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MUNICIPAL

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NEW CASE SUMMARY

By Josele Cleary, Esq.

ZONING AND PLANNING

Validity Challenges

The Pennsylvania Supreme Court considered, and rejected, Commonwealth Court's holding that a municipality could deny a curative amendment petition which was filed after the Pennsylvania Supreme Court reversed Commonwealth Court and held the zoning ordinance invalid because the municipality had acted quickly to institute a municipal cure under MPC §609.2. *Piper Group, Inc. v. Bedminster Township Board of Supervisors*, ___ Pa. ___, 30 A.3d 1083 (2011). Six days after the Supreme Court had held the zoning ordinance invalid in *C & M Developers, Inc. v. Bedminster Township Zoning Hearing Board*, 573 Pa. 2, 820 A.2d 143 (2002), Piper Group filed its challenge to the same zoning ordinance provision with a curative amendment. At its first meeting after the Supreme Court's 2002 decision, 13 days after the decision, the supervisors declared a municipal cure under MPC §609.2. The board held over 50 hearings on the Piper Group's challenge and denied it determining, inter alia, the ordinance enacted to settle the C & M challenge provided adequate relief. The lower court and Commonwealth Court held that the township was protected by MPC §609.2 by virtue of its acting quickly. The Supreme Court expressly rejected this holding, agreeing with the challenger that there is no "moratorium period to consider the impact of a new court decision, free from a stampede of savvy landowners rushing to file piggyback challenges, so long as the municipality acts quickly." *Id. at* ___, 30 A.3d at 1093.

> Thus, after a court issues a decision invalidating a municipality's zoning ordinance, the stampede may proceed apace, halted only by the declaration and proposal procedure of Section 609.2(1). Of course, a municipality has an incentive to act quickly to limit the number of challenges by filing such a declaration as soon as possible. Municipalities must balance their confidence that their ordinances are valid with the risk of facing comparisons between it and multiple variations, including, as here, its own amendment, in deciding when to declare and propose.

Id. at ___, 30 A.3d at 1093 (n. 17). However, the Supreme Court rejected Piper Group's claim that it was entitled to approval of its plan in its entirety. The Supreme Court held that it

> cannot ignore that Ordinance 149 cured the defects by severing the unconstitutional aspects of the AP Ordinance [held invalid in *C & M*], not only with respect to the AP District as a whole, but also with respect to Piper's land in particular. Thus, this case is distinguishable from *Casey [v. Zoning Hearing Board of Warwick Township,* 459 Pa. 219, 328 A.2d 464 (1974),] and *Fernley [v. Board of Supervisors of Schuylkill Township*, 509 Pa. 413, 502 A.2d 585 (1985)]. In those cases, the municipality purported to cure the de jure defect by permitting the multifamily housing in some sections of the municipality, but still attempted to deny any relief to the successful challenger. Here, in contrast, the Township cured the

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FROM THE CHAIR

By Joan London, Esq.

The fall and winter have been a busy time for the Municipal Law Section. The Municipal Law Section has been working with the Real Property, Probate, and Trust Law Section on reform of tax sale foreclosure procedures, which is the subject of House Bill 1782. On behalf of the two sections, I presented to the PBA Board of Governors and House of Delegates at its meeting in Harrisburg in November the concerns of our two sections on this proposed legislation. While our sections agree with the drafters of HB 1782 on the need for reform of procedures and a more unified and streamlined procedure with a goal of keeping housing in owner occupancy and providing buyers at tax sale with marketable title, we believed that HB 1782 did not provide adequate notice to property owners, and did not afford municipalities the discretion needed to decide which delinquencies to pursue. Further, the proposed legislation was drafted in a manner more suitable to states in which there is one, countywide collector of all taxes. Our sections did not believe that the legislation, as drafted, was well suited to Pennsylvania, with its multi-tiered system of collection of school and municipal taxes. I am happy to report that the House of Delegates unanimously adopted our position opposing the then-current form of HB 1782 on November 18, 2011, and an amended version of HB 1782 was referred to the House Urban Affairs Committee on December 21, 2011. As I stated to the Board of Governors and House of Delegates, our Section believes that HB 1782 is a beginning, and not an end to the discussion of tax sale foreclosures in Pennsylvania.

I invite all of you to the PBI Land Use Institute, which is a day-long seminar to be held on Friday, April 20, 2012 at PBI's facility in the Wanamaker Building in Center City Philadelphia. The course planners have been working to present a six (6) credit (five (5) substantive, one (1) ethics) workshop. The Land Use Institute will cover topics such as current case law, eminent domain, new PennDoT regulations, Marcellus Shale, and conflicts of interest and what constitutes overreaching by municipalities in negotiations with developers. This seminar will be extremely worthwhile, and we hope to see many of you there.

Joan London

As always, on behalf of the Section thanks to Josele Cleary for providing us with this very informative and well-written Newsletter!

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> de facto defects in the AP District that included Piper's land. While Piper was "thwarted" from developing at the specific density that it proposed, that remedy need not be automatically provided, because it would provide a windfall beyond what is necessary to cure constitutional defects. . . .
>
> We also note that the full automatic, site-specific judicial relief sought by Piper is not found in the governing scheme of the MPC. . . . In other words, while the governing body must cure the defects, it need not provide carte blanche development rights.

Id. at ___, 30 A.3d at 1097 (citations omitted; footnote omitted). The Supreme Court therefore affirmed Commonwealth Court's Order based on this different analysis.

