Pennsylvania Legislator's Municipal Deskbook

Fifth Edition

2017

Pennsylvania Local Government Commission

General Assembly of the Commonwealth of Pennsylvania

Harrisburg, PA

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Acknowledgement

This booklet, the *Pennsylvania Legislator's Municipal Deskbook,* is the fifth edition of a publication that will periodically be updated, expanded, and revised by the Local Government Commission. It was prepared by the staff of the Commission using a variety of sources.

The Local Government Commission, a legislative service agency, providing the Members of the Pennsylvania General Assembly with research and analysis on matters affecting local government, was created by Act 102 of 1935, referred to as the Local Government Commission Law.[1]

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[1] 1 46 P.S. § 431.1 et seq.

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Abbreviations, Acronyms, Signals, Symbols and Legal Terms

Meanings of abbreviations, acronyms, signals, symbols, and legal terms are only those that are relevant to this publication.

ACIR	Advisory Commission on Intergovernmental Relations
A.D.	anno Domini, "in the year of the Lord," used to indicate that a time division falls within the Christian era.[1]
aff'd	affirmed[2]
ALCAB	Agricultural Lands Condemnation Approval Board
A.L.R.	American Law Reports[2]
amend.	Amendment[2]
AOB	adult-oriented business
Art., art.	Article, article[2]
ASA	agricultural security area
Ass'n	Association[2] (also abbreviated Assn.)
A.2d	Atlantic Reporter, 2nd series
Bd.	Board[2]
[ ] – brackets	Alteration in quotation; or establishing short citation.
Bull.	Bulletin
But cf.	Cited authority supports a proposition analogous to the contrary of the main proposition.[2]
But see	Cited authority clearly supports a proposition contrary to the main proposition.[2]
cert.	"Certiorari"; an extraordinary writ issued, in Pennsylvania, by a federal appellate court, at its discretion, directing a lower court to deliver the record in a case for review; also termed writ of certiorari.[3]
cf.	compare[2]
C.F.R.	Code of Federal Regulations[2]
Ch.	Chapter[4]

[1] *Merriam-Webster Collegiate Dictionary,* 11th ed., Merriam-Webster, Incorporated, Springfield, Mass., 2004.

[2] Columbia Law Review Ass'n et al. eds., *The Bluebook: A Uniform System of Citation,* 17th ed., The Harvard Law Review Association, Cambridge, Mass., 2000.

[3] Bryan A. Garner (ed.), *Black's Law Dictionary,* 7th ed., West Group, St. Paul, Minn., 1999.

[4] Columbia Law Review Ass'n et al. eds.

Cir.	Circuit Court of Appeals (federal)[2]
citing	Referencing or adducing as precedent or authority.[3]
Co., co.	company; county (usually capitalized)[3]
C.O.G.	council of government Com.,
Commw.	Commonwealth[3]
Comm'n	Commission[2] (also abbreviated Com'n)
Corp.	Corporation[2]
Const.	Constitution[2]
C.P.	[Court of] Common Pleas[2]
crimen falsi	A crime in the nature of perjury; [or] any other offense that involves some element of dishonesty or false statement.[3]
d	Replacing "nd" or "rd" in 2nd or 3rd; [or] denoting edition or series (e.g., Summ. Pa. Jur. 2d [or Second Edition]).
D.C.	District of Columbia
DCED	Pennsylvania Department of Community and Economic Development
de facto	Actual; existing in fact; having effect even though not formally or legally recognized; [or] or illegitimate but in effect.[3]
de minimis	Trifling; minimal; [or] (of a fact or thing) so insignificant that a court may overlook it in deciding an issue or case.[3]
Dist.	District[2]
ed.	edition, editor[2]
E.D.	Eastern District, in reference to United States judicial districts
e.g.	for example[2]
EIT	earned income tax
EMST	emergency and municipal services tax
et al.	Abbreviation for Latin *et alii* or *et alia*; and other persons.[3]
et seq.	And those (pages or sections) that follow.[3]
Exec.	Executive[2]
ex parte	Latin for "from the part"; on or from one party, usually without notice to or argument from the adverse party.[3]
ex rel.	On the relation or information of.[3]
F.	Federal Reporter[2]
FHLMC, Freddie Mac	Federal Home Loan Mortgage Corporation[3]
FNMA, Fannie Mae	Federal National Mortgage Association[3]
F. Supp.	Federal Supplement[2]
FY	fiscal year
GNMA	Ginnie Mae Government National Mortgage Association[3]

Hosp.	Hospital[2]
HUP	*Hospital Utilization Project v. Commonwealth*, 487 A.2d 1306 (Pa. 1985).
htm; html, HTML	hypertext markup; hypertext markup language[1]
http	hypertext transfer protocol[1]
id.	Reference to the authority cited immediately before.[3]
i.e.	that is[3]
Inc.	Incorporated[2]
infra	Citational signal to reference a later-cited authority.[3]
in re	(Of a judicial proceeding) not including adverse parties, but concerning something; often used in case law citations, especially in uncontested proceedings.[3]
Iowa	Iowa Reports[2]
Iowa L. Rev.	Iowa Law Review[2]
IPPCA	Institutions of Purely Public Charity Act
L. Ed.	Lawyer's Edition[2]
Legis.	Legislative[2]
LERTA	Local Economic Revitalization Tax Assistance Act
L.P.	Limited Partnership[3]
Ltd.	Limited[2]
McQuillin Mun Corp	McQuillin *The Law of Municipal Corporations*[5]
Md.	Maryland [Court] Reports[2]
M.D.	Middle District, usually in reference to United States judicial districts[3]
Mgmt.	Management[2]
Minn.	Minnesota[2]
MPC	Pennsylvania Municipalities Planning Code
Mun.	Municipal[2]
n.	footnote[2]
n.d.	no date[2]
N.D.	Northern District, in reference to United States judicial districts[3]
nexus	A connection or link, often a casual one.[3]
NLRB	National Labor Relations Board[3]
No., Nos.	number[s][2]
nolo contendere	Latin for "I do not wish to contend"; no contest – a criminal defendant's plea that while not admitting guilt, the defendant will not dispute the charge.[3]

[5] *The Law of Municipal Corporations,* Third Edition, Eugene McQuillin, Thomson/West, 2004.

OPT	occupational privilege tax
p., pp.	page[s] in cross references[2]
Pa.	Pennsylvania; Pennsylvania State [Supreme Court] Reports[2]
Pa. Bull.	Pennsylvania Bulletin[2]
Pa. C.	Pennsylvania County Court Reports[2]
Pa. Cmwlth.	Pennsylvania Commonwealth Court [Reports][2]
Pa. Code	Pennsylvania Code[2]
Pa. Const.	Pennsylvania Constitution[2]
Pa.C.S.	Pennsylvania Consolidated Statutes
Pa.C.S.A.	Purdon's Pennsylvania Consolidated Statutes Annotated[6]
Pa. D. & C.	Purdon's Pennsylvania District and County Reports[2]
PA MPC	Pennsylvania Municipalities Planning Code
Pa. R.C.P.	Pennsylvania Rules of Civil Procedure[2]
Pa. R.C.P.D.J.	Pennsylvania Rules of Civil Procedure Governing Actions and Proceedings Before District Justices[2]
parens patriae	Latin for "Parent of his or her country"; the state regarded as sovereign; the state in its capacity as provider of protection to those unable to care for themselves; [or] a doctrine by which a government has standing to prosecute a lawsuit on behalf of a citizen, especially on behalf of someone who is under a legal disability to prosecute the suit.[3]
Pa. Super.	Pennsylvania Superior Court Reports[2]
pdf, PDF	Adobe portable document format
per curiam [opinion]	An opinion handed down by an appellate court without identifying the individual judge who wrote the opinion.[3]
per se	Of, in, or by itself; standing alone, without reference to additional facts.[3]
PIT	personal income tax
P.L.	[Pennsylvania] Pamphlet Law; [United States] Public Law[2]
Prac.	Practice[2]
prima facie	At the first sight; on first appearance but subject to further evidence or information.[3]
P.S.	Purdon's Pennsylvania Statutes Annotated[6]
Pt.	Part[2]
PTRR	[Senior Citizens] Property Tax and Rent Rebate [Program] PWS personal wireless service
Quar. Sess.	Court of the Quarter Sessions of the Peace[2]

[6] *Purdon's Pennsylvania Statutes and Consolidated Statutes Annotated,* West Publishing Corporation, St. Paul, Minn., 2014.

quo warranto	A common-law writ used to inquire into the authority by which a public office is held or a franchise is claimed[3]
R.R.	Railroad[2]
RUA or RULWA	Recreation Use Act or Recreational Use of Land and Water Act
§, §§	Section(s)[2]
S.B.	[Pennsylvania] Senate Bill
Sch.	School[2]
S. Ct.	[United States] Supreme Court Reporter[2]
See	Cited authority clearly supports the proposition.[2]
See also	Cited authority provides additional source information that supports the proposition.[2]
See, *e.g.*,	Cited authority states the proposition.[2]
See generally	Cited authority presents helpful background material related to the proposition.[2]
Serv.	Service[2]
SLDO	subdivision and land development ordinance
STEB	State Tax Equalization Board
sub nom.	"sub nominee;" under the name; often used to indicate a name change from one stage of a case to another.[3]
Subpt.	Subpart
Supp.	Supplement[2]
supra	Citational signal to reference a previously cited authority.[3]
Sup'rs.	Supervisors
TCA	Telecommunications Act of 1996
Twp.	Township (also abbreviated Tp.)
U.S.	United States; United States [Supreme Court] Reports[2]
U.S.C.	United States Code[2]
U.S.C.A	United States Code Annotated[2]
v.	versus[2]
Vill. L. Rev.	Villanova Law Review[2]
Vol.	Volume[2]
W.D.	Western District, in reference to United States judicial districts[2]
Whart.	Wharton [Reporter][2]
writ of certiorari	See definition of "cert."
ZHB	zoning hearing board

Overview

With this publication, the fifth edition of its *Pennsylvania Legislator's Municipal Deskbook*, together with all of the other resources available at www.lgc.state.pa.us, the Local Government Commission hopes to provide Members of the General Assembly with the following:

- Useful and concise observations on an assortment of basic topics that are fundamental to, or frequently arise in connection with, municipal government in the Commonwealth.
- A sample and a brief overview of some of the local government-related issues that may arise in constituent inquiries.
- Extensive online resources pertaining to municipal issues, and links to publications of the Governor's Center for Local Government Services in the Department of Community and Economic Development, contacts for government agencies and municipal associations, laws affecting municipalities, and other relevant websites.

The material presented in this publication should not be considered an exhaustive, complete, or all-inclusive treatment of issues relating to municipal government in Pennsylvania. Instead, the *Deskbook* is intended to offer an introductory collection or compilation of some of the recurring concepts, issues and resources that often are involved in providing assistance to Legislators and their constituents on matters involving local government.

In interacting with their government, including their municipal government, citizens often are faced with complex questions that are not susceptible to easy and swift resolution. The Local Government Commission recognizes this fact and knows that no single publication can be relied upon to resolve all municipal-related questions. Nevertheless, the information in this publication should provide support and assistance to Legislators and their staff in their attempts to serve the citizens of the Commonwealth.

Each article in this publication, as well as the publication in its entirety, is available on the Commission's website. Although the Commission may publish subsequent online editions of the entire Deskbook on a periodic basis, it may also update individual articles more frequently as changes in law or regulation, or new case law may warrant.

Disclaimer: The information provided in this publication is intended to assist Members of the Pennsylvania General Assembly; it is not a legal opinion or a substitute for legal advice and does not constitute a binding determination of the rights or remedies of any individual, municipality, or other person or entity. The Local Government Commission does not render legal advice or consultation. If legal advice is sought, in all cases, a municipal solicitor or private attorney should be contacted to undertake an up-to-date, full and complete examination of pertinent statutes, court rulings, ordinances and regulations. Nothing herein is intended to be an official restatement of the contents of any law, and the contents of this publication may not reflect the current state of the law. Court rulings, later amendatory statutes, and various other factors must be considered. To this extent, the Local Government Commission issues a specific disclaimer.

Note on "Solving" Constituent Inquiries

It goes without saying that many constituent problems brought to the attention of a Legislator cannot be resolved at the state level. This is particularly true with respect to local government issues. What is an appropriate response when a constituent seeks assistance in a purely local matter outside the purview of a Legislator's primary functions?

One role of the Local Government Commission is to provide information and resources to Members of the General Assembly with regard to constituent inquiries involving municipal issues. In performing this function, the staff of the Local Government Commission has taken notice of the fact that, at times, inquiries may involve citizens who feel aggrieved or upset by a particular incident or circumstance. In many instances, merely providing background explanatory information is all that is required. In other cases, however, constituents may seek redress through the office of their State Representative or State Senator and, in so doing, may pose a question to a Legislator in the following form:

"What can you (the State Legislator) do to help solve my problem?"

Inherent in this question is the constituent's belief that the Legislator can intervene effectively on his or her behalf. In many cases, however, such active intervention is either not permitted or not feasible. Thus, a meaningful response involves explaining to the constituent that remedies must be pursued at the local level. In effect, the question originally posed by the constituent often must be rephrased as follows:

"What must I (the constituent) do, and where do I (the constituent) go to find out if redress is available?"

In order to answer this rephrased question, a constituent may well require the advice of private legal counsel. Nevertheless, short of offering legal advice, a Legislator's office may be able to provide the constituent with helpful information, as indicated on the following chart.

Law	Forum	Remedies	Resources
What laws, if any, may be relevant to the inquiry?	Where does one go to get relief? o To the municipality (to an elected or appointed official, to the governing body, or to a board, department, or commission)? o To a district justice or to the common pleas court?	What kind of remedies or relief, if any, may be available?	What other avenues or contacts can be pursued?

What is the Local Government Commission?

The Local Government Commission is a bicameral, bipartisan legislative service agency. Created in 1935 by an Act of Assembly,[1] it is one of the oldest agencies of its kind in the United States. The Commission is comprised of five Senate Members and five House Members, appointed by the President Pro Tempore of the Senate and the Speaker of the House, respectively. A small staff, consisting of professional and clerical personnel, assists the Commission with its administrative and statutory duties.

Among the functions and responsibilities of the Local Government Commission are the following:

- Conducting or facilitating research projects on matters considered important by the Commission for all levels of local government. Examples include studies on Municipal Police Training Law; Real Estate Tax Sale Law; municipal tort liability; tax-exempt property; police classification and categorization; cable TV impacts upon municipalities; Local Government Unit Debt Act; state mandates placed upon local governments; county row officer fees; personnel practices, contracting procedures, and ratemaking and operation of large municipal authorities; revisions of the Pennsylvania Municipalities Planning Code; real estate assessment uniformity and equity; and municipal fiscal distress.

- Offering a resource for Legislators who need various types of assistance in the field of local government, including assistance with constituent inquiries.

- Providing a forum at which statewide local government associations present their concerns, possible amendments to municipal codes, and other legislative proposals, including resolutions adopted at the annual conventions, which they deem important to local government.

- Assisting, on request, standing committees in both the House and Senate.

- After the conclusion of each legislative session, updating and printing certain municipal codes for distribution to Legislators and municipal officials throughout the Commonwealth.

- Providing a *Summary of Acts Signed into Law by the Governor*, published at periodic intervals, for distribution to Members of the General Assembly.

The Commission's five-year *Report to the Pennsylvania General Assembly*, available on the website, provides a comprehensive overview of the agency's ongoing assignments, periodic work products, recent and current projects, and prospective projects.

[1] 46 P.S. § 431.1 *et seq.*

Local Government Entities in Pennsylvania

A citizen of the Commonwealth of Pennsylvania resides within an overlay of several distinctive local government entities.[1] Pennsylvania residents live within a municipal corporation,[2] such as a city of a particular class,[3] a borough or incorporated town, or a township of the first or second class. In turn, each municipal corporation is wholly or partially[4] situate within one of Pennsylvania's 67 counties.[5]

In 2016, there were 2,560 municipal corporations in Pennsylvania in addition to the Commonwealth's 67 counties—56 cities, 957 boroughs, one incorporated town, 93 first class townships and 1,453 second class townships. Furthermore, Pennsylvania has 500 school districts and 1,519 active authorities.[6] The Pennsylvania Constitution authorizes the General Assembly to classify municipalities and school districts by population.[7]

Besides residing within two types of municipalities[8] (i.e., the county and the municipal corporation), a Pennsylvanian also resides within one of 500 school districts. School districts, along with municipalities, are considered to be political subdivisions.[9] In addition to residing

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[1] As stated in the *Citizen's Guide to Pennsylvania Local Government*, 10th ed., Governor's Center for Local Government Services, Department of Community and Economic Development, Harrisburg, Pa., 2010, at page 1:

> Local government in Pennsylvania is a mosaic of 4,678 [2010] individual units. All were established by the state or provincial government and operate under the laws of the Commonwealth. Each unit is distinct and independent of other local units, although they may overlap geographically and may act together to serve the public.

[2] In 1 Pa.C.S. § 1991, "Municipal corporation" is defined as follows:

> (1) When used in any statute finally enacted on or before December 31, 1974, a city, borough or incorporated town.
>
> (2) When used in any statute finally enacted on or after January 1, 1975, a city, borough, incorporated town or township.

[3] Pennsylvania has one first class city, one second class city, one second class-A city and 53 third class cities.

[4] Some municipal corporations cross county lines.

