability pension benefit was to be decided in accordance with the terms of the collective bargaining agreement, including the definition of "total and permanent disability". *Perroz v. Fox Chapel Borough*, 143 A.3d 520 (Pa. Cmwlth. 2016). The definition in the collective bargaining agreement was more limited than the provisions of the Borough Code providing for discharge of an officer for disability and Act 600. The officer, who had served on the police negotiation committee, was bound by the definition in the collective bargaining agreement. The opinion also discusses the procedure which the borough followed and rejected a claim that the denial of pension benefits violated public policy. "Having voluntarily agreed to a pension benefit that is less than that available under the applicable statute, [the claimant] and the [u]nion cannot now claim that the very same provision in the CBA is illegal or void as against public policy." *Id. at* 537 (citation omitted; emphasis omitted).

Although an arbitrator has jurisdiction to consider procedural as well as substantive determinations, procedural determinations are subject to review under the essence

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test. *Allegheny County v. Allegheny Court Association of Professional Employees*, 138 A.3d 701 (Pa. Cmwlth. 2016). The collective bargaining agreement at issue contained time limitations for filing a grievance. The arbitrator had the authority to decide when the event occurred or when the grievant discovered or reasonably should have discovered the event. The arbitrator reviewed the circumstances and determined the grievance was timely. Because the court had to accept the arbitrator's findings of fact, the determination met the essence test.

In *City of Arnold v. Wage Policy Committee of the City of Arnold Police Department*, 138 A.3d 719 (Pa. Cmwlth. 2016), the court considered an appeal from a grievance arbitration filed by the widow of a police officer after the pension board notified her that the benefit she had been receiving had been miscalculated and would be reduced. The arbitrator directed that the higher benefit be restored and the city appealed asserting the arbitrator had no decision. "Widow's right to a death/survivor benefit is not derivative of Decedent's rights under the CBA, but an independent right under the City's pension plan as implemented under the Third Class City Code and its Ordinances" and therefore was not a dispute between a public employer and its employee subject to arbitration under Act 111 and the collective bargaining agreement. *Id. at* 725. The pension board is a local agency, the widow should have proceeded under the Local Agency Law, and the arbitrator did not have jurisdiction. In a footnote the court indicated that the pension board "may have failed to afford [the widow] the process that was due under the Local Agency Law prior to its reduction of her death/survivor benefit." *Id. at* 726 (n. 11).

PUBLIC CONTRACTS

The Pennsylvania Supreme Court considered the prompt payment provisions of the Procurement Code which are applicable to municipalities in *A. Scott Enterprises, Inc. v. City of Allentown*, 142 A.3d 779 (Pa. 2016). A jury had found that the city had breached its contract and withheld payments in bad faith, and the issue the Supreme Court considered was whether Section 3935 of the Procurement Code mandated an award of attorneys' fees and concluded:

> Accordingly, we hold Section 3935 of the Procurement Code allows – but does not require – the court to order an award of a statutory penalty and attorneys' fees when payments have been withheld in bad faith. The court's determinations in this regard are subject to review for an abuse of discretion.
>
> *Id.* at 791.

UTILITY ISSUES

Commonwealth Court considered rights granted under a sewer easement agreement in *Berwick Township v. O'Brien*, 148 A.3d 872 (Pa. Cmwlth. 2016). The township notified landowners that it would clear obstructions within the boundaries of the easement, and landowners responded with a letter from counsel threatening suit if township employees entered the right-of-way and damaged any vegetation and erected a fence across the width of the right-of-way where it was accessible from a public street. The township thereafter sued seeking a permanent injunction. The recorded easement granted the right to install, inspect, and maintain as the township may from time to time require upon, over and under the easement area. It also gave the township the right, with reasonable advance notification, to enter the area to perform work for the purpose of installing, inspecting and maintaining provided it repaired or replaced any damaged property. The agreement further provided that the owner would not erect or permit any structure or other obstruction within the right-of-way and expressly stated that trees growing naturally were permitted provided they did not interfere with the township's use of the right-of-way. The court construed those provisions together and determined that "the removal of brush and overgrowth in order to allow the Township to access its sewer lines for purposes of an inspection and maintenance is reasonable and necessary" and the lower court did not err in interpreting the agreement "to allow the Township to remove brush and overgrowth, including trees, as necessary to permit the Township access for the purposes set forth in the Agreement." *Id. at* 887. The entry of an injunction prohibiting landowners from taking action to prevent the township from accessing the easement area and removing brush and overgrowth,

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including trees, was proper. The opinion also addresses the standards necessary for the granting of a permanent injunction and rules concerning construction of easement agreements. The opinion also rejects the landowners' contentions that there was no actual controversy and that the granting of relief was overly broad.

The United States District Court for the Eastern District of Pennsylvania held that Philadelphia's procedure for imposing liens on properties for unpaid utility bills incurred by tenants violated constitutional rights to due process. *Augustin v. City of Philadelphia*, 171 F.Supp.3d 404 (E.D. Pa. 2016). Plaintiffs asserted that the Philadelphia Gas Works procedures concerning billing and liening violated procedural due process. The tenants were the customers. No notice was provided to the landowner when PGW sent a delinquency or shutoff notice to a tenant customer unless the landowner was enrolled in a "Landlord Cooperation Program". In order to be part of the program, the landowner had to enroll by email and would receive all communications by email and if a landowner failed to respond to a PGW email or appear for an appointment the landowner would be automatically deemed uncooperative and expelled. Even when a notice that a lien is about to be placed was given, PGW would not provide information on the tenant's account, citing tenant privacy. The court noted that Pennsylvania law afforded due process procedures after a lien had been filed. The court also contrasted the procedure followed by the city for water and sewer bills where if a tenant ratepayer became delinquent duplicate bills were automatically sent to the landowner. The court granted summary judgment in favor of the plaintiffs holding that the PGW "methods do not meet the fundamental requirements of due process in that they do not afford the plaintiffs and others like them the opportunity to address their tenants' arrearages at a meaningful time or in a meaningful manner nor is there any reason why the City cannot adopt an ordinance or follow a procedure similar to the one which it has adopted and which it follows with respect to the collection of overdue balances for water and sewer services." *Id.* at 417.