Commonwealth Court considered a validity challenge arguing reverse spot zoning in *Atherton Development Company v. Township of Ferguson*, 29 A.3d 1197 (Pa. Cmwlth. 2011). The property contained approximately 5½ acres and was part of a larger tract extending into the adjoining township. Approximately five acres was zoned residential and one half zoned commercial. The land was abutted by both residentially zoned property and commercially zoned property, and the portion of the tract classified as commercial had previously been part of a larger tract zoned commercial. The landowner asserted that retaining the residential zoning was reverse spot zoning. Commonwealth Court stated that reverse spot zoning "occurs where an 'island' develops as a result of a municipality's failure to rezone a portion of land to bring it into conformance with similar surrounding parcels that are indistinguishable." *Id.* at 1204. Commonwealth Court rejected the spot zoning claim noting that the subject tract was not completely surrounded by commercially zoned properties and that there was no indication that the high density residential zoning of the property "as compared to the commercial zoning of the properties surrounding it on three sides was unjustified." *Id.* at 1206. The township had presented evidence that certain streets were boundaries separating the residential and commercial areas and the high density residential classification was a logical transition between commercial and other residential districts. There was also evidence that the property could be used consistent with the high density residential zoning. Challenger had asserted that the participation of the township manager, who served at the pleasure of the governing body in the hearing, was evidence of bias. Commonwealth Court rejected this claim, indicating that the developer could have proceeded before the zoning hearing board, the developer did not seek recusal of any member of the governing body, and the governing body retained independent counsel to defend the validity of the zoning ordinance as authorized by MPC §916.1(c)(4). The fact that the zoning was inconsistent with the comprehensive plan did not in and of itself require finding the ordinance invalid.

Where a zoning ordinance specifically prohibited a bed and breakfast as a home occupation and did not otherwise allow a bed and breakfast, the ordinance was de jure exclusionary. *Thomason v. Zoning Hearing Board of Radnor Township*, 26 A.2d 562 (Pa. Cmwlth. 2011). Challengers owned a 6,000 square foot Victorian house with eight bedrooms, five full baths, and parking for 11 vehicles. They wished to operate a bed and breakfast with five guest bedrooms and challenged the validity of the zoning ordinance based on the express prohibition of bed and breakfasts as home occupations in all residential districts. The municipality defended the ordinance on the basis that because rooming homes and hotels were allowed, the ordinance was not exclusionary. A bed and breakfast would not fit within the definition of a hotel which required accommodations for 20 or more guests, and a rooming house was limited to three roomers. In addition, since a bed and breakfast was expressly prohibited in the district where a rooming house was allowed, it would be impossible for a bed and breakfast to fall under the designation of rooming house. Since the township offered no evidence that its exclusion of bed and breakfast establishments was substantially related to public health, safety and welfare, the ordinance was exclusionary.

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Commonwealth Court considered a procedural challenge to the validity of a zoning ordinance in *Gladstone Partners, LP v. East Union Township*, 26 A.3d 542 (Pa. Cmwlth. 2011). The municipality enacted an ordinance to establish a planning commission in 2008. The advertisement of the proposed ordinance was less than a week before the meeting at which the ordinance was enacted. The board of supervisors appointed the planning commission after enacting the ordinance, and the township planning commission thereafter prepared a zoning ordinance. The township followed the procedures in MPC Sections 607 and 608 to enact the zoning ordinance. Landowner challenged the zoning ordinance asserting that the planning commission had not been properly established and, therefore, there was no planning agency to prepare the zoning ordinance as required by MPC Section 607. Commonwealth Court held that the fact that the advertisement of the ordinance to create the planning commission was not advertised a full seven days before the meeting did not raise a due process issue and the challenge to its procedural validity was untimely. Commonwealth Court also rejected a claim that the proposed zoning ordinance had not been properly sent to the county planning commission. The draft was mailed on April 27, the township received a review letter dated May 21, and enacted the zoning ordinance on June 11. The court rejected challengers' contention that the county had to have received and had the draft ordinance in its possession for a full 45 days before the township could act. The MPC uses the word "submit" and "the ordinance map were 'submitted' to the Planning Commission when they were sent by certified mail on April 27." *Id.* at 551.

Variance Issues

Commonwealth Court reversed the denial of a use variance in *Appeal of Jones from the Decision of the Zoning Hearing Board of Upper Moreland Township*, 29 A.3d 60 (Pa. Cmwlth. 2011). Landowner sought a variance to use a six-bedroom, single family detached dwelling as an insurance office to enable relocation of his business which was approximately one block away. Although in a residential district, the property was surrounded by office uses, vacant properties, and was only two blocks from a shopping center. Landowner presented testimony from the realtor who tried to market the property for numerous years that it could not be sold for residential use. The residents in the neighborhood objected on traffic grounds. Commonwealth Court reviewed burdens of proof and concluded that the testimony of the objectors "does not demonstrate specific adverse effects that Jones' proposed use will have on the neighborhood or that a significant increase in neighborhood traffic will result from the proposed use." *Id.* at 65. After noting there was no expert traffic testimony, Commonwealth Court held that there was insufficient evidence to support the zoning hearing board's finding that traffic and safety problems would be exacerbated by the requested use. Since that was the sole basis for the denial and was unsupported by the evidence, Commonwealth Court reversed the denial of the use variance.