[5] Please note that the County and City of Philadelphia have been consolidated pursuant to the Philadelphia City – County Consolidation Act, Act 433 of 1953 (53 P.S. §§ 13151, 13132, 13152-13153), which was enacted "…to carry out the intent and purpose of Article XV, Section 1, of the Constitution of Pennsylvania, known as the 'Home Rule Amendment,' and Article XIV, Section 8, of the Constitution of Pennsylvania, known as the 'City-County Consolidation Amendment' . . . ."

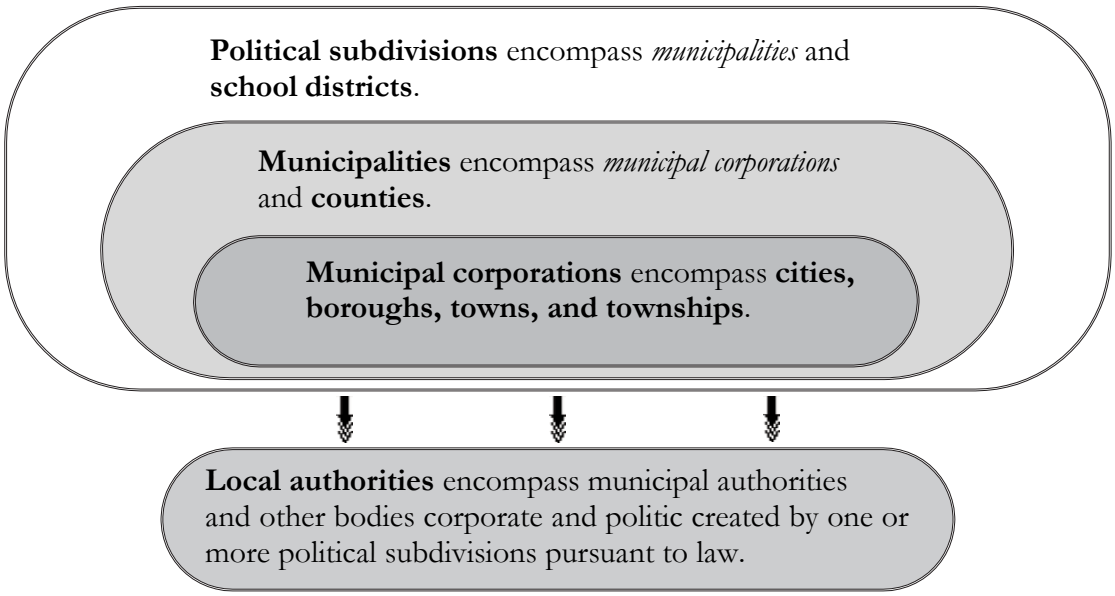
[6] *Pennsylvania Local Government Fact Sheet*, Governor's Center for Local Government Services, Pennsylvania Department of Community and Economic Development, January 8, 2014, http://dced.pa.gov/download/local-government-fact-sheet/ (March 29, 2017).

[7] Pa. Const. art. III, § 20. Currently there are nine classes of counties (first class, second class, second class A and third through eighth classes), four classes of cities (first class, second class, second class A and third class) and two classes of townships (first and second classes). Boroughs and towns are not broken down into classes. In addition, there are five classes of school districts (first class, first class A, second class, third class and fourth class).

[8] *See supra,* note 2.

[9] In 1 Pa.C.S. § 1991, "Political subdivision" is defined as "[a]ny county, city, borough, incorporated town, township, school district, vocational school district and county institution district." Of course, any given statute can contain its own definition of what constitutes a municipal corporation, a municipality or a political subdivision.

in, and paying taxes to,[10] these three different categories of political subdivisions, a Pennsylvania resident may also be provided services by one or more of the numerous local authorities.[11] In some states, these entities are referred to as special districts; in any event, local authorities[12] may be said to be governmental entities that have been "created to conduct authorized public functions, may incur indebtedness on their own account, and such indebtedness does not become the indebtedness of the municipalities creating them."[13]



[10] "[Except] in Philadelphia where the city and county are merged, the typical Pennsylvania landowner will pay real estate tax to at least three local governments." 27 Summ. Pa. Jur. 2d, Taxation § 15:2 (2014) (footnote omitted).

[11] In 1 Pa.C.S. § 1991, "Local authority" is defined as follows: "When used in any statute finally enacted on or after January 1, 1975, a municipal authority or any other body corporate and politic created by one or more political subdivisions pursuant to statute." Although considered to be local authorities, municipal authorities are bodies politic and corporate, created pursuant to the Municipality Authorities Act, 53 Pa.C.S. § 5601 et seq.; they are not creatures, agents or representatives of the municipalities that organize them, but are independent agencies of the Commonwealth. Municipal authorities are separate legal entities from the political subdivisions that created them and they derive their powers from different statutes. *See Commonwealth v. Erie Metropolitan Transit Authority*, 444 Pa. 345, 348-349 (1971); *O'Hare v. County of Northampton,* 782 A.2d 7, 13 (Pa. Cmwlth. 2001). *See also* 22 Summ. Pa. Jur. 2d Municipal and Local Law § 1:3 (2d ed.)(2017).

[12] There are a variety of types of local authorities: airport, business district, community facility, economic development, local government facility, nonprofit institution, parking, recreation, school, sewer, solid waste, transit, storm water or water.

[13] *See* 23 Summ. Pa. Jur. 2d Municipal and Local Law § 21:88 (2d ed.)(2017).

Dillon's Rule – State Primacy Over Local Governments

Ideally, the state-local relationship is harmonious, with both levels of government working in concert to achieve mutually compatible goals. Some discord, however, seems inevitable and, perhaps, desirable. ("Honest disagreement is often a good sign of progress." *Mahatma Gandhi.*) A local government, in its desire for autonomy, may be confronted with the Commonwealth's assertion of state supremacy.

This concept of state supremacy is embodied in a fundamental precept of municipal law holding that municipalities are creatures of, and subject to the plenary power of, the state. This tenet is embodied in what is known as Dillon's Rule.

For over a century, this general principle has explained the relationship between the state and its local governments. Judge John Dillon wrote in a now famous 1868 opinion that the powers of local governments must be sanctioned by the state:

> It is a general and undisputed proposition that a municipal corporation possesses and can exercise the following powers, and no others: first, those granted in *express words*; second, those *necessarily or fairly implied* in or *incident* to the powers expressly granted; third, those *essential* to the accomplishment of the declared objects and purposes of the corporation—not simply convenient, but indispensable. Any fair, reasonable, substantial doubt concerning the existence of a power is resolved by the courts against a corporation, and the power is denied.[1]

This doctrine was adopted by Pennsylvania in *Philadelphia v. Fox*,[2] and it remains fundamental for the evaluation of local government powers.[3]

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[1] *Clinton v. Cedar Rapids & Missouri River R.R. Co.,* 24 Iowa 455 (1868) (emphasis supplied).

[2] 64 Pa. 169 (1870).

[3] *See Hydropress Environmental Services, Inc. v. Township of Upper Mount Bethel, County of Northampton,* 575 Pa. 479, 491 (2003) (quoting from *Commonwealth v. Ashenfelder,* 413 Pa. 517 (1964) that "it is well settled that . . . political subdivisions of the Commonwealth . . . possess only such powers as have been granted to them by the legislature, either in express terms or which arise by necessary and fair implication or are incident to powers expressly granted or are essential to the declared objects and purposes of the [political subdivisions] . . . ."). *See also* 22A Summ. Pa. Jur. 2d, Municipal and Local Law § 13:4 (2014) ("Dillon's Rule is the law of Pennsylvania.") *citing Warner Cable Communications, Inc. v. Schuylkill Haven,* 784 F. Supp. 203 (E.D. Pa. 1992) (Dillon's Rule has been adopted by the Courts of Pennsylvania.); *Herbert v. Commonwealth,* 632 A.2d 1051 (Pa. Cmwlth. 1993), *appeal denied,* 540 Pa. 607 (1995). However, *see also,* Pa. Const. art. 9, § 2 ("A municipality which has a home rule charter may exercise any power or perform any function not denied by th[e] Constitution, by its home rule charter or by the General Assembly . . . ."); *City of Philadelphia v. Schweiker,* 579 Pa. 591, 605 (2004) (municipalities operating under home rule do not need "express statutory warrant" to enact ordinances).

Home Rule – An Incursion on State Supremacy

The concept of home rule is an exception to the traditional (Dillon's Rule) limitations on the powers of local government. Home rule is dependent on specific delegation from the state. In Pennsylvania, pursuant to a 1968 constitutional authorization,[1] legislation was enacted in 1972 that provides municipalities the option of home rule.[2]

A succinct summary of the meaning of home rule is provided in the Department of Community and Economic Development publication, *Home Rule in Pennsylvania*:[3]

> The basic concept of home rule is relatively simple. The basic authority to act in municipal affairs is transferred from state law, as set forth by the General Assembly, to a local charter, adopted and amended by the voters.
>
> This basic point has been explained… [as follows]. "Home rule means shifting of responsibility for local government from the State Legislature to the local community… a borough choosing home rule can tailor its governmental organization and powers to suit its special needs." [A home rule]… charter [can be likened] to a local constitution for the municipality. "It is a body of law, a framework within which the local council can adopt, adapt and administer legislation and regulations for the conduct of business and the maintenance of order and progress."
>
> But home rule does not set a municipality adrift from the rest of the state. It is subject to restrictions found in the United States and Pennsylvania constitutions and in state laws applicable to home rule municipalities. Local autonomy under home rule is a limited independence, but the thrust has been changed. Local governments without home rule can only act where specifically authorized by state law; home rule municipalities can act anywhere except where they are specifically limited by state law.

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[1] Pa. Const., art. IX, § 2.

[2] *See* Home Rule Charter and Optional Plans Law, 53 Pa.C.S. § 2901 et seq. Note: Allegheny County operates under a distinct home rule law, the Second Class County Charter Law, established by Act 12 of 1997 (16 P.S. §§ 6101-C – 6113-C). The County and City of Philadelphia were consolidated pursuant to the Philadelphia City – County Consolidation Act, Act 433 of 1953 (53 P.S. §§ 13151, 13132, 13152-13153), which was enacted ". . . to carry out the intent and purpose of Article XV, Section 1, of the Constitution of Pennsylvania, known as the 'Home Rule Amendment,' and Article XIV, Section 8, of the Constitution of Pennsylvania, known as the 'City-County Consolidation Amendment' . . . ."

[3] *Home Rule in Pennsylvania*, 9th ed., Governor's Center for Local Government Services, Pennsylvania Department of Community and Economic Development, Harrisburg, Pa., 2013, p. 2 (citations omitted). http://dced.pa.gov/download/Home%20Rule%20Governance%20in%20Pennsylvania/?wpdmdl=56792 (April 10, 2017).

Preemption of Municipal Regulation by the Commonwealth

As discussed previously in this publication,[1] under Dillon's Rule, municipalities generally do not have inherent power to act but must rely on delegated authority from the Commonwealth. In most cases, if municipalities are otherwise authorized to act, pursuant to their subordinate police power, they may promulgate regulations even though the state has also acted in that area. These municipal regulations can be supplemental or additional to those of the Commonwealth, and they must be reasonable and not offensive to the spirit of the state's regulatory provisions. Even where local regulation is authorized, if it contains provisions that contradict or are inconsistent with state law, those provisions would be superseded.[2] Thus, one can say that the mere fact that the state has legislatively regulated a particular field does not mean that the state has completely preempted the field, thereby preventing any municipal regulation of that same subject matter.

The doctrine of "preemption," as denominated by the courts, effectively provides that certain legislation of the Commonwealth will disallow municipal regulation of the same subject or activities, even though such local regulation would otherwise be proper in the absence of a statewide scheme. The rationale for the legislative preemption of local action can be said to be based on the fact that municipalities are creatures of the Commonwealth, and their powers are derived from the Commonwealth. As such, municipalities have no inherent or independent authority to act contrary to the laws of the Commonwealth.

The Commonwealth may achieve legislative preemption of local regulation in one of two ways: (1) by explicit language within a statute establishing a statewide scheme of regulation; or (2) by implication when the state and local powers actually and materially conflict.

When there is no explicit preemption, and one is attempting to establish that preemption is to be implied, the courts look to legislative intent. To ascertain legislative intent with regard to preemption of a statewide statutory scheme over a local ordinance, the courts will consider the following pertinent questions: (1) Does the ordinance conflict with state law, either because of conflicting policies or operational effect? (e.g., Does the ordinance forbid what the Legislature has permitted?) (2) Was the state law intended expressly or impliedly to be exclusive in the field? (3) Does the subject matter reflect a need for uniformity? (4) Is the state scheme so pervasive or comprehensive that it precludes coexistence of municipal regulation? and (5) Does the ordinance stand as an obstacle to the accomplishment and execution of the full purposes and objectives of the Legislature?[3]

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[1] *See Deskbook* article entitled "Dillon's Rule – State Primacy Over Local Governments."

[2] For example, local zoning ordinances are subordinate to the Municipalities Planning Code, Act 247 of 1968 (53 P.S. § 10101 et seq.) (MPC) and thus, to the extent that a zoning ordinance is inconsistent with the MPC, the MPC takes precedence over and invalidates the zoning enactments. *See* MPC, § 103.

[3] *See Liverpool Township v. Stephens,* 900 A.2d 1030 (Pa. Cmwlth. 2006); *Commonwealth of Pennsylvania v. Brandon,* 872 A.2d 239 (Pa. Cmwlth. 2005); *Klein v. Straban Tp.,* 705 A.2d 947 (Pa. Cmwlth. 1998).

Courts have found an intent to totally preempt local regulation in areas including alcoholic beverages, banking and anthracite strip mining. Also, an example of an explicit preemption, for both political subdivisions and home rule municipalities, exists in Chapter 5 (Nutrient Management and Odor Management) of the Agricultural Code,[4] where the statute provides that it is of statewide concern, and that it is to occupy the whole field of nutrient management to the exclusion of all local regulation.[5]

Although the prerogative of the General Assembly to preempt municipal regulations is inherent in the relationship between Pennsylvania and its municipalities, other constitutional imperatives must be honored in the manner by which such preemption occurs. In 2013, the Pennsylvania Supreme Court held that legislation preempting local ordinances with regard to oil and gas operations was unconstitutional.[6] In finding that various sections of the Pennsylvania Oil and Gas Act (Act 13 of 2012)[7] violated Article I, § 27 (the Environmental Rights Amendment) of the Pennsylvania Constitution,[8] the Court concluded:

> Imposing statewide [industrial standards] in sensitive zoning districts lowers environmental and habitability protections for affected residents and property owners below the existing threshold, and permits significant degradation of public natural resources. The outright ban on local regulation of oil and gas operations… that would mitigate the effect, meanwhile, propagates serious detrimental and disparate effects on [natural resources]…. [T]he Commonwealth fails to respond in any meaningful way to the citizens' claims that Act 13 falls far short of providing adequate protection to existing environmental and habitability features of neighborhoods in which they have established homes, schools, businesses…. For these reasons, we are constrained to hold that the degradation of [natural resources] and the disparate impact on some citizens sanctioned by… Act 13 are incompatible with the express command of the Environmental Rights Amendment.

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[4] 3 Pa.C.S. § 501 et seq.

[5] 3 Pa.C.S. § 519.

[6] *Robinson Twp. v. Commonwealth*, 83 A. 3d 901 (Pa. 2013).

[7] *See* 58 Pa.C.S. §§ 3303, 3304 and 3215(b)(4).

[8] Article I, §27:

> The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

Municipalities – How They Change: Boundaries, Classification or Forms of Government

The boundaries or governmental structure of Pennsylvania municipalities can be impacted in a variety of ways, such as resolution of boundary disputes, annexations, mergers, consolidations, change in classification or form of government, or adoption of a home rule charter or optional plan.

Municipal Boundary-Related Changes

Boundary Disputes. Boundary disputes involve instances in which two or more municipalities are in effect attempting to resolve a disagreement concerning the location of the dividing line between municipalities. The resolution of these disputes has been held to be distinct from a "consolidation, merger or boundary change." Boundary disputes are governed by the relevant sections of a municipality's governing code.[1] However, where the original boundary cannot be ascertained, the courts may support the application of the common law doctrine of acquiescence to rely on what the municipalities have acted upon and assumed the boundary to be.[2]

Annexation. Annexation is a type of boundary change whereby one municipality attempts to acquire a portion of another. It is governed by the initiative and referendum procedure provided in Article IX, Section 8, of the Pennsylvania Constitution. This provision was held to have superseded individual municipal code procedures governing annexation.[3]

Consolidation and Merger. The Municipal Consolidation and Merger Act[4] provides the methods by which municipalities may consolidate or merge. "Consolidation" is defined as "[t]he combination of two or more municipalities which results in the termination of the existence of each of the municipalities . . . and the creation of a new municipality."[5] "Merger" is defined as "[t]he combination of two or more municipalities which results in the termination of the existence of all but one . . . with the surviving municipality absorbing and assuming jurisdiction over the municipalities which have been terminated."[6] The governing bodies of the municipalities may agree to merge or consolidate, after which the question is placed on the ballot in all municipalities involved. An alternate method is available whereby electors may initiate a merger or consolidation action, with or without a home rule charter.[7]

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[1] *See* Borough Code, 8 Pa.C.S. § 502; The First Class Township Code, Act 331 of 1931, § 302 (53 P.S. § 55302); The Second Class Township Code, Act 69 of 1933, § 302 (53 P.S. § 65302); Third Class City Code, 11 Pa.C.S. § 10602 et seq. *See also Laflin Borough v. Yatesville Borough,* 404 A.2d 717 (Pa. Cmwlth. 1979).