MISCELLANEOUS

Where a zoning ordinance expressly requires that an application for a special exception provide a site plan including specific information set forth in the zoning ordinance such as location and size of all existing and proposed buildings and structures, the failure to submit such a site plan "is sufficient grounds on its own to deny the special exception application." *EDF Renewable Energy v. Foster Township Zoning Hearing Board*, 150 A.3d 538 (Pa. Cmwlth. 2016). Applicant filed a special exception application under a provision of the zoning ordinance providing that where a use is neither specifically permitted nor prohibited in the ordinance the zoning hearing board may allow the use by special exception subject to certain criteria. The applicant desired to create a wind farm with approximately 25 wind turbines on properties in three different zoning districts as well as supporting facilities such as a substation. The application included a letter, narrative, and a map with circled areas indicating approximate locations of wind turbines. The testimony was that the precise number and location of turbines would be determined after soil testing, existing roads would be used to the maximum extent feasible, and locations of new roads was not clear. This evidence was insufficient to meet the requirements of the zoning ordinance.

Commonwealth Court considered the level of evidence necessary to demonstrate a determination that a road is a public road through usage in *In re: Petition for Appointment of Board of Viewers for Purpose of Closing Township Road 444 and/or Compensating Wyoming Land Conservancy, Inc.*, 149 A.3d 911 (Pa. Cmwlth. 2016). The unpaved road identified as Cemetery Road bisected landowner's property and landowner sought its closure or compensation for a taking. The township presented evidence that the township received Liquid Fuels Tax allocation since 1930, it appeared on an 1869 map, a PSP officer testified he patrolled the township using the road, the township maintained the road, and two persons testified to usage. This was sufficient to demonstrate it was an existing public road.

In *Ziegler v. City of Reading*, 142 A.3d 119 (Pa. Cmwlth. 2016) (en banc), the court considered

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a challenge to a "curbside waste collection fee" which included a service fee for collection of recyclable materials. Residents asserted that the fee was preempted by Act 101 citing to Commonwealth Court's prior opinion invalidating a fee which covered "all cost" of the recycling program. *City of Reading v. Iezzi*, 78 A.3d 1257 (Pa. Cmwlth. 2013), vacated on other grounds, In re Iezzi, 504 B.R. 777 (Banker. E.D. Pa. 2014). The parties had provided a factual stipulation upon which the lower court relied in determining that the fee as constituted did not cover all cost associated with recycling and was not preempted. The opinion reviewed the purpose of Act 101 and its decision in *Waste Management of Pennsylvania, Inc. v. Department of Environmental Protection*, 107 A.3d 273 (Pa. Cmwlth. 2015) (en banc), which was decided after the lower court's decision. Commonwealth Court vacated the lower court's order because it "did not address how, if at all, the fee impacted the ultimate financial self-sufficiency of the program or whether the program was as efficient as it could be. These latter points are obvious purposes of Act 101." *Id. at* 130. The court also considered the fact that the city was a home rule municipality and the Third Class City Code has been amended to specifically authorize imposition of recycling fees. "[A]lthough home rule cities may not be limited or restrained by their former municipal codes, there is no law preventing a home rule charter from exercising powers bestowed by its former code." *Id. at* 134 (emphasis omitted). However, "whether authorized by statue or not, a City ordinance must not be inconsistent with the provisions and purposes of Act 101; otherwise, it is preempted." *Id.*

The court considered the Public Employee Pension Forfeiture Act, 43 P.S. §1311 et seq., in *Miller v. State Employees Retirement System*, 137 A.3d 674 (Pa. Cmwlth. 2016). A senior magisterial district judge pleaded guilty to the federal crime of mail fraud, and the State Employees Retirement Board determined that his pension was forfeited. Part of the opinion considers whether a senior magisterial district judge was an employee and determined that he was a public official and/or public employee when he committed the crime. The court also considered and rejected claims that forfeiture of pension benefits violated numerous state and federal Constitutional provisions as excessive fines and cruel and unusual punishment. The pension forfeiture was not a fine or penalty imposed for conviction but was a breach of the employment provisions.

Commonwealth Court reviewed the procedures under the Urban Redevelopment Law, 35 P.S. §1701 et seq., concerning blight determinations and notice to landowners in *In re Condemnation of Land in Bucks County*, 140 A.3d 744 (Pa. Cmwlth. 2016). The fact that the title of the notice of a blight determination was "Violation Notice" was not fatal because it listed the reasons for the blight determination and informed landowner that it had 30 days to obtain permits to correct the blighted conditions or file an appeal. The municipality did not abandon that notice merely because it did not initiate condemnation proceedings for a year because the municipality had attempted to work with landowner after landowner stated it would rehabilitate the property but failed to do so.

A "municipal authority or other political subdivision in a case sounding in contract can only be sued in a county where it is located" pursuant to Rule of Civil Procedure No. 2103(b). *Keystone Sanitary Landfill Inc. v. Monroe County Municipal Waste Management Authority*, 148 A.3d 915, 919 (Pa. Cmwlth. 2016). Section 5607(d)(2) of the Municipality Authorities Act granting the power to sue and be sued and complain and defend in all courts addressed the type of courts, not their location.

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