In contrast, Commonwealth Court reversed the granting of variances in *Singer v. Philadelphia Zoning Board of Adjustment*, 29 A.3d 144 (Pa. Cmwlth. 2011). The board had granted numerous dimensional variances including waiver of all off-street parking, elimination of a required off-street loading bay, and deviations from the maximum floor area ratio to develop a mixed use building with hotel rooms, apartments, restaurants, and retail space. The board also granted a use variance to allow a take-out restaurant. The property at issue was currently being used as a parking lot, a permitted use. Business owners in the vicinity appeared before the board to oppose the variances and presented testimony concerning existing parking problems and that the property could be developed in accordance with the zoning ordinance by reducing its scope. Commonwealth Court reaffirmed "that an applicant is not entitled to a dimensional variance under the relaxed standards set forth in *Hertzberg [v. Zoning Board of Adjustment of the City of Pittsburgh*, 555 Pa. 249, 721 A.2d 43 (1998),] where no hardship is shown or where the hardship alleged amounts to an applicant's mere desire to increase profitability." *Id.* at 149. While there were some configuration issues with the property, Commonwealth Court viewed the evidence as showing that

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"the property cannot be developed as proposed, in a manner that will maximize the development potential of the property, without the dimensional variances it seeks." *Id.* at 150 (emphasis omitted). The court also held that there was insufficient evidence for the use variance.

In *Pohlig Builders, LLC v. Zoning Hearing Board of Schuylkill Township*, 25 A.3d 1260 (Pa. Cmwlth. 2011), the court agreed that a developer was entitled to a variance from steep slope provisions of a zoning ordinance to construct a bridge and culvert which would enable development of a 65 acre tract. The tract was in essence bisected by a stream and inlet to a reservoir owned by a water company. The water company agreed to allow construction of the bridge and culvert at a certain location which would enable the property to be developed. The developer could develop the northern portion of the tract without the variance. The zoning hearing board found that the sole access between the two sides of the property was a 50-foot wide strip which could not be developed with a street. In order to subdivide the northern portion of the property from the southern portion of the property (which contained three dwellings), some variance would be required for the access to the southern portion. Commonwealth Court rejected the township's assertion that there was self-inflicted hardship. There was no evidence that the developer "intends to pay an excessive price for the subject property in anticipation of receiving a variance" even though the price could be varied based on the number of developable lots. *Id.* at 1273.

A zoning hearing board which denied a use variance for a telecommunications tower did not violate the Telecommunications Act where there was testimony from customers of the carrier at issue that they had satisfactory service. *Liberty Towers, LLC v. Zoning Hearing Board of the Township of Lower Makefield*, 2011 U.S. Dist. LEXIS 88740 (E.D. Pa. 2011). The tower company filed an application for a use variance presenting evidence that T-Mobile required the site to provide service to an area of Lower Makefield Township. A radio frequency engineer presented testimony based on propagation software of an area without reliable coverage. A protestant who lived in the community and was a T-Mobile user testified that her service was good and dependable and she could make and receive calls in her basement, notwithstanding her property being located in the area where the engineer testified there was inadequate service. The zoning hearing board determined that the applicant did not present testimony meeting land use standards for a use variance, and the evidence presented demonstrated that there was reliable coverage. The court agreed that the zoning hearing board could properly find the testimony of the radio frequency engineer based solely upon propagation software with no evidence of any calls being actually dropped or any residents or customers affected by the alleged gap in service and the testimony of residents that they had T-Mobile service "was insufficient evidence to support Liberty's contention that there was a significant gap in service absent the grant of a use variance for construction of a tower."

Procedure

The owner of a high-rise apartment building for elderly and handicapped persons which adjoined a property being used for a community corrections center had standing to bring a private zoning ordinance enforcement action. *Geneva House, Inc. v. Minsec of Scranton, Inc.*, 25 A.3d 427 (Pa. Cmwlth. 2011). The subject property had a prior nonconforming use of transitional living space for mental health/mental retardation clients. Protestant brought the private enforcement action after Minsec began operating its facility on the third and fourth floor of the building. The trial court granted a motion for summary judgment after extensive discovery on the basis that protestant lacked standing and there was no evidence of a violation of the zoning ordinance. Commonwealth Court reversed. MPC §617 authorizes persons "substantially affected by the alleged violation" to file a private enforcement action. Although protestant did not present evidence of "actual harm", it was not required to do so. Allegations that its elderly and frail residents were at greater risk of harm through the operation of a private correctional facility were sufficient to provide standing when the correctional facility immediately adjoined the protestant's apartment building. The prior zoning hearing board decision concerning the subject

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property had held that a transitional living facility for individuals with drug or substance abuse problems was sufficiently similar to the prior transitional living facility for MH/MR, and Minsec had never sought or obtained zoning approval before commencing operations. Commonwealth Court held there was a genuine issue of material fact whether what Minsec did fell within the recognized nonconforming use.

Commonwealth Court considered procedural issues relating to deemed approvals and res judicata and collateral estoppel in *Ulsh v. Zoning Hearing Board of Lower Paxton Township*, 22 A.3d 244 (Pa. Cmwlth. 2011). Developer filed an application for variances to increase residential density which was denied, although there was no written decision. After negotiations with the governing body and a neighborhood group, developer applied for variances to allow a development with fewer dwelling units, which was granted. An objector appealed that approval (Snyder Appeal). During the pendency of the Snyder Appeal, developer filed a mandamus action concerning its first application which had been deemed approved. Pursuant to the settlement of the mandamus agreement, notice of the deemed approval was advertised and Ulsh filed an appeal. The zoning hearing board decision granting developer's variances were reversed in the Snyder Appeal. Commonwealth Court agreed that the judgment on the merits in the Snyder Appeal that developer did not demonstrate unnecessary hardship could be used to collaterally estop developer from re-litigating the issue of unnecessary hardship. The mere fact that the objectors in the two cases were different citizens did not prevent use of collateral estoppel. Commonwealth Court held, however, that the trial court erred in not making substantive findings of fact in Ulsh's appeal of the deemed approval and could not simply rely on the opinion in the Snyder Appeal to conclude developer was not entitled to any approvals.