[2] *Adams Township v. Richland Township, et al.*, 2017 WL 694746, Slip op. at 11 (Pa. 2017).

[3] *See Middle Paxton Township v. Borough of Dauphin,* 308 A.2d 208 (Pa. Cmwlth. 1973), *aff'd,* 458 Pa. 396 (1974).

[4] Municipal Consolidation or Merger Act, 53 Pa.C.S. § 731 et seq.

[5] 53 Pa.C.S. § 732.

[6] 53 Pa.C.S. § 732.

[7] *See* 53 Pa.C.S. §§ 735, 735.1.

Dissolution of Municipalities. Aside from the procedures provided in the Municipal Consolidation and Merger Act, there is no law that governs the dissolution of a municipality under ordinary circumstances. However, where a municipality no longer contains an adequate tax base to continue to function, the municipality may be able to disincorporate by petitioning the county court of common pleas through the provisions of the Municipalities Financial Recovery Act.[8]

Classification Changes[9]

Counties. The County Code generally provides that a county may advance in class if the last decennial census reveals that it is so entitled.[10] A county may not recede in class until two successive censuses have revealed a decrease in population that would warrant a new classification.[11] For both scenarios, the Governor is obligated to certify the change to the commissioners of the county. The change is effective the first day of the year following the certification by the Governor. Salaries of county officials and employees will not be changed as a result of the reclassification during the term of the officers. In the next municipal election following the certification and before the effective date, the proper number of elected officials representing the new classification shall be placed on the ballot.

Townships. Townships are divided into two classes. First class townships are defined as those townships having a population density of at least 300 people per square mile that have elected to choose first class township status.[12] All other townships are townships of the second class. Given the requisite population change, statutory provisions exist for the creation of townships of the first class from townships of the second class and for the reestablishment of townships of the second class from townships of the first.

Cities. There are four classes of cities in Pennsylvania: first class cities with populations of 1 million and over (Philadelphia),[13] second class cities with populations of 250,000 and under 1 million (Pittsburgh), second class A cities with populations of 80,000 and under 250,000, and which elect by ordinance to be classified as such (i.e., Scranton), and third class cities with populations less than 250,000,[14] i.e., all of the remaining 53 cities in the Commonwealth.[15] If two

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[8] Act 47 of 1987 (53 P.S. §11701.101 et seq.). *See also* Deskbook article entitled "Municipal Fiscal Distress and Recovery."

[9] Article III, Section 20, of the Pennsylvania Constitution provides that the legislature shall have the power to classify counties, cities, boroughs, school districts and townships according to population. Using this method of classification, the legislature has created nine classes of counties, two classes of townships, four classes of cities, and five classes of school districts.

[10] *See* The County Code, Act 130 of 1955, § 211(16 P.S. § 211).

[11] *Id.*

[12] *See* The First Class Township Code, § 201.

[13] The consolidated city-county of Philadelphia is also the only first class county and is subject to Section 210 of the County Code, which provides that first class counties must have a population of 1,500,000 inhabitants or more.

[14] Third class cities include those with populations less than 250,000 and more than 80,000 that have not chosen, by ordinance, to become second class A cities. *See* City Classification Law, Act 188 of 1895, § 1 (53 P.S. § 101).

[15] *See* City Classification Law, § 1.

consecutive decennial censuses demonstrate that a city of the first, second or second A class has a population below the minimum required for its current classification, or a city of the second, second A or third class has a population increase beyond its current classification, the Governor shall certify the fact.[16]

Additional Changes to Local Forms of Government

Incorporation of Boroughs. Generally, boroughs are not "classed" based on population.[17] A borough may be incorporated from an existing township by petition to the court of common pleas, both by a majority of the landowners residing in the area of the proposed borough and by owners of a majority of the land within the area of the proposed borough, provided that the proposed borough area has a population of at least 500.[18] Upon receipt of the petition, the court shall appoint a borough advisory committee that shall determine the economic and logistic desirability of the proposed borough and what effect incorporation would have on the "parent" municipality.[19] After receiving the findings from the committee, the court conducts a hearing and determines if sufficient evidence exists to conclude incorporation is desirable.[20] Upon such a determination, the court certifies the question to the county board of elections for a vote by the residents of the area to be incorporated. Upon certification of results that favor incorporation by a majority of the affected voters, the court shall grant the petitioners' request for incorporation. The decree serves as the borough charter. The Pennsylvania Supreme Court has deter- mined that this procedure does not constitute a "consolidation or merger" that would be preempted by Article IX, Section 8, of the Pennsylvania Constitution.[21]

Creation of Boroughs from Cities. At least 10 percent of the residents of a city that has been operating for at least five years may petition the court of common pleas to order the question of whether the city charter should be changed to a borough charter.[22] If a majority of voters elect to change the charter, the court will order that the proceedings be recorded in the office of the county recorder of deeds, where such recording will constitute the new borough charter. If the question fails, a similar question shall not be presented to the voters for five years following the election.

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[16] *See Id.* § 2.

[17] The Borough Code does use population as a distinguishing factor for a variety of administrative purposes. *See, e.g.,* 8 Pa.C.S. § 801(b) (duration of residency as qualification for office), 8 Pa.C.S. § 1001 (compensation of council members determined by population), 8 Pa.C.S. § 10A04 (compensation of mayor determined by population) and 8 Pa.C.S. § 1104 (no elected official may serve as an employee of a borough with a population of 3,000 or more).

[18] *See* 8 Pa.C.S. §§ 201-202.

[19] *See* 8 Pa.C.S. § 202.1.

[20] *See* 8 Pa.C.S. § 202.2.

[21] *See In re Incorporation of Borough of New Morgan,* 562 A.2d 402 (Pa. Cmwlth. 1989), *aff'd,* 527 Pa. 226 (1991), *cert. denied,* 502 U.S. 860 (1991).

[22] *See* 8 Pa.C.S. § 231.

"Creation" of Third Class Cities. The corporate authorities of a town, township or borough may, or upon petition of 200 or more qualified electors of the municipality, shall adopt an incorporating resolution to have the question of whether or not the municipality shall become a third class city placed before the voters of the municipal corporation.[23] If a majority of the electors vote in favor of the change, the corporate authorities shall, within 60 days of the election, inform the Secretary of the Commonwealth with information about the new city, and the Governor shall issue a charter. Two or more municipalities may, using the procedures within the Municipal Merger or Consolidation Act, elect to incorporate as a third class city. The municipality or combination of municipalities must have a population of at least 10,000.[24]

Home Rule and Optional Charter Changes. In addition to changes discussed above, a municipality may change its form of government or adopt a home rule charter. In 1957, the legislature provided for optional charters for third class cities with the Optional Third Class City Charter Law.[25] Authorization to adopt charters under this law was eliminated in 1972; however, 11 cities continue to operate according to this statute.[26] The addition of Article IX, Local Government, to the 1968 Pennsylvania Constitution explicitly gave all municipalities, excluding the consolidated city-county of Philadelphia,[27] the right to frame and adopt home rule charters and optional plans.[28] In 1972, the General Assembly enacted the Home Rule Charter and Optional Plans Law,[29] which established general procedures for most municipalities adopting an alternative form of government. Pursuant to this law, a government study commission is elected to examine the current form of government and make recommendations regarding an alternative form. If the commission recommends home rule, it drafts a charter and presents it to the voters. Upon a majority vote in the referendum, the charter is adopted. For optional plans, the same commission procedure is followed, except that the commission chooses one of the optional plans provided for in the act. Optional plan municipalities continue to be governed by their respective municipal codes except where it is superseded by the optional plan itself. The law also provides streamlined methods by which local governments in the process of a merger or consolidation may adopt the charter of one of the municipalities or frame a new optional plan or home rule charter.[30]

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[23] *See* The Third Class City Code, 11 Pa.C.S. 10203.1.

[24] *See Id*, § 10201.

[25] Optional Third Class City Charter Law, Act 399 of 1957 (53 P.S. § 41101 et seq.).

[26] Lock Haven, Meadville, Oil City and Titusville under a council-manager form of government, and Bethlehem, Erie, Harrisburg, Lancaster, New Castle, Williamsport and York under a mayor-council form of government. *City Government in Pennsylvania Handbook*, 4th ed., Governor's Center for Local Government Services, Pennsylvania Department of Community and Economic Development, Harrisburg, January 2017, p. 11. http://dced.pa.gov/download/City%20Government%20in%20Pennsylvania/?wpdmdl=70282 (April 10, 2017).

[27] The City of Philadelphia operates under a home rule charter pursuant to the provisions of the First Class City Home Rule Act, Act 155 of 1949 (53 P.S. § 13101 et seq.), as amended.

[28] *See* Pa. Const. art. IX, §§ 2, 3.

[29] 53 Pa.C.S. § 2901 et seq.

[30] *See* 53 Pa.C.S. § 731 et seq.

Intergovernmental Cooperation

Generally

Introduction. Today, many municipalities utilize mechanisms made available in state law to jointly cooperate to achieve similar goals or implement specific projects; but prior to 1968, provisions of the Pennsylvania Constitution[1] were interpreted as greatly limiting the potential for cooperation among local governments. In 1968, however, a new constitution was adopted for Pennsylvania, including a new Article IX that, among other things, added three sections related to intergovernmental cooperation,[2] area government and areawide powers. In 1972, the General Assembly adopted enabling legislation pursuant to the constitutional authorization for intergovernmental cooperation.

Intergovernmental Cooperation. The law authorizing intergovernmental cooperation, now codified in Title 53 of the Pennsylvania Consolidated Statutes, Sections 2301-2315, was originally adopted as Act 180 of 1972. Title 53 authorizes two or more "local governments" to "jointly cooperate in the exercise or in the performance of their respective governmental functions, powers or responsibilities."[3] Such cooperation is to be authorized by ordinance, which must specify the conditions, duration, purpose, manner and extent of any financing, organizational structure, manner in which property will be acquired, managed and disposed of, and that the entity created will be empowered to enter into certain employee-related contracts. Also, intergovernmental cooperation may be mandated by voters by initiative and referendum.[4]

Councils of Governments. In addition to the many single purpose entities created through intergovernmental cooperation, councils of governments (COGs) represent a type of intergovernmental cooperation that is more general or multipurpose in nature. COGs need not be created for a specific purpose and are typically established as a coordinating organization. "[T]he organization, form and procedures of a COG are determined by the participating municipalities."[5]

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[1] These are the provisions now set forth in Article III, Section 31, of the Pennsylvania Constitution prohibiting the General Assembly from delegating the power to perform municipal functions to any special commission, private corporation or association.

[2] Article IX, Section 5, of the Pennsylvania Constitution provides:

> A municipality by act of its governing body may, or upon being required by initiative and referendum in the area affected shall, cooperate or agree in the exercise of any function, power or responsibility with, or delegate or transfer any function, power or responsibility to, one or more other governmental units including other municipalities or districts, the Federal government, any other state or its governmental units, or any newly created governmental unit.

[3] 53 Pa.C.S. § 2303(a).

[4] *See supra* note 2.

[5] *Intergovernmental Cooperation Handbook,* 6th ed., Governor's Center for Local Government Services, Pennsylvania Department of Community and Economic Development, Harrisburg, Pa., 2006, p. 12. http://dced.pa.gov/download/Intergovernmental%20Cooperation%20Handbook/?wpdmdl=56790 (March 20, 2017).

Other Forms of Municipal Cooperation

Joint Authorities. The Municipality Authorities Act[6] authorizes the creation of municipal authorities by two or more local governments.[7] These entities are typically created when large capital expenditures are required for projects such as sewage treatment, water supply, airports and bus transit systems.[8]

Planning and Zoning. Articles VIII-A and XI of the Pennsylvania Municipalities Planning Code[9] contain provisions for joint planning and zoning. A joint planning commission may be created without implementing joint zoning. Joint zoning, however, cannot be implemented without a joint comprehensive plan.

Tax Collection. Act 32 of 2008 extensively amended The Local Tax Enabling Act[10] by, among other things, creating 69 countywide tax collection districts for the purpose of consolidating the collection of earned income and net profits taxes levied by municipalities and school districts. A county tax collection district exists in each county, except in Philadelphia and Allegheny Counties. The geographic boundaries of a tax collection district are coterminous with the county in which it is created, with some exceptions.[11] Allegheny County is divided into four tax collection districts, as specified.[12]

Transportation Development Districts. The Transportation Partnership Act[13] allows municipalities to cooperate with one or more local governments or municipal authorities to establish transportation development districts for the purpose of planning, acquiring, developing, constructing and operating transportation facilities or services in the district. A municipal authority may not join unless it first obtains the approval, by way of ordinance, of the municipalities organizing the authority. Projects undertaken may be either facility projects, i.e., construction or acquisition of roads, streets, buses, stations, airports and parking areas, or service projects, i.e., systems of public transportation by any mode and the salaries and costs associated therewith.

Environmental Improvement Compacts. The Environmental Improvement Compact Act[14] authorizes municipalities, through initiative and referendum, to agree on the structure of government and powers concerning one or more municipal functions. Also authorized is a board

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[6] 53 Pa.C.S. § 5601 et seq.

[7] Although municipal authorities are not considered "local governments" for purposes of the law relating to intergovernmental cooperation, as a practical matter, municipal authorities do have broad authority to contract with municipalities, even those that are not members of the authority.

[8] *See Deskbook* article entitled "Municipal Authorities."

[9] Act 247 of 1968 (53 P.S. §§ 10801-A-10821-A, 11101-11107).

[10] Act 511 of 1965 (53 P.S. § 6901 et seq.).

[11] *Id.* Ch. 5.

[12] *Id.* § 504.

[13] Act 47 of 1985 (53 P.S. § 1621 et seq.).

[14] 53 Pa.C.S. § 2501 et seq.

"for the purpose of acquiring, holding, constructing, improving, maintaining and operating, owning or leasing, either in the capacity of lessor or lessee, for any government function of two or more municipalities."[15] The board of an environmental improvement compact is elected by the voters, has the power to levy taxes up to two mills, and has corporate powers similar to a municipality, including the power of eminent domain.

Other Laws. Various specialized intergovernmental cooperation laws exist in municipal codes and elsewhere in state law beyond the predominant forms listed above. For example, joint municipal cooperation for purposes of acquiring recreational land is authorized in several codes.[16] Municipalities may create environmental advisory councils.[17] Cities and counties may cooperate for the building, acquisition and maintenance of auditoriums, libraries, memorial buildings, municipal buildings and monuments.[18]

Local Government Commission Review

The Intergovernmental Cooperation Law requires the Local Government Commission to review certain cooperative agreements. Specifically, an agreement between a local government and the Federal Government, the Commonwealth, any other state or government of another state must be submitted to the Local Government Commission for review and recommendation prior to and as a condition precedent to enactment of an ordinance.[19] The law delineates exceptions to this requirement.[20]

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[15] 53 Pa.C.S. § 2555.

[16] *See, e.g.,* The Borough Code, 8 Pa.C.S. § 2701(c)); The Second Class Township Code, § 2205 (53 P.S. § 67205); The County Code, § 2505 (16 P.S. § 2505).

[17] *See* 53 Pa.C.S. § 2321-2329 (relating to Environmental Advisory Councils).

[18] *See* Joint Building for City and County Municipal Buildings, Act 69 of 1913 (53 P.S. §§ 1331-1335).

[19] 53 Pa.C.S. § 2314.

[20] *Id.*

Municipal Authorities

Generally

There is often confusion resulting from the erroneous impression that a municipal authority is merely the child or instrumentality of the municipality incorporating it. Municipalities create authorities pursuant to various statutes, perhaps the most common of which is the Municipality Authorities Act.[1] In accordance with the Municipality Authorities Act, one or more municipalities may act to form a municipal authority. Also, municipal authority board members are to be appointed by municipal governing bodies. Nevertheless, for reasons of public policy and convenience, a municipal authority is NOT the creature, agent, or representative of the municipality or municipalities organizing it; but rather, it is a separate and distinct entity.[2] A municipal authority is an independent agency of the Commonwealth, a part of the Commonwealth's sovereignty. Defined as "[a] body politic and corporate,"[3] a municipal authority may be said to be an independent corporate agent of the Commonwealth, exercising governmental, as well as private corporate power, in assisting the Commonwealth in meeting the needs of its citizens.

Many authorities exercise certain powers and perform certain functions both within and outside the municipal limits of the incorporating municipality, within constitutional and statutory limitations. The Municipality Authorities Act dictates a broad grant of power so that municipal authorities may accomplish the purposes intended under the act in an efficient and economical manner and for the benefit and health of all the people of this Commonwealth.[4]

Like municipalities, the power of municipal authorities to act depends upon statutory delegation. By statute, municipal authorities are permitted to undertake a wide range of different projects. It is true that the municipality or municipalities that organize the authority, by either an initial or subsequent ordinance or resolution, may limit or specify the project or projects to be undertaken by the authority.[5] If this is done, then no other projects are to be undertaken by the authority, except those specified; but if this power to limit or specify authority projects is not used, then the authority is deemed to have all the powers permitted it under law.

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[1] 53 Pa.C.S. § 5601 et seq.

[2] *Smith v. Athens Tp. Authority,* 685 A.2d 651 (Pa. Cmwlth. 1996), *appeal denied,* 548 Pa. 622 (1997)

[3] 53 Pa.C.S. § 5602.

[4] *See*, *generally*, 22A Summ. Pa. Jur. 2d. Municipal and Local Law § 13:10 (2d ed.)(2017).

[5] Under specific circumstances, authorities may be forced to dissolve and/or have their projects overtaken by the municipalities that created them. *See Township of Forks v. Forks Tp. Mun. Sewer Authority*, 759 A.2d 47 (Pa. Cmwlth. 2000).

Projects of an Authority

Among the many projects in which an authority may engage are those involving the following:

> . . . [the] acquiring, holding, constructing, financing, improving, maintaining and operating, owning or leasing [of] . . .
>
> (1) Equipment to be leased by an authority to the municipality or municipalities that organized it or to any municipality or school district located wholly or partially within the boundaries of the municipality or municipalities that organized it.
>
> (2) Buildings to be devoted wholly or partially for public uses, including public school buildings, and facilities for the conduct of judicial proceedings and for revenue-producing purposes.
>
> (3) Transportation, marketing, shopping, terminals, bridges, tunnels, flood control projects, highways, parkways, traffic distribution centers, parking spaces, airports and all facilities necessary or incident thereto.
>
> (4) Parks, recreation grounds and facilities.
>
> (5) Sewers, sewer systems or parts thereof.
>
> (6) Sewage treatment works. . . .
>
> (7) Facilities and equipment for the collection, removal or disposal of ashes, garbage, rubbish and other refuse materials by incineration, landfill or other methods.
>
> (8) Steam heating plants and distribution systems.
>
> (9) Incinerator plants.
>
> (10) Waterworks, water supply works, water distribution systems.
>
> (11) [Certain] Facilities to produce steam . . . .
>
> (12) [Certain] Facilities for generating surplus electric power which are related to incinerator plants, dams, water supply works, water distribution systems or sewage treatment plants . . . .
>
> (13) Swimming pools, playgrounds, lakes and low-head dams.
>
> (14) Hospitals and health centers.
>
> (15) [Certain] Buildings and facilities for private, nonprofit, nonsectarian secondary schools, colleges and universities, State-related universities and community colleges . . . .
>
> (16) Motor buses for public use . . . and subways.
>
> (17) Industrial development projects . . . .
>
> (18) Storm water planning, management and implementation[6]

[6] 53 Pa.C.S. § 5607.

Disputing the "Rates" for Services Charged by a Municipal Authority

A common constituent question involves the method by which a customer within a municipal authority's service area who feels aggrieved by the rates imposed by the authority for its services can seek redress. The municipal authority may insist that its rates are justified.

The language of Title 53 of the Pennsylvania Consolidated Statutes, Section 5607(d)(9), speaks of fixing reasonable and uniform rates "in the area served by [a municipality authority's] facilities." Under this section, the municipal authority is granted the exclusive authority to set rates for its services. The recipient of these services does not negotiate the amount that he or she is to be charged. These ratepayers, therefore, are intended to be protected by the provision requiring the rates to be reasonable and uniform. These rates are subject only to judicial review, not to the review of the incorporating municipality.

In construing a municipal authority's ratemaking powers, Pennsylvania courts have repeatedly emphasized and relied upon two controlling legal principles: (1) that a municipal authority has been granted the exclusive power to fix the rates to be charged its customers (ratepayers), and (2) that an authority may exercise, but not abuse, its discretion in fixing rates, which are reasonable and uniform in the area serviced by its facilities.[7] Similarly, in disputes between a ratepayer and a municipal authority concerning an authority's possible abuse of discretion in fixing rates, the Legislature has designated the court of common pleas as having exclusive jurisdiction to resolve all such questions.[8] Moreover, in exercising its jurisdiction to resolve questions concerning rates set by a municipal authority, a common pleas court may not appropriate the rate-fixing power of the municipal authority by substituting its discretion for that of the authority. The court's function is to determine whether the ratepayer has met the burden of proof regarding the municipal authority's alleged abuse of discretion in establishing a rate system that violates the statutory standards of reasonableness or uniformity.

[7] *See, e.g., Smith, supra*, note 2; *West v. Hampton Tp. Sanitary Authority,* 661 A.2d 459 (Pa. Cmwlth. 1995).

[8] *See* 53 Pa.C.S. § 5607(d)(9).

Municipal Statistics

The following selected municipal statistics are as of 2017:

Municipalities	
Municipality Type	No.
Municipalities (Total)	2560
1st Class Cities	1
2nd Class Cities	1
2nd Class A Cities	1
3rd Class Cities	53
Boroughs	957
1st Class Townships	93
2nd Class Townships	1453
Towns	1
Counties	67

Other Selected Entities	
Entity Type	No.
Fire Departments (Total)	1853
Paid	30
Paid/Volunteer	92
Volunteer	1731
Police Departments (Total)	1288
Traditional	966
Consolidated	121
Contractual	201
Local Authorities (Active)	1519
School Districts	500
Councils of Governments	85
Planning Commissions (Total)	1510
Multicounty	10
County	61
Municipal	1439

There exists voluminous statistical information regarding municipalities that researchers may access. See below some examples of the numerous online resources available for municipal statistics.

The Department of Community and Economic Development (http://dced.pa.gov). DCED features a database with information on tax rates, municipal officials, school district statistics and financial statistics. http://dced.pa.gov/local-government/municipal-statistics/ (March 29, 2017).

The Pennsylvania State Data Center (http://www.pasdc.hbg.psu.edu/). The Data Center has information on municipal demographic and population statistics based on historical and current (2010) census figures, as well as publications and abstracts.

Census Database (http://factfinder2.census.gov//faces/nav/jsf/pages/index.xhtml). The official federal government website of the census (2010) contains population and demographic results available on all states and their municipalities.

Pennsylvania Right-to-Know Law[1]

Taken together, the Sunshine Act[2] and the Right-to-Know Law, often referred to as the Open Records Law, are intended to provide residents of the Commonwealth with first-hand knowledge of the activities of public agencies taken at meetings and access to contents of public records.

The original version of the Right-to-Know Law, enacted in 1957 and amended extensively by Act 100 of 2002, was repealed and replaced by Act 3 of 2008. The earlier versions of the Right-to-Know Law were designed to permit the examination, inspection, and duplication of defined "public records" of "public agencies." Act 3 of 2008, hereinafter referred to as "the Law," expands these rights and makes fundamental changes to the transparency of governmental operations in Pennsylvania. Most notably:

- The rights under the Law are extended to any legal resident of the United States and other defined "agencies."
- Any record in the possession of a "Commonwealth agency"[3] or a "local agency"[4] is presumed to be public. Similarly, defined legislative records of legislative agencies and financial records of judicial agencies are also presumed to be public. Such records are

[1] Act 3 of 2008 (65 P.S. § 67.101 et seq.). The Right-to-Know Law discussed herein is not to be confused with the Worker and Community Right-to-Know Act, 35 P.S. § 7301 et seq., an act that, among other things, requires the chemical identification of substances in the community and on employer premises. Federal law dealing with the movement and storage of hazardous materials is also often referred to, colloquially, as the Right-to-Know Law.

[2] 65 Pa.C.S. § 701 et seq., also referred to as the Open Meetings Law.

[3] "Commonwealth agency" is defined as any of the following:

(1) Any office, department, authority, board, multistate agency or commission of the executive branch, an independent agency and a State-affiliated entity. The term includes:

(i) The Governor's Office.

(ii) The Office of Attorney General, the Department of the Auditor General and the Treasury Department.

(iii) An organization established by the Constitution of Pennsylvania, a statute or an executive order which performs or is intended to perform an essential governmental function.

(2) The term does not include a judicial or legislative agency.

Right-to-Know Law, § 102.

[4] "Local agency" is defined as any of the following:

(1) Any political subdivision, intermediate unit, charter school, cyber charter school or public trade or vocational school.

(2) Any local, intergovernmental, regional or municipal agency, authority, council, board, commission or similar governmental entity.

Right-to-Know Law, § 102.

shielded from disclosure only if the record is specifically exempt under the Law, protected by a privilege, or exempt from disclosure under another law or by judicial order or decree.[5]

- The burden of proving that a record is not public is on the agency denying access to the record.

Pennsylvania municipalities (a type of "local agency") are subject to broad disclosure requirements under the new Right-to-Know Law. Whereas the previous Right-to-Know law defined "public records" primarily as records documenting the receipt or expenditure of public funds and a "minute, order, or decision" of the municipality, the new Law requires that municipalities disclose any information, regardless of its format, "that is created, received or retained pursuant to law or in connection with a transaction, business or activity"[6] of the municipality, unless the record is exempt by law, privilege, or judicial order or decree.

The Law imposes administrative requirements on all agencies. Each agency must maintain an "open records officer" and must post information related to open records requests at its physical location and on its website if it maintains one. The open records officer is the designated agency administrator of requests under the Law.

Access

If a record is subject to disclosure, it must be provided in the medium (i.e., paper or electronic form) requested if it exists in that medium. An agency may fulfill named or anonymous written (including e-mailed or faxed) or verbal requests. Upon receipt, agencies generally have five business days to respond to a request unless certain legal or logistical grounds exist to extend the time. If the agency does not respond within five days or within an extension as provided by the Law, the request is deemed denied.

An agency may charge for duplication, certification, postage and enhanced electronic access.[7] An agency is explicitly prohibited from charging fees other than those authorized by law. Municipalities and other "local agencies" are required to use the duplication fee schedule promulgated by the Open Records Office. Prepayment of fees is required prior to providing records if the fees are expected to exceed $100.

Exemptions

As previously mentioned, the Law contains a list of exemptions at Section 708. The exemptions include documents that could affect private safety or public or infrastructure security, certain internal draft documents and academic materials, certain trade secrets, collective bargaining and personnel information, medical history, and certain private personal information. Because the exemption provision of the Law covers a spectrum of information beyond the scope of this article,

[5] *See* Right-to-Know Law, § 305.

[6] Right-to-Know Law, § 102.

[7] *Id.* § 1307.

and permits access to certain subsets of otherwise exempt types of records, municipal officials should carefully review the Law when determining whether an exemption applies to a requested record. An agency must redact exempt materials from a requested record that is otherwise subject to disclosure and provide the redacted document to the requester.[8]

The Law also provides that a record may be exempt if other federal or state law prohibits disclosure. A court may also prohibit a record from being disclosed.

Office of Open Records

The Law establishes the Office of Open Records within the Pennsylvania Department of Community and Economic Development.[9] The Office is charged with providing information, training, and advisory opinions related to the Law. *The Office also acts as the forum for appeals from decisions of Commonwealth agencies and local agencies, including municipalities, under the Law.* The Office may resolve disputes through a mediation program in addition to formalized appeal hearings. The Office maintains a website, http://openrecords.state.pa.us, which contains a wealth of information about the Law.

Appeals, Fees, and Penalties

It is important to note that although an agency is permitted to respond to verbal requests, **a requester can avail him/herself of the right to appeal from an agency decision only if he/she first makes a written request for a record**. In the case of an explicit or a deemed denial, a requester has 15 business days from the mailing date of the denial, or the date of the deemed denial, to appeal to the agency appeals officer.[10] The appeals officer has 30 days upon receipt of an appeal to render a final decision.[11] Within 30 days of mailing the appeal decision, a request for a subsequent review by a court may be made.[12] Notice of appeals to court must be provided to the agency, the requester, and the Office of Open Records or the designated appeals officer in accordance with court rules.

The Law provides that a reversal of an agency decision by a court may result in the awarding of attorney fees and costs to the requester if the agency acted in bad faith with wanton disregard for the Law, or in a manner based on an unreasonable interpretation of the Law.[13] Conversely,

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[8] Right-to-Know Law, § 706.

[9] *Id.* § 1310.

[10] *Id.* § 1101.

[11] If the appeals officer fails to render a decision within 30 days, the appeal is deemed denied. *See* Right-to-Know Law, § 1101(b)(2).

[12] The request for judicial review is filed with the Commonwealth Court in cases related to a request of a Commonwealth agency, a legislative agency, or a judicial agency. In appeals from appeal orders involving local agency requests, initial judicial review is conducted by the court of common pleas. *See* Right-to-Know Law, §§ 1301-1302.

[13] Right-to-Know Law, § 1304.

the court may award fees and costs, or a portion thereof, to the agency if the court determines that the appeal was frivolous.

Agencies may incur civil penalties of not more than $1,500 for denials made in bad faith. An agency or public official who does not promptly comply with a court order related to the Law is subject to a civil penalty of not more than $500 per day until the records are provided.[14]

[14] Right-to-Know Law, § 1305.

The Pennsylvania Sunshine Act

The right of the public to be present at all meetings of certain defined public bodies (i.e., "agencies") and to witness the deliberation, policy formulation, and decision making of agencies is "vital to the enhancement and proper functioning of the democratic process."[1]

In addition to guaranteeing this right, the Sunshine Act[2] also requires the advertising and public notice of agency meetings and provides for reasonable public comment during board, council, or authority meetings. It also provides for limited exceptions and establishes penalties for violations of the act.

"Agencies" Subject to the Act

"The body, and all committees thereof[3] authorized by the body to take official action or render advice on matters of agency business, of all the following: the General Assembly, the executive branch of the government of this Commonwealth, including the Governor's Cabinet when meeting on official policymaking business, any board, council, authority or commission of the Commonwealth or of any political subdivision of the Commonwealth or any State, municipal, township or school authority, school board, school governing body, commission, the boards of trustees of all State-aided colleges and universities, the councils of trustees of all State-owned colleges and universities, the boards of trustees of all State-related universities and all community colleges or similar organizations created by or pursuant to a statute which declares in substance that the organization performs or has for its purpose the performance of an essential governmental function and through the joint action of its members exercises governmental authority and takes official action. The term does not include a caucus or a meeting of an ethics committee created under rules of the Senate or House of Representatives."[4] Senate and House of Representative caucuses and meetings of ethics committees are not subject to the Sunshine Act.[5]

The Sunshine Act does not prohibit the nonpublic gathering of less than a quorum of the agency body, e.g., two members of a five-member board of supervisors. It also does not apply to meetings where only "administrative action" is taken by the body. "Administrative action" is defined as "the execution of policies relating to persons or things as previously authorized or required by official action of the agency adopted at an open meeting of the agency. The term does not, however, include the deliberation of agency business."[6] The Pennsylvania Supreme Court held that closed-door fact-finding meetings conducted by a quorum of the governing body did not violate

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[1] 65 Pa.C.S. § 702.

[2] 65 Pa.C.S. § 701 *et seq.*

[3] For an interesting discussion on committees of agencies, *see Lee Publications, Inc., et al., v. The Dickinson School of Law of The Pennsylvania State University Assn., et al.*, 848 A.2d 178 (Pa. Cmwlth. 2004).

[4] 65 Pa.C.S. § 703.

[5] 65 Pa.C.S. § 712.

[6] 65 Pa.C.S. § 703.

the Sunshine Act because the gatherings were held for informational purposes only and did not involve deliberations.[7] The court noted that "merely learning about the salient issues so as to reach an informed resolution at some later time does not in itself constitute deliberation."[8] The law also provides that during meetings, all votes of agency members must be made in public.

Exceptions in the Act

Executive Sessions. Defined as a meeting from which the public is excluded, executive sessions may occur for only one of the six purposes:[9]

(1) To discuss matters involving employment or performance of officers or employees of the agency, provided that any affected individual is given the opportunity to request, in writing, that the meeting be held in public.

(2) To hold meetings involving collective bargaining, labor relations and arbitration.

(3) To consider the purchase or lease of real property.

(4) To meet with an attorney or other professional advisor regarding litigation or issues where an identifiable complaint is expected to be filed.

(5) To discuss agency business which, if discussed in public, would lead to the disclosure of information protected by law, including ongoing investigations.

(6) To hold discussions of academic admissions or standing by the governing bodies of State-owned, State-aided, or State-related colleges or universities.

Executive sessions may be held during an open meeting or at the conclusion of an open meeting or announced for a future time. Prior to convening an executive session, the agency must announce with proper specificity the purpose of the executive session. If the session is not for a future time, the members of the agency must be notified of the session 24 hours in advance.

Conferences. A quorum of an agency may attend conferences or other informative gatherings without requiring that the event be open to the public. Deliberation concerning agency business, however, is prohibited.

Working Sessions. Although most agency bodies may no longer hold "work sessions" to avoid the act's requirements, boards of auditors may do so for the purpose of discussing and deliberating accounts and records, provided any official action is then taken at a subsequent public meeting.

Other Confidential Communications. The act exempts from its scope the "deliberations or official actions which, if conducted in public, would violate a lawful privilege or lead to the

[7] *Smith v. Twp. of Richmond*, 82 A.3d 407 (Pa. 2013).

[8] *Id.* at 416.

[9] *See* 65 Pa.C.S. § 708.

disclosure of information or confidentiality protected by law, including matter related to the investigation of possible or certain violations of the law and quasi-judicial deliberations…."[10]

Public Comment

Section 710.1 of the act allows residents of a political subdivision, or taxpayers in the political subdivision or authority created by the political subdivision, a reasonable opportunity to "comment on matters of concern, official action or deliberation which are or may be before the board or council prior to the taking of official action."[11] If a reasonable opportunity for comment is allowed before official action, the official action cannot be voided solely on the basis of lack of comment on the action. Also, any person may raise an objection to a perceived violation of the act at any time during a meeting of a board or council of a political subdivision or board of an authority.

The language of the act appears to apply the public comment provisions only to "the board or council of a political subdivision or of an authority created by a political subdivision." This section also seems to limit the right to public comment to those who reside or pay taxes in the political subdivision, although anyone may object to perceived violations of the act.