A zoning hearing board in an appeal from a denial of a permit application did not have the ability to impose conditions when it reversed the denial, even if the conditions required compliance with the applicant's testimony. *Orange Stones Co. v. Borough of Hamburg*, 28 A.3d 228 (Pa. Cmwlth. 2011). In prior applications the applicant sought to use the subject property as a rehabilitation center and halfway house. The most recent application was for a 20-room motel/hotel, a permitted use. The zoning officer denied the application, and the applicant appealed. The zoning hearing board reversed but imposed numerous conditions so that the property could not become a rehabilitation center or halfway house. Commonwealth Court also held that the zoning officer could not deny the permit application on the basis of an ordinance governing permit applications which was specifically not enacted pursuant to the MPC. In rather broad language, Commonwealth Court held that "a zoning officer's authority is limited to administering a zoning ordinance which has been enacted pursuant to the provisions of the MPC. Accordingly, because Ordinance 765-09 did not originate under the MPC, the zoning officer erred in relying on Ordinance 765-09 in denying Orange Stones' zoning permit application." *Id.* at 234. The opinion does not address the common circumstance where the language of the zoning ordinance itself requires demonstration that an applicant for a zoning permit receive related approvals, such as subdivision or land development, before the zoning permit can be issued.

Commonwealth Court considered an action by a property owner seeking to compel a municipality to enforce its zoning ordinance against a neighboring property owner in *Bell v. Township of Spring Brook*, 30 A.3d 554 (Pa. Cmwlth. 2011). The municipality requested that the action be dismissed on the basis of collateral estoppel and res judicata since the plaintiff had filed a similar action in 2005. Commonwealth Court held that the action could proceed only as to allegations regarding changes in conditions and circumstances that post-dated the prior litigation. It appears that the municipality did not raise as a defense prior court decisions holding that municipalities cannot be compelled to enforce ordinances, particularly zoning ordinances in light of MPC §617 granting persons the right to file private enforcement actions. *Hanson v. Lower Frederick Township Board of Supervisors*, 667 A.2d 1221 (Pa. Cmwlth. 1995).

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Subdivision Issues

In *Victoria Gardens Condominium Association v. Kennett Township*, 23 A.3d 1098 (Pa. Cmwlth. 2011), Commonwealth Court considered an action filed against a municipality for specific performance and mandamus relief to compel the municipality to complete improvements shown on a subdivision plan. In 2001 the developer and the township executed an agreement under which the developer agreed to complete the required improvements within three years. The agreement provided for financial security and addressed similar issues including withholding permits if the developer was in default. The association was not a party to the agreement or named as a beneficiary on the financial security. The developer failed to install all of the improvements, and improvements were installed improperly. There were insufficient funds left to complete the improvements, and the association sought to compel municipal completion. Commonwealth Court rejected the association's claim that it was a third party beneficiary. There was no intent to confer such status demonstrated in the agreement and the terms "clearly indicate that both Developer and the Township entered into the contract to serve their own interests; there is absolutely no indication of their intention to benefit any other party." *Id.* at 1107. The claims of promissory estoppel and willful misconduct by members of the board of supervisors were waived. The Court rejected the assertion that because the developer had no assets and could not complete the improvements the association met the requirements for mandamus. An inadequate remedy at law is not the same as the inability to collect a judgment because of a defendant's insolvency. The opinion distinguishes *Safford v. Board of Commissioners of Annville Township*, 387 A.2d 177 (Pa. Cmwlth. 1978), because in *Safford* the municipality had agreed it was obligated to pave and accept the streets and in this case the municipality "did not explicitly bind itself to pave the streets within the development, nor was the Township required to accept the streets if offered by the Developer for dedication." *Id.* at 1110 (n. 19).

Miscellaneous

A condition imposed on a conditional use approval for an ethanol plant requiring a payment of ½ cent per gallon of ethanol produced to a township to be used for any purpose is an impermissible impact fee requiring the condition be stricken. *In re: Appeal of Maibach, LLC*, 26 A.3d 1213 (Pa. Cmwlth. 2011). The applicant, after negotiations with the volunteer fire company, had agreed to the imposition of a condition providing for a ¼ cent per gallon contribution with the funds being used for emergency response and police protection. The board of supervisors instead imposed the ½ cent per gallon requirement, eliminating the use restriction. Commonwealth Court reviewed statements made by supervisors at the meeting when the decision was rendered and agreed that the condition "violates the MPC because it requires a contribution in lieu of capital expenditures." *Id.* at 1219. Commonwealth Court also noted that even if the condition was not an impact fee in violation of the MPC, it would have been stricken since there was no evidence in the record to support its imposition. The court rejected the request of the fire department to restore the condition to which the applicant had agreed.

A smoker-cooker placed on the sidewalk in front of a barbecue restaurant which was used to cook constituted a sign under the municipal zoning ordinance. *Gulan v. Zoning Hearing Board of East Berlin Borough*, 23 A.3d 629 (Pa. Cmwlth. 2011). The zoning ordinance defined the term sign to include structures or devices as well as a "declaration, demonstration, display, illustration or insignia used to advertise or promote the interest of any person or business when the same is in view of the general public." The zoning hearing board noted that the smoker was within several feet of the sign for the restaurant, and the municipality had presented evidence that the restaurant owner had told people that the smoker was placed to advertise the restaurant. The zoning hearing board had the right to accept the testimony of that witness rather than the testimony of the restaurant owner that the main purpose of the smoker was for cooking.