Recording Proceedings

Anyone attending a meeting of an agency may record the proceedings, subject to the adoption and enforcement of reasonable rules, if any, by the agency, although the Senate and the House of Representatives may adopt rules regarding the recording and/or broadcast of sessions, meetings, and hearings.[12]

Legal Remedies

A proceeding may be brought before the Commonwealth Court for violations of the act by Commonwealth agencies or before the county court of common pleas for violations by any other agency. The action must be brought within 30 days of a meeting that was open to the public, or 30 days from the discovery of a meeting that was not, provided that no more than one year has elapsed since the alleged closed meeting. The court at this proceeding has the authority to find that all official action taken in violation of the act is void, may render a declaratory judgment, or provide injunctive relief. Agencies may cure the violation by ratifying any invalid decisions at a subsequent public meeting.

Concurrently with proceedings before the common pleas court or Commonwealth Court, a summary offense proceeding may be brought against an agency member before a district justice

[10] 65 Pa.C.S. § 716.

[11] 65 Pa.C.S. § 710.1.

[12] 65 Pa.C.S. § 711.

whereby a conviction of intentionally violating the act would result in fines, plus any costs of prosecution, as follows:

(1) For a first offense, a fine of at least $100 and not more than $1,000.

(2) For a second or subsequent offense, a fine of at least $500 and not more than $2,000.[13]

An agency may not make a payment on behalf of or reimburse a member of an agency for a fine or cost resulting from the member's violation of the act.[14]

Attorney fees may be awarded to any petitioner when the court determines that an agency "willfully or with wanton disregard" violated the act.[15] Conversely, if the court determines that a frivolous action with no "substantial justification" was brought by a petitioner, the court shall award the prevailing party reasonable attorney fees and costs of litigation or the appropriate portion of the fees and costs.[16]

[13] 65 Pa.C.S. § 714.

[14] *Id.*

[15] 65 Pa.C.S. § 714.1.

[16] *Id.*

Procedural Due Process

In order to protect persons from the unjustified deprivation of life, liberty or property by the government,[1] there must be some method by which they can contest the means by which the government proposes to deprive them of protected interests; i.e., they must be afforded procedural due process. Questions may arise concerning the adequacy of the procedures provided to contest the deprivation of a protected interest. While the exact procedures appropriate to one set of facts may not be required under differing circumstances,[2] there are certain fundamental or basic aspects of procedural due process that should be considered:

(1) **Notice.** Sufficient notice should be given in order to apprise interested parties of the pendency of the action, afford them an opportunity to present their objections, and enable them to determine what is being proposed and what must be done to protect their interests.

(2) **Hearing.** Individuals cannot be deprived of property or liberty interest unless they are provided some form of hearing in which they will have the opportunity to be heard.

(3) **Impartiality.** In order to provide procedural due process to an individual who may be subject to a deprivation of his or her interests, it is important not only that a hearing be provided, but also that the tribunal or decision maker not be predisposed against the individual. An impartial decision maker is considered to be essential.

(4) **Counsel.** An individual should be permitted to be represented and assisted by counsel, although it is not necessarily required that counsel be provided to one unable to afford his own. Generally speaking, an indigent has an absolute right to appointed counsel only where he may lose his physical liberty if he loses the adjudication.

(5) **Evidence.** Especially in cases where a decision rests on questions of fact, it may be necessary to provide an individual with not only the ability to confront and cross-examine adverse witnesses, but also the opportunity for discovery, i.e., investigation and accumulating evidence, in order to give him or her a chance to show that the facts upon which the proposed deprivation is based are untrue.

(6) **Decision.** Although a full opinion or formal findings of fact and conclusions of law may not be required, the tribunal should provide the reasons for its decision and indicate the evidence upon which it was based.

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[1] This protection is guaranteed by the Fifth Amendment to the United States Constitution and is made applicable to states and therefore, by implication, to its political subdivisions through the Fourteenth Amendment. In Article I, Sections 1, 9, and 11 of the Pennsylvania Constitution, there are due process guarantees similar to those in the United States Constitution. *See Katruska v. Bethlehem Center Sch. Dist.*, 767 A.2d 1051, 1056 (Pa. 2000), quoting *Lyness v. State Board of Medicine*, 605 A.2d 1204, 1207 (Pa. 1992).

[2] For example, a student subject to discipline by a school district is constitutionally due far less procedural protection than an applicant for a subdivision or a criminal defendant being tried for a capital crime.

With regard to procedural due process and municipal government, Pennsylvania has adopted the Local Agency Law,[3] which, among other things, is intended to provide for procedural due process and for appeals from an adjudication in municipal adjudications, in situations where a statute has not provided a separate procedure.

Illustration: Among the categories of cases in which a municipality may be faced with procedural due process challenges are those involving dismissals of certain public employees. Many public employees in Pennsylvania are employees at-will and are subject to summary dismissal for a good reason, a bad reason or no reason at all. In some cases, however, legislatively, certain public employees have "tenure" in their employment as an integral part of a comprehensive governmental employment scheme. In Pennsylvania, "tenure" in public employment may be said to exist if the public employee has a claim to employment that precludes summary dismissal. If a public employee is not an employee at-will and cannot be dismissed summarily, then it may be said that a "property right" exists in the employment, and the employee may not be deprived of that "property" without constitutionally sufficient procedural protections.[4]

[3] 2 Pa.C.S. §§ 105, 551-555, 751-754.

[4] See Werner v. Zazyczny, 681 A.2d 1331 (Pa. 1996).

Substantive Due Process

In addition to the requirement that municipalities provide "procedural due process," municipalities also are impacted by the correlative doctrine of "substantive due process."

Substantive due process involves a right that the courts have construed as being derived from the protections afforded by the Fifth and Fourteenth Amendments to the United States Constitution and the Declaration of Rights or Article I of the Pennsylvania Constitution. It is meant to ensure that a person's life, freedom or property cannot be taken without appropriate governmental justification.

The substantive due process requirement for appropriate justification exists independently from the procedural due process requirement that there be constitutionally adequate procedures through which an individual can protest the government action; i.e., the right to substantive due process does not depend on the fairness of the procedures provided to challenge the government's action.

If government action is taking away something of value that could be considered "life," "liberty" or "property," then, regardless of the procedures used, the questions remain concerning whether the goal being pursued by the government constitutes a valid state interest, and whether there is a sufficient relationship between the means being used to reach that goal and the goal itself.

There are different tests for substantive due process, depending on whether fundamental or nonfundamental rights are involved:

- In the case of governmental action impairing fundamental rights (e.g., the rights to marry, to have children, to direct the education and upbringing of one's children), a strict scrutiny test is used.

  The strict scrutiny test requires that, if government action impairs a fundamental right, the objective being pursued by the government must be "compelling" and not merely "legitimate." The strict scrutiny test also requires that the means chosen to achieve that compelling end must be "necessary"; i.e., there must not be any less restrictive means that would do the job just as well.

- In the case of governmental action impairing nonfundamental rights (e.g., nearly all economic and "social welfare" regulation), the "mere rationality" test is used.

  This "mere rationality" or rational basis test requires that the government is pursuing a legitimate objective (e.g., most economic and social welfare regulation), and that it do so with a means that is rationally related to that objective.

Illustration: In the context of municipal zoning law, a substantive due process analysis might be utilized to determine questions of the constitutionality of a zoning ordinance. Generally, a zoning ordinance will be found to be a constitutional and valid exercise of the police power so long as it promotes public health, safety and welfare and is substantially related to the purpose it purports to serve. A specific example of this kind of analysis is provided in *Kirk v. Zoning Hearing Board of Honey Brook Township*,[1] in which it was found that a specific minimum lot size requirement for single-family detached dwellings in an agricultural zoning district was reasonably related to the legitimate government goal of preserving agricultural land in the township, and, for this reason, the lot size requirement did not violate substantive due process.

[1] 713 A.2d 1226 (Pa. Cmwlth. 1998), *appeal denied*, 558 Pa. 624, 737 A.2d 745 (1999). *See also Southeastern Chester County Refuse Authority v. Zoning Hearing Bd. of London Grove Tp.*, 898 A.2d 680 (Pa. Cmwlth. 2006) (zoning ordinance setback requirements do not violate landfill operator's right to substantive due process).

Equal Protection

The Fourteenth Amendment of the United States Constitution[1] provides that "[n]o state shall make or enforce any law which shall … deny to any person within its jurisdiction the equal protection of the laws."

- The application of this clause constitutes a control on how various classifications (not only those based on race, but also those based on other attributes) can be legitimately used by the government.

- Like due process protection, the "equal protection" applies to governmental action, but generally not to action taken by private individuals.

- The issue of equal protection may arise when the government allows people in one classification to do a thing, but denies this right to people in another classification where there is no legitimate and applicable distinction between the classifications.

- Generally speaking, equal protection is intended to have the government treat people in comparable circumstances similarly. One of its purposes is to prevent discrimination.

- Depending on the circumstances, violations of equal protection are analyzed under one of three standards of review:

  (1) In those cases in which an ordinance or its application utilizes a classification that does not involve either "suspect classification" (e.g., race or national origin) or a "quasi-suspect" category (e.g., gender), and in those cases in which an ordinance or its application utilizes a classification that does not impair a "fundamental right" (e.g., First Amendment rights), then the "mere rationality" test is used. All that is required is that the classification used by the government must conceivably bear some rational relationship to a legitimate governmental purpose sought to be achieved.

  (2) When an ordinance or its application involves a "suspect" classification or utilizes a classification that impairs a "fundamental right," it will be strictly scrutinized and will be upheld only if there is a compelling interest to be achieved, and the classification is necessary to further that interest. This "strict scrutiny" test is the same as that for substantive due process when a "fundamental right" (e.g., the right to privacy) is involved.

  (3) Under some limited classifications (e.g., gender and illegitimacy), an intermediary test is applied. This test has a higher standard than the "mere rationality" test but not one as demanding as the "strict scrutiny" test. Under this middle level test, the classification used must be "substantially related" to an "important" governmental objective.

[1] The Pennsylvania Constitution builds on the Fourteenth Amendment through Article I, Sections 26 and 28; Article III, Section 32; and Article VIII, Section 1. These provisions have been interpreted to provide an equivalent or greater level of equality than the minimum guaranteed by the United States Constitution.

Illustration: Equal protection issues can arise in the area of local taxation, because courts apply both the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, as well as the Pennsylvania requirement that all taxes shall be uniform upon the same class of subjects. In fact, in the context of taxation, the principles of "equal protection" are similar to those applied under "uniformity" in that classifications must be reasonable, and the tax should be consistent within each class. For example, in *Tredyffrin-Easttown School District v. Valley Forge Music Fair, Inc.*,[2] a music fair producer asserted that a systematic, unequal enforcement of an amusement tax violated the Equal Protection Clause of the United States Constitution and the Uniformity Clause of the Pennsylvania Constitution. Not only were enforcement actions not commenced against other amusements that refused to pay the tax for months or years, but the district also systematically accepted tax payments from other amusements based on unaudited figures or records while auditing the Music Fair producer's books and records. Furthermore, the district secretly settled claims for liabilities with other amusements while denying this compromise option to the Music Fair producer. In that case the court, in effect, found that there was no rational basis for different treatment of various, similarly situated taxpayers, specifically finding that there was selective enforcement of an amusement tax by a school district, which violated the music fair producer's equal protection rights.[3]

[2] 156 Pa. Cmwlth. 178, 627 A.2d 814 (1993), *appeal denied*, 538 Pa. 638, 647 A.2d 513 (1993).

[3] For an additional discussion of the rational basis standard in taxing classifications, *see Beattie v. Allegheny County*, 847 A.2d 185 (Pa. Cmwlth. 2004); *aff'd*, 907 A.2d 519 (Pa. 2006); *Clifton v. Allegheny County*, 969 A.2d 1197 (Pa. 2009).

Quorum: Official Action - Abstention

With regard to the number of members of a municipal governing body that is needed to constitute a quorum or the number of votes that is required for official action, the provisions, if any, of the respective municipal codes will prevail. For example, concerning the establishment of a quorum, the municipal codes provide as follows:

- In third class cities, a majority of the whole number of council members physically present at a meeting place within the city will constitute a quorum.[1]
- In cities operating under an optional third class city charter, a majority of the whole number of members of the council constitutes a quorum.[2]
- In boroughs, a majority of the membership of council then in office and physically present constitutes a quorum.[3]
- In townships of the first class, a majority of the members of the board of commissioners constitutes a quorum.[4]
- In townships of the second class, a quorum is two members of a three-member board of supervisors or three members of a five-member board of supervisors.[5]

Pennsylvania generally follows the common law rule under which a majority of the members of a municipal governing body constitutes a quorum. The common law also provides that the vote of a majority of those present, provided there is a quorum, is deemed sufficient for action by a governing body.

Pennsylvania follows the common law rule that in the absence of any language to the contrary in the enabling statute, action may be taken by a majority of the members of the governing body present and voting as long as a quorum is present.[6] Some statutes also require a supermajority of all of the members of a body to take specific action, such as the abolition of the elected auditors and establishment of an appointed auditor in a borough.[7]

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[1] The Third Class City Code, 11 Pa.C.S. § 11004.

[2] Optional Third Class City Charter Law, Act 399 of 1957, § 607 (53 P.S. § 41607).

[3] Borough Code, 8 Pa.C.S. § 1001.

[4] The First Class Township Code, Act 331 of 1931, § 702 (53 P.S. § 55702).

[5] The Second Class Township Code, Act 69 of 1933, § 603 (53 P.S. § 65603).

[6] *Stoltz v. McConnon*, 473 Pa. 157 (1977).

[7] 8 Pa.C.S. § 1005(7).

> *Caution: The common law rule does not apply to second class townships. A second class township can only take action by a majority vote of all of the members of the board of supervisors, not a simple majority of those present if only three members of a five-member board are voting.*[8]

Thus, with regard to the effect of abstaining from voting, unless otherwise specified in statute, a majority of the votes actually cast is all that is required for official action, so long as there is a quorum present. This is the case, even if as a result of the abstentions, the total number of votes cast is less than the number of members required for a quorum, and the number of favorable votes is less than a majority of the actual number of members present.

A discussion of this issue is set forth in 36 Standard Pennsylvania Practice, 2nd edition, Section 166:50 (2017), as follows:

> [A] majority of any board or commission constitutes a quorum.[9] A majority of those voting in the presence of a quorum can act for a board or other body, absent language to the contrary in the relevant enabling statute.[10] A board is composed of those members serving and voting, not the number authorized to serve on a board; thus, absent specific legislation to the contrary, a board may act if there is a quorum.[11]
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> Illustration: A vote by two members of a state health facility hearing board was sufficient to affirm the Department of Health's grant of a certificate of need to a health-care facility, even though the Health Care Facilities Act had been amended to state that the board would consist of five members; because only three members were in fact present and eligible to participate in the decision, a majority vote of that number was sufficient.[12]
>
> Except where a statute provides otherwise, Pennsylvania follows the common-law rule in determining the number of votes necessary for a deliberative body to take official action. So long as a quorum is present at a meeting, therefore, all that is required is that the highest vote be equal to a majority of the quorum number, even though the highest vote constitutes only a plurality of all the legal votes cast. This is true even if more than the quorum number is present at the meeting.[13]
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> Illustration: If there are seven members of a body and four of those members constitute a quorum and attend a meeting, a majority of the four, that is, three, is necessary to take official action of any kind. Even if all seven members attend

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[8] The Second Class Township Code, § 603. *See also Sheipe v. Orlando*, 559 Pa. 112 (1999).

[9] 1 Pa.C.S. § 1905(b).

[10] *Com. ex rel. Bagnoni v. Klemm*, 499 Pa. 566 (1982).

[11] *Mercy Regional Health System (formerly Mercy Hosp.) of Altoona v. Department of Health*, 645 A.2d 924 (Pa. Cmwlth. 1994).

[12] *Id.*

[13] *DiGiacinto v. City of Allentown*, 486 Pa. 436 (1979).

> the meeting, the same number of votes, namely three, is all that is necessary to take official action if that is the highest number of votes cast in a given matter. Thus, if the minimum quorum of four is present, and the vote on a particular proposal is three in favor and one against, the proposal is adopted, and if all seven members of the body attend and the vote on a particular issue is three in favor, one against, and three abstentions, the proposal is likewise adopted by the plurality vote.[14]
>
> The common-law quorum rule does not permit a member to attend and abstain from voting, and yet demand that the highest number of votes required to take official action be more than if that member had been absent.[15]

The Third Class City Code and the Borough Code further permit council to provide for the participation of its members in council meetings by means of a telecommunication device,[16] subject to certain conditions, if a majority of council members[17] are physically present at the advertised meeting place within the municipality and a quorum is established at the convening or reconvening of the meeting.

[14] 486 Pa. 436.

[15] *Id.*

[16] *See* The Third Class City Code, 11 Pa.C.S. § 11005; Borough Code, 8 Pa.C.S. § 1001(c).

[17] In the case of a borough, participation by telecommunication is limited to council members and not extended to the mayor. *See* 8 Pa.C.S. § 1001(c).

Can a Municipal Governing Body Enter into a Contract That Will Bind Future Governing Bodies?

The Distinction Between Propriety and Governmental Functions

General Rule. When a municipal governing body, in the performance of its governmental functions, enters into a contract, there traditionally has been a limit on the term or period of time that the municipality can be bound by that contract, so that one municipal governing body does not limit or curtail the policy-making authority of a subsequent governing body.