RIGHT TO KNOW LAW

A person who has requested that an agency waive the fee for reproducing requested documents, asserting that the fee waiver denial is discriminatory, does not have the right to appeal denial of the waiver to the Office of Open Records.

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Department of Public Welfare v. Froehlich, 29 A.3d 863 (Pa. Cmwlth. 2011). The requester, a community legal services employee, asserted that the refusal to waive the fee was based on the source of CLS's funding, appealed the refusal to waive the fees to the OOR, and the OOR entered a order requiring DPW to provide the records at no cost. Commonwealth Court held that OOR has only the jurisdiction granted to it by the Legislature and that Section 1101(a)(1) of the RTKL grants jurisdiction to hear appeals where "a written request for access to a record is denied or deemed denied." The denial of the fee waiver is not a denial of access. While Commonwealth Court agreed that "the more practical procedure" would be to allow such an appeal to the OOR, "this reasoning along is not sufficient if the statute does not support such an interpretation." *Id*. at 868. Commonwealth Court concluded that "the only method to challenge the alleged discrimination by an agency is by bringing an action in this Court claiming the agency denied its fee-waiver request for an unlawful discriminatory reason." *Id*. at 869.

An affidavit where the open records officer which states that "based on the information provided to me, I do hereby affirm that, to the best of my knowledge, information and belief, such records do not exist within our agency" meets the burden of proof that the requested records do not exist. *Hodges v. Pennsylvania Department of Health*, 29 A.3d 1190, 1193 (Pa. Cmwlth. 2011). Requester asserted that this language suggested that the records might exist under another spelling or under another classification and, therefore, was not sufficient. Commonwealth Court acknowledged that "misfiling or misclassification of records is always a possibility. An agency is only required, however, to search for and provide the records which are requested. . . . It was not required to sift through all of its records in order to determine if something under a different spelling or classification might possibly relate to Hodges' request." *Id*.

Where a person requested copies of documents, the agency informed the person that the documents, subject to certain redactions, were available on payment of the copying fee, and the person refused to pay the copying fee, his appeal to the Office of Open Records challenging the redactions should have been denied. *Indiana University of Pennsylvania v. Loomis*, 23 A.3d 1126 (Pa. Cmwlth. 2011). Loomis requested various information concerning pledges, payments, fund transfers, and filings from the foundation for Indiana University of Pennsylvania. The University obtained the records from the Foundation and redacted signatures, pre-decisional deliberation discussions, donor identities, and a few other items. Loomis then filed an appeal challenging the redactions and claiming that he should have been allowed to examine the records without paying. Section 506(d)(3) of the RTKL expressly provides that if a "requester does not pay the fee in full, the agency may withhold access." Therefore, "because Requester was properly denied access to the records due to his failure to pay the required copying costs, the OOR should have denied his appeal." *Id*. at 1128.

In a petition for review filed directly with Commonwealth Court by a former attorney and state prison inmate requesting an order declaring common law and constitutional rights of access to document, the court held that, "the RTKL provides the exclusive means to seek redress for violation of the RTKL." *Guarrasi v. Scott*, 25 A.3d 394, 405 (Pa. Cmwlth. 2011). Since the plaintiff had not appealed any of the various defendants' decisions to deny records using the RTKL procedure, the counts seeking records were dismissed.

Commonwealth Court agreed that "federal law makes tax returns and tax return information, including W-2 forms, confidential and prohibits their disclosure." *Office of the Budget v. Campbell*, 25 A.3d 1318, 1319 (Pa. Cmwlth. 2011) (footnote omitted). The OOR determined that the W-2 forms for Office of the Budget employees had to be released redacting all information except the name of the employer, the name of the employee, and the state employee's retirement system contribution in response to a RTKL request seeking copies of all W-2 forms issued by the Office of Budget in 2009. The Office of the Budget denied the request on the basis that it would violate Section 6041 of the Internal Revenue Code, 26 U.S.C. §6041. "Because W-2 forms are exempt from disclosure under federal law, they are not public records under the RTKL." *Id*. at 1319-1320 (footnote omitted).

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EMINENT DOMAIN

A second class township does not have the power under the Second Class Township Code to condemn an easement for a new storm water management system. *Township of Millcreek v. Angela Cres Trust of June 25, 1998*, 25 A.3d 1288 (Pa. Cmwlth. 2011). Section 1513 of the Second Class Township Code authorizes a township to "widen and deepen watercourses running through the township . . . to prevent water from overflowing the banks" and grants the power of eminent domain for this purpose. Section 2702(a) authorizes a township to acquire an "existing system or facility for management of surface water runoff". Since Millcreek Township was seeking an easement to create a new channel 500 feet long where there was no existing swale, ditch or storm water pipe, condemnation of the easement for that purpose was not authorized by the Second Class Township Code. The fact that the township was not able to present evidence concerning the need for its drainage project was not relevant because there was no authorization in the Township Code to condemn land to change the course of a drainage channel no matter how beneficial the purpose. Commonwealth Court succinctly concluded: "We hold that the trial court correctly held that the Township lacked authority under The Second Class Township Code to condemn Trust property. The statute does not authorize construction of a new watercourse or the construction of a new system to manage storm water runoff." *Id*. at 1293.