Municipal governing bodies have the authority to enter into contracts. These contracts may involve the exercise of either governmental or proprietary functions.

> A governmental function is one performed for public purposes exclusively in its public, political or municipal character. A proprietary function, on the other hand, is a function which traditionally or principally has been performed by private enterprise.[1]

While distinguishing between governmental and proprietary functions can be difficult, Pennsylvania courts have often utilized a three-prong test to determine whether a specific action of a local government is one or the other. The court will consider:

(1) [W]hether the activity is one which the governmental unit is not statutorily required to perform,

(2) whether the activity may also be carried on by private enterprise, and

(3) whether the activity is used as a means of raising revenue. If the answer to any of these inquiries is yes, the function is proprietary.[2]

Traditionally, a newly elected governing body is empowered to act on behalf of the public without being constrained by the contracts of its predecessor that would significantly weaken the new governing body's making use of its policy-making powers. Thus, historically, when a municipal governing body, in the performance of its governmental functions, enters into a contract, there has been a limit on the time that the municipality can be bound by that contract, so that one municipal governing body does not limit or curtail the policy-making authority of a subsequently elected governing body.

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[1] *Boyle v. Municipal Authority of Westmoreland County*, 796 A.2d 389, 393 (Pa. Cmwlth. 2002) (citations omitted, emphasis added).

[2] *Boyle*, 796 A.2d at 393, *citing County of Butler v. Local 585, Service Employees International Union, AFL-CIO*, 631 A.2d 1389 (Pa. Cmwlth. 1993). *See also Lobolito, Inc. v. North Pocono Sch. Dist.*, 562 Pa. 380 (2000) (discussing the historical basis for the distinction between proprietary and governmental functions).

Applying this principle, the Pennsylvania Supreme Court, in *Lobolito, Inc. v. North Pocono School District*, emphasized the fact that agreements involving governmental bodies have long been viewed in a different light than agreements made exclusively between private parties,[3] particularly where the contract involves the governmental functions of the governing body.[4] In the exercise of its governmental functions, as distinguished from those that are business or proprietary, no municipal legislative body can take action that will bind its successors by entering into a contract that will extend beyond the term for which the members of the body were elected.[5] The successor governing body may, however, choose to ratify the existing contract that constitutes a governmental function.

[3] 562 Pa. at 384.

[4] *Id.*

[5] *Id.* The opinion in *Lobolito* indicates that limited exceptions may exist to the rule that one governing body may not bind a subsequent one with a contract that involves the municipality's governmental/policy-making functions. It also is indicated that any exceptions would most certainly require not only an absence of bad faith or ulterior motivation but also circumstances of great urgency and necessity in which the public interest clearly would be served by permitting the contractual commitment to be enforced.

Municipal Procurement

Competitive bidding requirements for municipalities can be summarized, generally, as follows:

Generic[1] Competitive Bidding Requirements

Contract Base Amounts *as of January 1, 2017*, subject to annual adjustment[2]	**Contracts and Purchases Generally[3]**	**"Exempted" Categories of Contracts or Purchases[4]**
Contracts up to $10,700	**No** advertising or competitive bidding or price quotations are required	**No** advertising or competitive bidding or price quotations are required
Contracts over $10,700 and up to $19,700	**Only** written or telephonic **price quotations** are required	**No** advertising or competitive bidding or price quotations are required
Contracts over $19,700	**Advertising and competitive bidding are required**	**No** advertising or competitive bidding or price quotations are required

Though similar, the municipal code provisions governing advertising and competitive bidding are not identical. The following chart shows the location of the article or chapter on "Contracts" in each of the listed municipal codes:

[1] The specific contract and procurement provisions of the applicable municipal code always should be referenced when examining procurement by any non-home rule municipality. Home rule municipalities may adopt their own purchasing procedures; and reference should be made to their charters and administrative codes.

[2] Contract base amounts are subject to possible annual adjustment by the Pennsylvania Department of Labor and Industry, effective January 1, as determined from the percentage change in Consumer Price Index for All Urban Consumers: All Items (CPI-U) for the United States City Average as published by the United States Department of Labor. The Department publishes notice of adjusted base amounts prior to January 1 of each year in the Pennsylvania Bulletin. The most recent published adjusted base amounts are accessible through the Local Government Commission's website (http://www.lgc.state.pa.us).

[3] Chapter 46 (Electronic Bidding by Local Government Units) of General Procurement Provisions (62 Pa.C.S., Part II), which was added by Act 88 of 2006, provides that requirements for competitive bidding may be met through electronic submission of bids to, and electronic receipt of bids by, a local government that has the capability of maintaining the confidentiality of such bids. The Chapter also permits electronic auction bidding. In a related but nonprocurement context, The Third Class City Code, the Borough Code, The First Class Township Code and The Second Class Township Code authorize electronic auction sales to dispose of municipal personal property (*see*, *e.g.*, the Borough Code, 8 Pa.C.S. § 1201.2(a.1)).

[4] While differing somewhat in the various municipal codes, each code does identify those purchases and contracts that are exempt from bidding requirements. Some examples are contracts for insurance, the purchase of certain patented or copyrighted materials, or contracts involving personal or professional services. This is not a complete list of exceptions, and the appropriate municipal code provisions should be examined for applicable exemptions.

Advertisement and Competitive Bidding Citations

Municipal Code	Code Article	Citation
County Code[5]	Article XVIII	16 P.S. § 1801 et seq.
Third Class City Code[6]	Chapter 119	11 Pa.C.S. § 11901 et seq.
Borough Code[7]	Chapter 14	8 Pa.C.S. § 1401 et seq.
First Class Township Code[8]	Article XVIII	53 P.S. § 56801 et seq
Second Class Township Code[9]	Article XXXI	53 P.S. § 68101 et seq.

Pennsylvania Consolidated Statutes Title 62 (Procurement)

Municipalities and other political subdivisions, as well as municipal authorities and other local authorities, are also subject to Title 62 of the Pennsylvania Consolidated Statutes, Part II (General Procurement Provisions), which, among other things, contains:

- Chapter 33, relating to the prevention of environmental pollution.
- Chapter 37, Subchapter A, Section 3701, relating to contract provisions prohibiting discrimination.
- Chapter 37, Subchapter B, Section 3731 et seq., the Motor Vehicle Procurement Act.
- Chapter 37, Subchapter C, Section 3741 et seq., relating to mass transportation.
- Chapter 37, Subchapter D, Section 3746, relating to used oil products.
- Chapter 37, Subchapter E, Section 3751 et seq., the Guaranteed Energy Savings Act.
- Chapter 39, relating to contracts for public works.
- Chapter 41, relating to the purchase of surplus federal property.
- Chapter 43, Section 4301 et seq., the Public Facilities Concession Regulation Act.
- Chapter 45, Section 4501 et seq., the Antibid-Rigging Act.
- Chapter 46, Section 4601 et seq., the Local Government Unit Electronic Bidding Act.

[5] Act 130 of 1955 (16 P.S. § 101 et. seq.)

[6] 11 Pa.C.S. § 10101 et seq.

[7] 8 Pa.C.S. § 101 et seq.

[8] Act 331 of 1931 (53 P.S. § 55101 et seq.)

[9] Act 69 of 1933 (53 P.S. § 65101 et seq.)

Also, in the Commonwealth Procurement Code,[10] Chapter 19 (Intergovernmental Relations) is made applicable to political subdivisions.

For a more thorough discussion of the subject of this article, the reader may wish to consult the *Purchasing Handbook*, published by the Pennsylvania Department of Community and Economic Development, Governor's Center for Local Government Services,[11] keeping in mind the changes in law since the *Handbook's* 2003 publication.

[10] 62 P.S. et seq.

[11] *Purchasing Handbook,* 12th ed., Governor's Center for Local Government Services, Pennsylvania Department of Community and Economic Development, Harrisburg, Pa., 2014. https://dced.pa.gov/download/Purchasing%20Handbook/?wpdmdl=57762.

Selected Municipal Employment Issues

Generally

Municipalities are vested with the power to create employment positions and fill them, subject to restrictions in their individual codes, statewide mandates, civil service laws, and the Federal and State constitutions. These limitations vary considerably between and among the different classes of municipalities in the Commonwealth. Often the law provides very specific grants of employment power for a particular class of municipality. Some examples of specific grants include the following: Third class cities are entitled to establish a fire marshal position. A borough council and a board of supervisors of a second class township, upon the request of school directors, may appoint special school crossing guards to direct traffic near schools. Second class township supervisors may employ a roadmaster, who shall do, or direct to be done, maintenance, repairs or construction of township roads.

The "At-Will" Rule

In Pennsylvania, nonunion, non-civil service public employees are employees at-will, unless they are parties to a contract for a defined term or the Legislature has otherwise limited the municipality's power to discharge them.[1] Furthermore, municipalities generally have not been granted the authority to enter into contracts with employees that would result in the municipalities forfeiting their power to summarily dismiss employees. In other words, a contract of employment may not supersede the rule of at-will employment.[2] A public employer may generally dismiss an at-will employee at any time, for any reason or for no reason at all, provided that the dismissal does not violate a constitutional protection and is not in contravention with a clear mandate of public policy.

Civil Service Laws

Pennsylvania has civil service systems for certain municipal employees. With regard to municipal police, civil service laws apply in cities, boroughs, towns and first class townships with three or

[1] Certain municipal codes authorize the governing body to create the office of municipal manager or city administrator by permitting the governing body to enter into an employment agreement with the manager for a term of up to two years. The agreement may provide for the terms and conditions of employment and a severance package for the manager, but neither is it a guarantee of employment through the term of the agreement, nor does it confer upon the manager any legal remedy based upon specific performance. *See* Act 566 of 1956 (incorporated town manager office created), §§ 1-2 (53 P.S. §§ 53163-53164); Borough Code, 8 Pa.C.S. §§ 1141-1142; The First Class Township Code, Act 331 of 1931, § 1502.IV. (53 P.S. § 56504); The Second Class Township Code, Act 69 of 1933, § 1301 (53 P.S. § 66301); The Third Class City Code, 11 Pa.C.S. §§ 112A02-112A03.

[2] *See Short v. Borough of Lawrenceville,* 548 Pa. 265 (1997). Questions may arise under some home rule charters concerning a municipality's power to summarily dismiss certain employees. *See Delliponti v. DeAngelis,* 545 Pa. 434 (1996); *Katzenmoyer v. City of Reading,* 158 F.Supp.2d 491 (E.D. Pa. May 21, 2001).

more police officers.[3] First class townships, towns and boroughs provide civil service or tenure protection only for police and firefighters. Cities' civil service laws cover a wider group of employees:

> Municipal employment outside the police and fire services is governed in Philadelphia by its civil service regulations adopted under the authority of its home rule charter, in Pittsburgh, under the provisions of the second class city laws, in second class A cities, under their statute, and in third class cities, under the provisions of the third class city code. . . . Where a class of municipalities is governed by a police civil service act and also by a civil service statute relating, by its terms, to all employees, the police legislation overrides the general civil service legislation with respect to police matters where both deal with the same subject.[4]

Municipal civil service systems have the following common elements:

(1) hiring and promotion on merit, often after a competitive examination and creation of a list of eligible candidates;

(2) protection against dismissal or other adverse employment action except for good cause or budgetary constraints;

(3) procedural rights prior to most adverse employment action, including a hearing before a civil service commission or the municipal governing body.[5]

Veterans' Preference

Veterans' preference provisions are codified at Title 51 of the Pennsylvania Consolidated Statutes, Sections 7101-7109, and apply to all municipalities for both civil service and non-civil service employment. Veterans receiving an honorable discharge,[6] the spouses of disabled veterans and qualified widows or widowers of veterans are entitled to certain preferences in hiring. The Pennsylvania Supreme Court has determined that veterans' preference for purposes of promotion is unconstitutional.[7] With regard to hiring, eligible applicants who pass civil service appointment

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[3] All second class townships and, if they have fewer than three police officers, boroughs, towns and first class townships are subject to Act 144 of 1951 (Regulating the Suspension of Police Officers) (53 P.S. § 811 et seq.), which deals only with adverse employment actions and does not regulate hiring.

[4] 22A Summ. Pa. Jur. 2d, Municipal and Local Law § 10:14 (2009) (citations omitted). The Second Class Township Code has no civil service provisions. In boroughs, townships of the first class and the incorporated town (Bloomsburg), civil service is restricted to police and firefighters. *See* The Borough Code, 8 Pa.C.S., Ch. 11, Subch. J (Civil service for police and fire apparatus operators); The First Class Township Code, §§ 625-650 (Civil Service for Police and Firemen); Act 45 of 1941 (53 P.S. § 53251 et seq.), Act 427 of 1945 (53 P.S. § 53301 et seq.) (civil service for local police officers and paid firefighters, respectively, in towns).

[5] *Solicitor's Handbook,* 3rd ed., Governor's Center for Local Government Services, Pennsylvania Department of Community and Economic Development, Harrisburg, Pa., 2003, p. 56., *citing Delliponti v. DeAngelis,* 545 Pa. 434 (1996).

[6] A reservist receiving an honorable discharge from active duty during a conflict, but still obligated as a reservist, qualifies as a "soldier" entitled to veterans' preference under the act. *See Soberick v. Salisbury Tp. Civil Service Com'n,* 874 A.2d 155 (Pa. Cmwlth. 2005).

[7] *See Housing Authority of the County of Chester v. Pennsylvania State Civil Service Com'n,* 556 Pa. 621 (1999).

tests receive ten points added to their final test score.[8] If they are among the top three available candidates on an employment certification, they receive mandatory preference in appointment over nonveterans.[9] Pennsylvania courts have held, however, that employers may deny employment to a veteran who does not have the level of expertise demanded for the position.[10]

Other Factors Affecting Municipal Employment

The municipal employer also must be cognizant of other issues when making employment decisions, including military leave legislation, family and medical leave laws, "whistleblower" protection and various constitutional considerations, such as due process and equal protection guarantees, protections against political discrimination and privacy considerations.

[8] 51 Pa.C.S. § 7103(a).

[9] 51 Pa.C.S. § 7104(b); 556 Pa. at 647-648 (1999).

[10] *See* 556 Pa. at 639 (Pennsylvania Supreme Court restricting its holding in *Brickhouse v. Spring-Ford Area Sch. Dist.,* 540 Pa. 176 (1995) to non-civil service cases).

Authority Over Borough Police: Mayor vs. Council

Borough police force may only be established by ordinance

Borough council may establish, by ordinance, a police department, the ranks of the officers, and the duties ascribed for each rank.[1]

The mayor controls the manner in which police duties are performed *only* in those cases in which council has, by ordinance, established a police department.[2]

The mayor may direct the operation of the police force

The mayor, under some provisions of the Borough Code, appears to have full charge and control of the chief of police and the police force, including the power to direct the time during which, the place where, and the manner in which the chief of police and the police force shall perform their duties.[3]

Borough council, however, has the power to fix and determine the total weekly hours of employment that shall apply to the police.[4]

Borough council has final police employment decision authority

In general, only borough council can appoint, remove, suspend or reduce in rank any borough police officer.[5]

The mayor, however may suspend a police officer for cause until the next council meeting after the suspension, pending council's determination to reinstate, discharge, suspend or reduce in rank the officer.[6]

Note: Mayors of boroughs that have their own police force retain limited power over controlling the manner in which police discharge their duties. Because such control is often ill-defined and because of the professional nature and greater specialization associated with law enforcement, the mayor is now more often better suited to act as an intermediary between council and the department. Also, in municipalities, including boroughs, where there is a regional police force or where there is contracting for police services, the mayor may be divested of any power he or she may have had over a borough force.

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[1] 8 Pa.C.S. § 1121(a)(3).

[2] 8 Pa.C.S. § 1123.1(b). For example, the mayor may receive notice that a noise ordinance is not being obeyed. He can direct the police force to investigate or more vigorously enforce the ordinance; but, if this same borough has enacted an ordinance restricting the chief of police's hours of duty to daylight hours, the mayor may not force the chief to personally enforce the ordinance during evening hours in contravention of the ordinance.

[3] 8 Pa.C.S. § 1123.1(a).

[4] 8 Pa.C.S. § 1121(a)(5).

[5] 8 Pa.C.S. § 1121(a)(2).

[6] 8 Pa.C.S. § 1124.

Ethics and Conflicts of Interest

The Public Official and Employee Ethics Act[1] assures citizens that the financial interests of public officials and nominees and candidates do not conflict with the public trust. The act promotes full financial disclosure of officials and employees, provides standards for conduct regarding conflicts of interest and possible financial impropriety, and establishes the State Ethics Commission to promote, administer and facilitate enforcement of the act.

Important Definitions

"Public Official" includes "any person elected by the public or elected or appointed by a governmental body or an appointed official in the executive, legislative or judicial branch of this Commonwealth or any political subdivision thereof, provided that it shall not include members of advisory boards that have no authority to expend public funds other than reimbursement for personal expense or to otherwise exercise the power of the State or any political subdivision thereof."[2]

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

- Contracting or procurement;
- Administering or monitoring grants or subsidies;
- Planning or zoning;
- Inspecting, licensing, regulating, or auditing any person; or
- Any other activity where the official action has an economic impact of greater than a *de minimis* nature on the interests of any person."[3]

The act also contains definitions of "Candidate" and "Nominee"—two additional public figures subject to the act.

Restricted Activities

The act enumerates "Restricted Activities" in which parties subject to the act may not engage.[4] Those most frequently encountered are:

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[1] 65 Pa.C.S. §1101 et. seq. **Note: This act is repealed insofar as it is inconsistent with the Act of July 5, 2012, P.L. 1102, No. 132, known as the State-Owned University Intellectual Property Act, which applies to all economic development transactions entered into by state-owned universities and system employees.**

[2] 65 Pa.C.S. § 1102.

[3] *Id.*

[4] *See* 65 Pa.C.S. § 1103. *See also Shaulis v. Pennsylvania State Ethics Com'n,* 574 Pa. 680, 682 (2003) (holding that Section 1103(g) is unconstitutional as applied to former government employees who are also attorneys since the Pennsylvania

Conflict of Interest. No public official or public employee shall engage in conduct that constitutes a "conflict of interest," broadly defined as use of the authority of one's office or employment, or confidential information received through official duties, for the substantial (more than "*de minimis*") private pecuniary benefit of that person,[5] a member of his or her immediate family, or a business of which that person or a member of his or her immediate family is associated.[6]

Seeking Improper Influence. No one shall offer an official, employee, candidate, nominee or member of his or her immediate family, or business with which that person is associated, anything of monetary value with the understanding that any official action or judgment of the official, employee, candidate or nominee would be influenced thereby.

Accepting Improper Influence. None of the above-mentioned parties shall solicit or accept anything of monetary value based on an understanding that they would be influenced in the discharge of their public duties thereby.

Contracts. No public official, public employee, or his or her spouse or child, or any business in which that person or any of his or her immediate family is associated, shall enter into any contract valued at $500 or more with the governmental body with which the official or employee is associated, or any subcontract valued at $500 or more with a party that has contracted with the official or employee's governmental body unless the contract was awarded publicly, with full public notice and disclosure. In such a case, the official or employee shall not have any supervisory or overall responsibility for the administration of the contract. Any contract made in violation of this provision may be voided by a court of competent jurisdiction if a suit is commenced within 90 days of the making of the contract or subcontract.

Voting Conflicts. Unless otherwise provided for in the Pennsylvania Constitution or other law, any public official, who in the discharge of his or her official duties would be required to vote on a matter that would result in a conflict of interest, shall abstain from voting and publicly disclose in writing to the person responsible for preparing minutes the nature of the conflict. If this abstention results in an inability of the body to take action, then the conflicted member may be permitted to vote if the disclosure is made. Also, in three-member governing bodies, if the abstention of a member results in a tie vote, the member may break the tie provided proper disclosure is made.

Supreme Court has the "exclusive authority to regulate the conduct of an attorney insofar as it constitutes the practice of law." – Section 1103(g) states that "Former Official or Employee. No former public official or public employee shall represent a person, with promised or actual compensation, on any matter before the governmental body with which he has been associated for one year after he leaves that body.")

[5] The Pennsylvania Supreme Court held that in order to violate the conflict of interest provisions in Title 65 of the Pennsylvania Consolidated Statutes, Section 1103 (a), "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." *See Kistler v. State Ethics Comm'n*, 610 Pa. 516, 528 (2011).

[6] *See Bixler v. State Ethics Com'n,* 847 A.2d 785 (Pa. Cmwlth. 2004) (township supervisor's action of suggesting at a public meeting that township vehicles could be taken to the auto repair business where he was employed fell within the *de minimis* exclusion since the auto repair business only received $561.77 in net profit and there was an insignificant effect on both the township and the business). More recently, the Pennsylvania Supreme Court has held "private pecuniary benefit" to mean private financial gain. *See Commonwealth of PA vs. Veon*, 150 A.3d 435 (Pa. 2016).

State Ethics Commission

The State Ethics Commission is also created by the act. Perhaps the most important power of the Commission is issuing orders and findings pursuant to ethics investigations. The Commission may hold hearings, take testimony, issue subpoenas and compel the attendance of witnesses.[7] Should the Commission find a violation of the act that results in financial gain, it can order restitution plus interest to the appropriate governing body and make recommendations to law enforcement officials for criminal prosecution or dismissal of charges.[8] Investigations must be made within five years of the alleged occurrence of a violation of the act.

Penalties for violation of the act are serious. Anyone who engages in a conflict of interest or who offers, seeks or solicits improper influence commits a felony and, upon conviction, may pay a fine of not more than $10,000 and/or may be imprisoned for not more than five years. Anyone who engages in any other restricted activity or violates the financial disclosure provisions of the act commits a misdemeanor and could be fined up to $1,000 and/or may be imprisoned for not more than one year. Furthermore, anyone found to have made financial gain as a result of a violation of the act "shall pay a sum of money equal to three times the amount of the financial gain resulting from such violation into the State Treasury or the treasury of the political subdivision."[9]

The act also provides for remedies for anyone harmed by a person who engages in wrongful use of the act by filing a frivolous complaint, including fees and costs, defamation damages, actual pecuniary damages and damages for emotional distress.

For more information on the Public Official and Employee Ethics Act and the State Ethics Commission, including a request for an advisory or the filing of a complaint, visit the Commission's website http://www.ethics.pa.gov (Nov. 15, 2017).

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[7] *See* 65 Pa.C.S. § 1107.

[8] *Id.*

[9] 65 Pa.C.S. § 1109(c).

Surcharge: Accountability of Officials for Misuse of Public Funds

Pennsylvania law provides a system by which the actions of municipal officers and employees, in the context of expenditure or use of public funds, may be "checked" or questioned by other elected officials, taxpayers and the courts. While there are limitations on this system, it serves as a powerful tool to ensure the accountability of elected or appointed municipal personnel.

"The term 'surcharge' generally refers to the imposition of personal liability on a fiduciary[1] for willful or negligent misconduct in the administration of his or her fiduciary duties. As used in [municipal codes], the word 'surcharge' usually refers to charges assessed against municipal officers, officials, employees, or other persons who have access to or control over [municipal funds]."[2]

As inferred by the court in the quote above, most municipal codes[3] contain provisions whereby those in control of municipal funds may be forced to reimburse the municipality for the mismanagement, misappropriation, or otherwise wrongful or unlawful use or expenditure of public monies.[4] Typically, whether the official or employee in question willfully or intentionally caused an unlawful loss to the municipality is not determinative.[5] The chief inquiry is whether the municipality suffered a "financial loss" as a result of the conduct of the official or employee. Also, the financial loss suffered by the municipality need not have been one that benefited the official(s), such as a board of supervisors authorizing "double" payments to themselves. For a surcharge based on a violation of law or an act beyond the official's authority, a surcharge is often limited to the municipality's financial loss to the extent that it exceeds the cost that would have been incurred had the proper procedure been followed.[6]

Auditors and Controllers. Surcharges are usually raised and levied through the final annual audit of municipal elected or appointed auditors and controllers. Absent fraud or criminal activity on the part of a municipal official, this is the exclusive method by which mismanagement of

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[1] "One who owes to another the duties of good faith, trust, confidence and candor." Bryan A. Garner (ed.), Black's Law Dictionary, 7th ed., West Group, St. Paul, Minn., 1999, p. 640.

[2] *In re Bethlehem Township Annual Audit and Financial Report 1982,* 8 Pa.D.&C.4th 601, 604 (1990), *aff'd and opinion adopted by* 585 A.2d 586 (Pa. Cmwlth. 1991).

[3] The Third Class City Code, 11 Pa.C.S. § 10101 et seq., apparently has no specific provisions that empower the controller to impose surcharges on city officials or employees. Many home rule and optional plan municipalities have audit and surcharge provisions similar to those in the various codes.

[4] The County Code, Act 130 of 1955, § 1730; Borough Code, 8 Pa.C.S. § 1059.3; The First Class Township Code, Act 331 of 1931, § 1003; The Second Class Township Code, Act 69 of 1933, § 907.

[5] *Dougherty v. Borough of Meshoppen,* 612 A.2d 595 (Pa. Cmwlth. 1992), *citing Mascara Appeal,* 529 Pa. 81 (1992); *Likovich Appeal,* 347 Pa. 40 (1943) ("Surcharges have been imposed upon public officials . . . despite their reliance on the advice of legal counsel or good faith beliefs that they were acting properly." *Id.*).

[6] There exist other "surcharge" provisions of municipal codes that specifically set the liability of municipal officials. *See* The Third Class City Code, 11 Pa. C.S. § 11902; Borough Code, § 1403; and The First Class Township Code, § 1802.1, setting joint and several surcharge liability at 10 percent of contract price for deliberate evasion of contract advertising requirements in third class cities, boroughs and first class townships, respectively.

municipal funds may be remedied.[7] After the appeal period for the annual report has passed, the surcharge contained within the report may be reduced to a civil judgment against the public official or employee in favor of the municipality.[8] Should a report reflect a surcharge on a public employee or official, that person may appeal the report to the county court of common pleas. The audit has a presumption of validity, and the burden is on the public official to show that the surcharge is invalid. In establishing the record in the appeal, the account(s) of the official are examined anew. *Any challenge to an audit must be brought within a specified period of time after it is filed[9] or the audit may not later be challenged, barring extraordinary circumstances.*

Role of the Citizen. Taxpayers may ask their auditors or controllers to investigate or impose a surcharge on a public official. Should the annual audit fail to reflect the requested surcharge, the taxpayer may appeal the audit as would a public official.[10] The taxpayer in most cases is required to post a bond to cover costs in the event that a decision is reached that is not more favorable than that proposed by the auditors.[11] At this juncture, the burden is on the taxpayer to prove the municipality suffered financial loss or that the audit is otherwise inaccurate.[12] Should the court find that the surcharge is warranted, it may impose such on an official or employee. Surcharge may not be used to reach otherwise "private" parties who may have been appropriated public monies, but only public officials and employees who have control or regular access to those funds.[13] The appropriate statutory deadline for challenging the report is applicable to taxpayers and will foreclose any remedy to the alleged mismanagement of funds if missed. *Challenging the annual report of the auditors or controller is the primary means by which a citizen may attempt to unilaterally remedy the mismanagement or illegal use of municipal funds.*

Because of the mechanism of surcharge and the ability of the taxpayer to actively participate as a "watchdog" in municipal spending, the annual audit is a crucial event in municipal government. The various municipal codes require publication of the audit in newspapers of general circulation, and a derivative statement is filed with the Pennsylvania Department of Community and Economic Development. Although the "window" for the remedy of surcharge is narrow and citizens must generally rely on the diligence of their auditors and controllers to protect the public coffers, the extensive publication of municipal finances and the possibility that municipal officials and employees may have to "go into their pocket" whenever they are responsible for financial loss suffered by a municipality, adds an essential level of accountability to local government.

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[7] *Bennett v. Mountain View School Board,* 693 A.2d 651, 654 (Pa. Cmwlth. 1997) (citing cases that support this principle involving various municipalities).

[8] Borough Code, § 1059.9; The First Class Township Code, § 1008; The Second Class Township Code, § 913.

[9] The County Code, § 1731 (60 days for parties other than the Commonwealth); Borough Code, § 1059.4 (40 days); The First Class Township Code, § 1009 (45 days); The Second Class Township Code, § 909 (45 days).

[10] In counties, 10 or more taxpayers must jointly challenge the audit. *See* The County Code, § 1731.

[11] Third Class City Code, § 11705; Borough Code, § 1059.5; The First Class Township Code, § 1010; The Second Class Township Code, § 910. There is no specific requirement in the County Code that taxpayers who file an appeal must post a bond.

[12] *In re 1980 Auditors' Report for New Castle Tp.,* 482 A.2d 287, 290 (Pa. Cmwlth. 1984).

[13] *In re Bethlehem Tp. Annual Audit and Financial Report,* 585 A.2d 586 (Pa. Cmwlth. 1991).

Removal from Office[1]

The Pennsylvania Constitution provides the exclusive grounds for the removal of an elected official.[2] Removal requires the elected official's conviction of an infamous crime or the common law crime of misbehavior in office. The relevant provisions of the Pennsylvania Constitution are Article II, Section 7 (relating to ineligibility by criminal conviction of an infamous crime),[3] Article VI, Section 6 (relating to officers liable to impeachment for misbehavior in office), and Article VI, Section 7 (relating to removal of civil officers for conviction of an infamous crime, misbehavior in office, or reasonable cause). These provide the exclusive methods for removing elected officials, including elected local officials. In conformity with the Constitution, a court is authorized to remove an elected official upon his or her conviction of an infamous crime.[4]

Infamous Crime. These include crimes such as forgery, perjury, embezzlement of public moneys, bribery, or like offenses. "[A] crime is infamous for purposes of Article II, Section 7, if its underlying facts establish a felony, a *crimen falsi*[5] offense, or a like *offense involving the charge of falsehood that affects the public administration of justice*."[6]

Misbehavior in Office. "Misbehavior in office" as an impeachable offense under the Pennsylvania Constitution, Article VI, Section 6, is equivalent to the common-law crime of misconduct in office variously called misbehavior, misfeasance or misdemeanor in office. It occurs when there is

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[1] It should be understood that the question of whether a person has the requisite qualifications to hold office (e.g., with regard to age, residency, not holding an incompatible office, etc.) is distinct from the question of removal from office under the Constitution. *See Andrezjwski v. Borough of Millvale,* 543 Pa. 539, 540, note 2 (1996) ("a challenge to the qualifications of a person to run for or hold an elective office is fundamentally different from an attempt to remove a person from office for misbehavior after a valid election").

[2] *See, e.g., South Newton Tp. Electors v. South Newton Tp. Supervisor, Bouch,* 575 Pa. 670 (2003); *In re Petition to Recall Reese,* 542 Pa. 114 (1995). The opinion of the Pennsylvania Supreme Court in *South Newton* alludes to a possible exception to this rule. In *South Newton,* the Court addressed an argument raised by the municipality which relied on a 1926 Pennsylvania Supreme Court decision, *Georges Tp. Sch. Directors,* 286 Pa. 129 (1926). Based on *Georges,* the municipality argued that a contemporary statutory means for removal of an elected public official that differs from the means specified under our current constitution should be upheld if the contemporary statute utilized the same grounds and methods for removal as did a statute that preexisted the 1874 Pennsylvania Constitution and was constitutional under the pre-1874 scheme. *See* 575 Pa. 677-678. The Court found that the statute being considered utilized different means for removal than those statutes that would have applied prior to 1874, and therefore, was unconstitutional. No appellate court in Pennsylvania has utilized this analysis to uphold any removal provisions currently contained within the various municipal codes applicable to a majority of Pennsylvania municipalities.

[3] It could be argued that Article II, Section 7, is not a removal provision in the strict sense of removing a validly elected public official from office. It could be considered a disqualification provision upon which *quo warranto* (challenges of right or title to office) have been based. *See, e.g., Com. ex rel. Baldwin v. Richard,* 561 Pa. 489 (2000).

[4] *See* 542 Pa. at 124, *citing Citizens Committee to Recall Rizzo v. Board of Elections,* 470 Pa. 1, 35 (1976) (Nix, J., concurring).

[5] *Crimen falsi* is defined as perjury or "any other offense that involves some element of dishonesty or false statement." Bryan A. Garner (ed.), *Black's Law Dictionary,* 7th ed., West Group, St. Paul, Minn., 1999, p. 379.

[6] *Com. ex rel. Baldwin v. Richard,* 561 Pa. 489, 499 (2000) (emphasis added); *see also Bolus v. Fisher,* 785 A.2d 174 (Pa. Cmwlth. 2001), *aff'd,* 568 Pa. 600 (2001).

the breach of a positive statutory duty or the performance by a public official of a discretionary act with an improper or corrupt motive.[7]

Reasonable Cause. In addition to the "self-executing" removals upon conviction in court (i.e., sentencing) of an infamous crime or misbehavior in office, as discussed above,[8] or removal after impeachment pursuant to Article VI, Section 6, of the Pennsylvania Constitution, another means of removing an elected public officer, set forth in Article VI, Section 7, is removal "by the Governor for reasonable cause, after due notice and full hearing, on the address of two thirds of the Senate." While discretion may reside with the Senate to find what constitutes "reasonable cause," there is no significant modern case law adjudicating the issue.

		Grounds for Removal[9]		
		Infamous Crime	**Misbehavior in Office**	**Reasonable Cause**
Methods of Removal	**Impeachment**		Article VI, § 6	
	By Governor upon address of Senate			Article VI, § 7
	Conviction	Article II, § 7[10] Article VI, § 7	Article VI, § 7	

[7] *See Larsen v. Senate of Pennsylvania,* 646 A.2d 694, 702 (Pa. Cmwlth. 1994) (discussing the "Preparatory Committee Report on the Judiciary for the Pennsylvania Constitution Convention, 1967-1968"); *see also Commonwealth v. Bellis,* 508 Pa. 122, 126 (1985), and *Commonwealth v. Peoples,* 345 Pa. 576 (1942).

[8] *See* Robert E. Woodside, *Pennsylvania Constitutional Law,* Murrelle Printing Company, Inc., Sayre, Pa., 1985, p. 455.

[9] This discussion does not specifically explore the removal of elected judicial officers who may be removed from office pursuant to the provisions of Article V of the Pennsylvania Constitution, in addition to the sections discussed herein. *See* Pa. Const. art. V, § 18.

[10] *See supra,* note 3.