ETHICS ACT

The Pennsylvania Supreme Court determined that there is no strict liability under the Ethics Act, and a public official could not be convicted of a violation where there was no evidence of intent to use his office for private pecuniary gain. *Kistler v. State Ethics Commission*, ___ Pa. ___, 22 A.3d 223 (2011). Mr. Kistler, a member of the board of directors of an intermediate unit, also owned a pole building supply company. After he learned that a garage construction project might use a pole building, he resigned from the building committee and sought advice from the solicitor. The solicitor informed Mr. Kistler that he could participate in the construction of the garage but should abstain from any votes concerning the project. He did so and the architectural firm chosen to do the work recommended a pole building which it acquired from Mr. Kistler's company. Mr. Kistler also voted in favor of proceeding with another building project after there was evidence that the then-current leased location had a mold problem. After learning that a pole building was being considered for that project, he also abstained from all votes. After reviewing Commonwealth Court holdings, the Supreme Court held

> that to violate the conflict of interest provision in subsection 1103(a) of the Ethics Act, a public official must be consciously aware of a private pecuniary benefit for himself, his family, or his business, and then must take action in the form of one or more specific steps to attain that benefit.

Id. at ___, 22 A.3d at 231. Because there was no evidence that Mr. Kistler was aware that his vote to proceed with the school project after the mold was discovered would result in his receipt of a subcontract for construction of the garage, there was no evidence that the vote was motivated by private pecuniary benefit. The Supreme Court noted the undisputed testimony that Mr. Kistler had sought and followed solicitor's advice, did not attempt to influence the board's deliberation with respect to either contract, and the vote on terminating the lease for the school was based on the study demonstrating the mold problem. The Pennsylvania Supreme Court also rejected the Ethics Commission's contention that Section 1103(f) which provides that no public official or public employee or business either is associated with may enter into a contract or subcontract with the public body "unless the contract has been awarded through an open and public process" requires competitive public bidding".

GOVERNMENTAL IMMUNITY

Allegations that a motorist lost control of his vehicle due to black ice caused by melting and refreezing of improperly removed snow and ice from a cartway is barred by the Tort Claims Act. *Page v. City of Philadelphia*, 25 A.3d 471 (Pa. Cmwlth. 2011). The streets exception to governmental immunity did not apply to a claim that the city failed to properly salt the roadway. Since there was no allegation that

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"the black ice was caused by the improper design, construction, deterioration or inherent defect of the street itself" immunity applied. *Id*. at 480.

MUNICIPAL OFFICIALS

Commonwealth Court rejected a challenge to setting tax collector compensation in *Baker v. Central Cambria School District*, 24 A.3d 488 (Pa. Cmwlth. 2011). The old compensation was 2.9% of taxes collected, which produced average compensation of $20,000. The new compensation was $3.00 per tax parcel, which resulted in a reduction in compensation by over 60%. Cambria County was also a defendant and it had reduced compensation from 1.9% of taxes collected to $2.85 per parcel for the first 2,500 parcels and $1.25 per parcel thereafter. The tax collectors raised numerous challenges to the compensation, and the school district and county filed preliminary objections. Vague allegations that taxing authorities acted illegally in reducing their pay, that the taxing authorities did not perform or obtain any studies before reducing compensation or that the taxing authorities did not comply with the law were insufficient to state a cause of action. "[T]he marketplace, not collection practices long employed by tax collectors, establish[] the benchmark for reasonable compensation." *Id*. at 494.

LABOR RELATIONS

The Pennsylvania Supreme Court considered the interrelationship of Act 111 and the Municipalities Financial Recovery Act, commonly referred to as Act 47, in *City of Scranton v. Firefighters Local Union No. 60*, ___ Pa. ___, 29 A.2d 773 (2011). The decision concerned consolidated appeals relating to arbitration awards for firefighters and police officers dating back to 2006 which covered the period from January, 2003, to December, 2007, and which made awards which substantially exceeded the Act 47 recovery plan. The city challenged the awards. The opinion reviewed the facts and the various opinions of the lower courts and then indicated that the court "agree[s] with the Unions that the historic balance struck with the passage of Act 111 embodies a broader public policy" than Section 252 of Act 47. *Id*. at ___, 29 A.3d at 787. Section 252 of Act 47 provides that a "collective bargaining agreement or arbitration settlement executed after the adoption of a [recovery] plan shall not in any manner violate, expand or diminish its provisions." 53 P. S. §11701.252. The unions took the position that an "arbitration settlement" was different from an "arbitration award". The Supreme Court "conclude[d] that the policies underlying Act 111 interest arbitration are too strong and ingrained in Commonwealth public-sector labor law to be displaced by extrapolation or on account of an ambiguous reference." *Id*. at ___, 29 A.3d at 789.

Commonwealth Court reviewed the public policy and core functions analysis in reviewing an arbitration award in *City of Bradford v. Teamsters Local Union No. 110*, 25 A.3d 408 (Pa. Cmwlth. 2011) (en banc). The city discharged a refuse collector after he pocketed money which had spilled out of a purse in an open garbage bag. The purse had been reported stolen earlier in the day. The employee eventually returned the money. The arbitrator reduced the discharge to a long-term suspension without back pay or benefits, and the city appealed. Commonwealth Court set forth the procedures which courts should follow:

> In our view, application of the public policy exception requires a three step analysis. First, the nature of the conduct leading to the discipline must be identified. Second, we must determine if that conduct implicates a public policy which is well-defined, dominant, and ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests. Third, we must determine if the arbitrator's award poses an unacceptable risk that it will undermine the implicated policy and cause the public employer to breach its lawful obligations or public duty, given the particular circumstances at hand and the factual findings of the arbitrator.

Id. at 414 (citations, internal quote, and footnote omitted). The court agreed that on the on the job theft implicates a well-defined, dominant public policy. However, the third prong of the test "allows for consideration of the particular circumstances of the

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case and any attendant aggravating or mitigating factors" which the arbitrator specifically addressed. *Id.* at 415. Since the arbitrator's award "does not pose a significant risk of undermining the public policy against theft," the court affirmed the reinstatement. *Id.* at 416.

A city council which statutorily has the power to "provide for and regulate the award of all contracts" does not commit an unfair labor practice when it refuses to amend its police pension ordinance to implement an increase in pension benefits to which the mayor has agreed. *Capital City Lodge No. 12, Fraternal Order of Police v. Pennsylvania Labor Relations Board*, 30 A.3d 1241 (Pa. Cmwlth. 2011). The mayor and the FOP agreed to terms of a collective bargaining agreement which included a pension benefit increase which would cost approximately $514,000 per year in additional pension funding. City council refused to enact an ordinance to implement this benefit, and the FOP filed an unfair labor practice charge. The court reviewed the provisions of the Optional Third Class City Charter Law, which governs Harrisburg, to compare the powers of council and the mayor. After reviewing those powers, it concluded "the contract extension agreement between Mayor Reed and the FOP modifying the pension plan must be characterized as a tentative agreement subject to approval of City Council" and the failure to approve the modification was not an unfair labor practice. *Id.* at 1245.

An arbitration award which required overtime to be offered to full-time officers first, using a rotating seniority system, including overtime arising from unscheduled absences and emergencies, does not infringe on the non-bargainable managerial prerogatives of a municipality and was valid. *Borough of St. Clair v. St. Clair Police Department*, 24 A.3d 1107 (Pa. Cmwlth. 2011). Since the borough retained the right to decide the extent to which it would provide police coverage and services and whether call-in any off-duty officers, the borough retained its managerial prerogatives. The award only went to who must be offered the overtime; "not whether or when it should be offered" and thus was bargainable. *Id.* at 1112.

A redevelopment authority does not have the power to grant an employment contract to its solicitor, and a statement in the authority's rules and regulations for personnel administration that employees would be terminated only for cause does not bind the authority. *Guerra v. Redevelopment Authority of Philadelphia*, 27 A.3d 1284 (Pa. Super. 2011). Superior Court reviewed the Pennsylvania Supreme Court's decision in *Scott v. Philadelphia Parking Authority*, 402 Pa. 151, 166 A.2d 278 (1961), and determined that tenure in public employment must be authorized by the Legislature. Superior Court rejected a claim that the authority was equitably estopped from raising as a defense that it did not have the power to grant its employees other than at-will status. Superior Court also rejected a plaintiff's claim that the rules and regulations essentially promised him continued employment and, therefore, he could bring a promissory estoppel claim. Superior Court concluded that the rules and regulations "did not create an enforceable contract of employment or tenure under either contract law or estoppel theory". *Id.* at 1294.

The Pennsylvania Supreme Court in a per curiam decision affirmed the order of the Pennsylvania Commonwealth Court in *Mitman v. Police Pension Commission of the City of Easton*, 972 A.2d 1276 (Pa. Cmwlth. 2009). ___ Pa. ___, 23 A.3d 527 (2011). Commonwealth Court had affirmed the decision of the police pension commission to award a disability pension benefit to a police officer who had killed a fellow officer while cleaning his gun. After a grand jury determined the officer's actions were negligent but not criminal, the police department began procedures to terminate the officer. Before city council took final action to terminate the officer, the officer tendered his retirement and submitted a request for disability as a result of stress from the on-duty incident, i.e. killing his fellow officer. The court agreed that an honorable discharge was not a prerequisite to a pension award and even though the officer's actions were negligent they were within the performance of his duties. This fit within the requirement of the ordinance that a disability pension benefit be given for an injury during "lawful performance of duties".

PUBLIC CONTRACTS

A school district can and did waive the doctrine of nullum

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tempus in a construction contract. *Selinsgrove Area School District v. Lobar, Inc.*, 29 A.3d 137 (Pa. Cmwlth. 2011). The doctrine of nullum tempus provides that statutes of limitation do not run against the Commonwealth or its agencies. The school district entered into a contract containing general conditions which provided that the "applicable statutes of limitation" would begin to run at the date of the issuance of the final certificate of payment. Commonwealth Court concluded:

> We hold that where a Commonwealth agency has offered and entered into a contract addressing applicable statutes of limitations with no mention of the nullum tempus doctrine, it would be fundamentally unfair and contrary to public policy in general to permit the agency to nullify provisions of the same contract by subsequently invoking the doctrine. Accordingly, with respect to the contract at issue, we hold that the trial court properly found that the District waived any applicability of the doctrine of nullum tempus.

Id. at 140.

TAXATION

Persons who successfully challenged Allegheny County's procedures to assess property for real estate taxes were not entitled to proceed under Section 1983 "for violations of the Federal Equal Protection Clause in controversies that involved state taxation and, therefore, there was no basis for counsel fees pursuant to 42 U.S.C. §1988." *Clifton v. Allegheny County*, 23 A.3d 607, 609 (Pa. Cmwlth. 2011). Commonwealth Court affirmed on the basis of the opinion of the Allegheny Court of Common Pleas.

UTILITY ISSUES

A municipal authority may require homeowners to plug floor drains and condensate drains connected directly to a sewer system by a resolution adopted after dwellings with such facilities have been constructed and inspected. *Payne v. Spring-Benner-Walker Joint Authority*, 22 A.3d 1108 (Pa. Cmwlth. 2011). Developer constructed houses in 1999 and connected those houses to the public sewer system. In 2006, the authority adopted a resolution to prohibit inflow of rain, surface water, ground water, and similar flows into the sewer system. The authority rejected developer's request that it grant a waiver from this requirement because the authority had inspected the units constructed in 1998. Commonwealth Court agreed that the doctrines of vested rights, variance by estoppel, and equitable estoppel were not relevant. Instead, the issue was whether the authority's regulation was reasonable. See 53 Pa. C.S. §5607(d)(9) under which developer had filed its action. There was no evidence that there had been an abuse of discretion, and the sewer system was nearing capacity. Requiring disconnection of drains allowing water to enter the sewer system "is a reasonable solution to that problem." *Id*. at 1122. Commonwealth Court also rejected a claim that the authority's procedures and fees were not uniform because they applied only to properties which changed ownership. The resolution at issue did not contain such a limitation, although that was the way the authority had commenced the inspection program. Since eventually all properties would be inspected, the program was uniform.

MISCELLANEOUS

The necessity to file tax liens of record promptly was addressed in *Keller v. McGowan*, 29 A.3d 436 (Pa. Cmwlth. 2011). A city sought to collect delinquent taxes which had not been reduced to liens after the properties were sold at the upset sale. The lower court had dismissed the new owner's declaratory judgement action seeking to bar collection of the delinquent taxes from him or through a lien filed against the properties. Commonwealth Court reversed the dismissal of the action and remanded for trial stating that the landowner "has pled sufficient facts to state a claim for declaratory relief to the effect that while the City is not barred by filing a delayed claim (i.e. beyond the three years provided under Section 9 of the Tax Liens Act) against the prior owners of the properties to collect the unpaid taxes that they owe to the City, it has forever lost its lien against the properties for those amounts." *Id*. at 443 (emphasis omitted).

A sewage enforcement officer properly denied a permit to repair an on-lot sewage disposal system where the area the landowner proposed to install the system was designated for required off-street parking for a Dunkin Donuts store that had already been constructed. *In re: Rainmaker*

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Capital of Chestnuthill, LLC, 23 A.3d 1117 (Pa. Cmwlth. 2011). The landowner had a malfunctioning sewage system and proposed construction of a new off-site system as part of a land development plan for the Dunkin Donuts store. DEP approved the planning module, and the township allowed construction to begin, with temporary use of a smaller, functioning on-site sewage system conditioned on changing the sewage disposal for the Dunkin Donuts to the new system upon completion. When the cost of the new system was determined, the landowner instead made application for the repair permit to be constructed where the required parking was located. Commonwealth Court agreed that the sewage enforcement officer and, on appeal, the governing body had sufficient evidence to deny the permit, i.e. its inconsistency with the agreement to build the new off-site sewage system and its inconsistency with the approved land development plan and planning module for land development. The landowner's submission of a revised land development plan which eliminated the off-street parking and created a zoning ordinance violation did not change the result.

Josele Cleary is a shareholder with the Lancaster firm of Morgan, Hallgren, Crosswell & Kane, P.C. She is a co-author of the municipal and local law volumes of Summary of Pennsylvania Jurisprudence 2d and a course planner and presenter for the Municipal Law Colloquium.

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Municipal Codes

Effective January 1, 2012, the bidding threshold for purchases by various types of municipalities has been increased from $10,000 to $18,500. See Act 91 (Third Class City Code); Act 92 (Borough Code); Act 85 (First Class Township Code); Act 84 (Second Class Township Code); Act 93 (Incorporated Towns); and Act 90 (Intergovernmental Cooperation Act and Municipality Authorities Act) of 2011. The threshold for local governments required to gather telephonic quotes was increased from $4,000 to $10,000. The Acts contain a procedure which allows an annual increase in the bidding limits based on changes in the CPI-U, with a cap on any annual increase of 3% of the current base. The Department of Labor and Industry is given the authority to determine whether to increase the bidding threshold and by how much between October 1 and November 15 of each year with any increase to take effect on January 1 of the following calendar year. The Department of Labor and Industry is to publish the annual increase in the Pennsylvania Bulletin prior to January 1.

Municipalities can sell unneeded person property through on-line actions under the procedures added to the various municipal codes by Act 15 (Third Class City Code); Act 12 (Borough Code); Act 14 (First Class Township Code); and Act 13 (Incorporated Towns) of 2011. Second class townships had this authority before enactment of these statutes. In each case the sale must still be advertised in accordance with the requirement to sell by sealed bids, but it can also be advertised by other methods. The advertisement has to provide a means by which potential bidders may access the electronic auction. The purchase price must be paid by the high bidder immediately or within a reasonable time after conclusion of the electronic auction, and the high bidder must pay any shipping costs.

Five Acts also amended various municipal codes to authorize employment agreements for managers. See Act 75 (Third Class City Code); Act 54 (Borough Code); Act 73 (First Class Township Code); Act 74 (Second Class Township Code); and Act 53 (Incorporated Towns) of 2011. The manager cannot be granted a term of employment and must serve at the pleasure of the governing body. The agreement cannot extend beyond the term of the governing body entering into the contract, so two years is the maximum length. The main impact of the legislation is authorization to provide for severance for managers if terminated during the term of the employment agreement.

Sunshine Act

Act 56 amended the penalty provisions of the Sunshine Act. For a first violation, the agency members has to pay costs of prosecution plus a fine of not less than $100 nor more than $1,000. For second or subsequent offenses the agency member must pay costs of prosecution and a fine of not less than $500 and nor more than $2,000. The agency cannot pay the fine or costs on behalf of the member or reimburse the member for the fine or costs.

May 9-11

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Marriott Lancaster at Penn Square, Lancaster

May 10

PBA Committee & Section Day

Marriott Lancaster at Penn Square, Lancaster

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