Governmental Immunity & Municipal Liability

Traditionally, under the doctrine of governmental immunity, a local governmental unit in Pennsylvania was immune from tort liability, i.e., for damages resulting from an injury caused by the municipality's negligent violation of another person's rights, when the municipality was acting in a governmental rather than a proprietary role.[1]

After the courts abrogated the common-law doctrine of governmental immunity, the tort liability of local governments became the subject of statute, first set forth in what is commonly referred to as the Political Subdivision Tort Claims Act and now contained in the Pennsylvania Consolidated Statutes, Title 42 (Judiciary and Judicial Procedure), Part VII (Civil Actions And Proceedings), Chapter 85 (Matters Affecting Government Units), Subchapter C (Actions Against Local Parties).[2]

The Legislature has established the following exceptions to governmental immunity,[3] providing that a municipality may be liable for acts in eight limited areas:

(1) Vehicle liability.

(2) Care, custody or control of personal property

(3) Real property.

(4) Trees, traffic controls and street lighting.

(5) Utility service facilities.

(6) Streets.

(7) Sidewalks

(8) Care, custody or control of animals.

The statutory provisions relating to governmental immunity set forth in Title 42 of the Pennsylvania Consolidated Statutes do not afford immunity against suits under federal laws like those protecting civil rights. Also, no immunity would exist where the Commonwealth specifically has allowed in another law for the possibility that civil damages may be recoverable, as is the case, for example, under Act 169 of 1986, the Whistleblower Law.[4]

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[1] For a discussion of the distinction between governmental and proprietary functions of a governmental unit, *see* the *Deskbook* article entitled "Can a Municipal Governing Body Enter Into a Contract That Will Bind Future Governing Bodies?"

[2] 42 Pa.C.S. § 8541 et seq.

[3] A more complete description of these exceptions to the statutory immunity is provided in 42 Pa.C.S. § 8542(b).

[4] 43 P.S. § 1421 et seq.

Application: a vehicle in the possession and under the control of a municipality collides with a private vehicle. A citizen whose car has been damaged as a result of the negligent operation of a municipal vehicle often is surprised when the municipality states it is liable for damages only to the amount of the deductible of the citizen's collision insurance coverage.

The municipality is correct. Although "vehicle liability" is one of the eight limited areas in which a municipality may be held liable for its negligent acts, the law that permits this liability also limits a person's recovery to the extent that the person either receives or is entitled to receive insurance benefits (other than life insurance) for damages resulting from a municipality's negligence.[5]

In effect, the amount of these insurance benefits is deducted from the amount of damages that would otherwise be recoverable. Thus, the citizen whose vehicle was damaged can recover only the amount of the deductible on his or her insurance.[6]

[5] *See* 42 Pa.C.S. § 8553(d)

[6] The deduction of insurance benefits is applied to a jury verdict or judgment of damages before it is "molded" to the statutory cap on damages. *See Fernandez v. City of Pittsburgh*, 643 A.2d 1176 (Pa. Cmwlth. 1994), *appeal denied*, 675 A.2d 1253 (Pa. 1996).

Discretionary vs. Ministerial Acts and the Action of Mandamus

Perhaps the most effective way a citizen may influence municipal government is to attend and actively participate in the public meetings of the municipal governing body. Citizens have a right to make public comments at these meetings, subject to reasonable rules of the governing body. With regard to the actions of municipal officials, sanctions exist for those acts that are criminal, unethical, or which constitute an unauthorized use of funds. Nevertheless, the mere fact that a citizen disagrees with the manner in which a municipality is being run does not, in and of itself, give rise to any right to "force" the municipal officials to change or alter their decisions or their conduct.

What Are Discretionary Acts? Pennsylvania case law is replete with examples of discretionary powers of municipalities. Discretionary acts include taxing, issuing bonds, appointing municipal employees, inspecting properties for land use violations, passing or repealing ordinances, enforcing ordinances, erecting public improvements, and issuing licenses.[1] As a rule, performance of discretionary acts cannot be compelled by a court as a result of a citizen suit, because the court will not substitute its judgment for that of the municipality. Nevertheless, there is some authority which indicates that a court may compel a municipal official to exercise discretion so as to arrive at some decision.[2] "While mandamus does not lie to compel a government body which is vested with discretionary authority to use it in a particular manner, mandamus is appropriate to compel a government body to perform a discretionary act when it has a legally mandated duty to perform such act and has refused to do so."[3]

What Are Ministerial Acts? A ministerial act has been defined as one that a public officer is required to perform under a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority.[4] Basically, if all discretionary precursors to an official act have been completed, and all that remains to be done is the act itself, courts may compel a municipal official to perform such action:

> "[T]he purpose of mandamus is to compel the performance of a single ministerial act; it is not usually the appropriate remedy where the relief sought is a general course of official conduct or a series of actions."[5]

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[1] *See Germantown Business Association v. City of Philadelphia,* 534 A.2d 553 (Pa. Cmwlth. 1987); McQuillin Mun. Corp. § 51.17 (3d ed., 2004).

[2] *Madden v. Jeffes,* 482 A.2d 1162 (Pa. Cmwlth. 1984); *Hotel Casey Co. v. Ross,* 343 Pa. 573, 583 (1942); *Commonwealth ex rel. Kelley v. Pommer,* 330 Pa. 421, 439, 440 (1938).

[3] *Department of the Auditor General, Commonwealth of Pennsylvania v. State Employees' Retirement System,* 836 A.2d 1053, 1069 (Pa. Cmwlth. 2003), *citing Hugie v. Horn,* 730 A.2d 1042 (Pa. Cmwlth. 1999).

[4] *Meadville Area School District v. Department of Public Instruction,* 398 Pa. 496 (1960); McQuillin Mun. Corp. § 51.19 (3d ed., March 2017 update).

[5] *Dorris v. Lloyd,* 375 Pa. 474 (1953).

What Is an Action of Mandamus? The procedure by which a citizen can force a municipality to take action is called a petition for a writ of mandamus. This is "a writ issued by a superior court to compel a lower court or government officer to perform mandatory or purely ministerial duties correctly."[6] One seeking a writ of mandamus against a municipality or municipal official has a heavy burden. The plaintiff must establish: (1) a clear right to relief;[7] (2) that a corresponding duty exists in defendants;[8] (3) the lack of any other adequate remedy at law;[9] and (4) that the plaintiff has demanded performance of the duty, and the defendant has refused to so perform.[10] A private plaintiff who seeks to enforce a public duty must also establish "an individual and beneficial interest in the litigation independent of that which is held by the public at large."[11] As previously stated, "the courts have repeatedly held that mandamus can issue only where [a municipality] has failed to perform a ministerial duty . . . which [requires] the exercise of neither judgment nor discretion . . . ."[12]

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[6] Bryan A. Garner (ed.), *Black's Law Dictionary,* 7th ed., West Group, St. Paul, Minn., 1999, p. 973.

[7] *Philadelphia Firefighters' Union, Local 22, et al v. City of Philadelphia*, 119 A.3d 296, 303-304 (Pa. 2015).

[8] *Id.*

[9] *Id.*; Pa. R.C.P. No. 1095.

[10] Pa. R.C.P. No. 1095.

[11] *Carino v. Board of Commissioners of Armstrong County,* 468 A.2d 1201, 1205 (Pa. Cmwlth. 1983), *quoting Dombrowski v. Philadelphia,* 431 Pa. 199, 204 (1968).

[12] *Anderson v. City of Philadelphia,* 348 Pa. 583, 586-587 (1994).

Selected Examples of Actions Against Municipalities

Municipalities have been delegated the authority to sue and be sued. The right of action against a municipality, to a large degree, is within the discretion of the Legislature and may be withheld, granted absolutely or granted on condition. This article provides a brief description of some common legal actions private citizens may bring against municipalities or municipal officials and employees.

Equity Actions in General. Under proper circumstances, an injunction will lie to restrain a municipality from acts inflicting irreparable damage to private rights or private property.[1] For example, an equity action may be brought against a municipality for maintaining a nuisance on private property.[2] On the other hand, a municipality may not be enjoined from enacting an ordinance unless doing so is beyond the scope of its power and would, in itself, cause an irreparable injury.[3] Also, an injunction will not lie for enforcement of ordinances.[4] Taxpayers may bring injunction actions against public officials to restrain them from wrongfully expending public funds.[5] Generally, any injunction against public officials must involve illegal acts that are detrimental to the municipality and so imminent and substantial as to make it proper that the taxpayers be protected.[6]

There exist several other equity actions that may be brought against municipalities, such as specific performance and quiet title actions, but a discussion of the many possible equity actions is beyond the general scope of this section.

Quo Warranto. This is a legal action brought against a public official, not the municipality itself. Established in Pennsylvania as the only method of challenging a public official's right to hold office, a quo warranto action must be brought by the county district attorney or the Attorney General. The only exception to this rule is where a private party solicits the Attorney General or district attorney, and these officials refuse to bring the action. In these cases, the private party may bring an equity action seeking removal of the official or bring a mandamus action (see below) petitioning the court to issue a writ compelling the Attorney General or district attorney to bring a quo warranto action. Only a private party with a special right or interest distinguishable from a right or interest of the public generally may bring such an action.[7]

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[1] *See Penn Iron Co. v. Lancaster,* 25 Pa. Super. 478 (1904); *see also Price v. Grencavage,* 531 A.2d 108 (Pa. Cmwlth. 1987).

[2] *See Miller v. Borough of New Oxford,* 165 A. 766 (Pa. Super. 1933).

[3] *See* 17 McQuillin Mun. Corp. § 49:60 (3rd ed.)

[4] *Reed v. Harrisburg City Council*, 927 A.2d 698 (Pa. Cmwlth. 2007).

[5] *Theil v. Philadelphia,* 245 Pa. 406 (1914).

[6] Another option exists pursuant to the Declaratory Judgment Act (42 Pa.C.S. § 7531 et seq.), whereby any person with a real and substantial or imminent interest may bring an action to have an ordinance examined for validity. The act of rendering a declaratory judgment is within the discretion of the court.

[7] *See Coghlan v. Borough of Darby,* 844 A.2d 624 (Pa. Cmwlth. 2004); *In re 100 or More Electors of Clairton,* 546 Pa. 126 (1996).

Mandamus. This is an action brought against a municipality or public official requesting the court to compel the municipality or official to take a specific action. It is defined as "a writ issued by a superior court to compel a lower court or government officer to perform mandatory or purely ministerial duties correctly."[8] One seeking a writ of mandamus against a municipality or public official has a heavy burden. Although generally considered a legal action, it is similar to other equity actions against municipalities in that the plaintiff must establish a clear right to relief,[9] the lack of any other adequate remedy at law,[10] and that the plaintiff has demanded performance of the duty and the defendant has refused to so perform.[11] A private plaintiff who seeks to enforce a public duty must also establish "an individual and beneficial interest in the litigation independent of that which is held by the public at large."[12] Ordinarily, a court will not compel a discretionary act, but where an action is taken, a court "will review the exercise of the actor's discretion where it is arbitrarily or fraudulently exercised or is based on a mistaken view of the law."[13]

Taxpayer Suits. A taxpayers' suit is technically a representative or class suit, whereby a private party brings an action against a municipality for illegal acts injurious to their interests as taxpayers through misuse, disuse or spoliation of public funds or property. In Pennsylvania, a taxpayer bringing such an action must have a "substantial, direct and immediate" interest in the alleged wrongdoing of the municipality that "surpasses the common interest of all citizens in procuring obedience to the law."[14] The only exception to this "special interest" rule is where: "1. governmental action would go otherwise unchallenged; 2. those directly affected are beneficially affected; 3. judicial relief is appropriate; 4. redress through other channels is not available; and 5. no one else is better positioned to assert the claim."[15]

Municipal Liability for Torts. As discussed in another section of this publication, except as permitted by statute, no local agency is liable for any damages on account of any injury to a person or property caused by any action of a local agency or any employee thereof or any other person.[16] This immunity extends to almost any type of injury, including physical, mental, reputational or economic, unless the act or omission giving rise to liability falls under one of the statutory exceptions.[17]

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[8] Bryan A. Garner (ed.), *Black's Law Dictionary,* 7th ed., West Group, St. Paul, Minn., 1999, p. 973.

[9] *Madden v. Jeffes*, 482 A.2d 1162, 1165 (Pa. Cmwlth. 1984).

[10] Pa.R.C.P. 1095.

[11] *Id.*

[12] *Carino v. Board of Commissioners of Armstrong County,* 468 A.2d 1201,1205 (Pa. Cmwlth. 1983), *quoting Dombrowski v. Philadelphia,* 431 Pa. 199, 204 (1968).

[13] *County of Allegheny v. Commonwealth of PA,* 518 Pa. 556, 560 (1988) (*citing County of Allegheny v. Commonwealth of PA,* 507 Pa. 360, 375 (1985).

[14] *In re Application of Beister,* 487 Pa. 438 (1979).

[15] *Id.* at 851-852.

[16] *See* 42 Pa.C.S. § 8541 et seq. (relating to governmental immunity).

[17] *See* the *Deskbook* article entitled "Governmental Immunity & Municipal Liability."

Federal Actions. Among other types of actions that may be brought by citizens against municipalities are Sections 1981 and 1983 claims authorized by federal law.[18] To establish a claim under Section 1981, a plaintiff must allege facts in support of certain requisite elements, including that the plaintiff is a member of a racial minority, and there exists intent to discriminate on the basis of race by the defendant. The two essential elements necessary to establish a Section 1983 claim are: (1) that the conduct complained of was committed by a person acting under color of state law, and (2) that the conduct deprived the plaintiff of rights, privileges or immunities secured by the United States Constitution or other laws of the United States.

[18] 42 U.S.C. §§ 1981, 1983.

What is the "Police Power"?

Any examination of governmental powers necessarily involves a discussion of the term "police power." It is considered one of the most essential of governmental powers and is subject to the least limitations. Attempts to define the term are somewhat elusive and include the following:

- The power of government to promote the public health, morals or safety, and the general well-being of the community.
- The inherent power of government to enact and enforce laws for the promotion of the general welfare.
- The inherent power by which the state regulates private rights in the public interest.
- A power of government that extends to all the great public needs.

Admittedly, these definitions are sweeping, but the following list of some examples of governmental use of the police power may assist in understanding the extent of its practical application:

- Protection of property
- Use of property in general (zoning)
- Building regulations
- Regulation of billboards, signs, and other structures or devices for advertising purposes
- Prevention of and protection against fire
- Keeping and use of animals
- Prohibition of nuisances in general
- Restriction of smoke and offensive or noxious odors
- Removal and disposition of garbage, refuse and filth
- Removal of dead animals
- Regulation of occupations and employment

The Commonwealth delegates limited police power to municipalities, and a local government's police power may be said to be subject to its enabling legislation or home rule charter. The municipal codes authorize municipalities to exercise their police power not only pursuant to specific grants of authority, but also pursuant to a general welfare clause or a general grant of powers clause. The delegation of the police power to municipalities through a general welfare

clause does not mean that municipalities have unlimited police power or even the same degree of police power as the Commonwealth.[1]

Clearly there are limits on a municipality's ability to use its police power to control the persons and property of citizens. The general rule is that the means employed in the exercise of the police power can be neither arbitrary nor oppressive, and there must be a reasonable and substantial relationship between the means employed and the end to be attained.[2] Moreover, the end to be attained must be a public one, specifically the public health, public safety or public morals, or some other facet of the "general welfare." Also, the exercise of delegated police power by a municipality is limited to its municipal functions. Municipal corporations have been granted limited police power over matters of local concern and interest, but the scope of such power does not extend to subjects inherently in need of uniform treatment or to matters of general public interest that necessarily require exclusive state policy.

A government's exercise of its police power is presumed to be constitutional, and anyone challenging an exercise of the police power has the burden of establishing that the use of the police power was arbitrary and unreasonable and unrelated to the public health, safety, morals or general welfare. Courts will not scrutinize the wisdom of the policy that impelled the government's decision to exercise its police power and will not substitute their judgment as to whether the best means of achieving the desired result were used. Thus, although the exercise of police power often causes tensions between the government and its citizens, if a challenge is raised, a court should examine only whether the statute, ordinance or regulation was promulgated for a legitimate "police power" purpose, and whether it is carried out in an unreasonable and arbitrary manner.

[1] *See* the *Deskbook* article entitled "Dillon's Rule – State Primacy Over Local Governments."

[2] *Gambone v. Commonwealth,* 375 Pa. 547, 101 A.2d 634 (1954).

Public Nuisances

A nuisance has been defined as the unreasonable or unlawful use of property that causes damage, injury, inconvenience or annoyance to another in the enjoyment of his or her reasonable rights.[1]

A nuisance can be a public nuisance or a private nuisance. The important difference between public and private nuisances is not the nature of the activity itself, but the party the nuisance affects.[2] In the case of a public nuisance, it is the general public, and not merely one or more private individuals that is impacted.[3] However, it is possible for a nuisance to be both a public and a private one because of the injury it causes to a single individual or group of individuals.[4]

This discussion focuses on the topic of public nuisances because they are of most concern to local governments.

Definition

A public nuisance is an unreasonable interference with a right common to the general public. Circumstances considered by courts in determining whether an interference with a public right is unreasonable include the following:

- Whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience; or
- Whether the conduct is proscribed by a statute, ordinance or administrative regulation; or
- Whether the conduct is of a continuing nature or has produced a permanent or long lasting effect, and, as the person knows or has reason to know, has a significant effect upon the public right.[5]

A public nuisance does not have to be explicitly prohibited by statute, and certain acts or conditions have been declared a public nuisance as a matter of common law.[6] What is required is a showing that the act or condition unreasonably interferes with the rights of the public.[7] Interference with a public right is unreasonable when the conduct involves a significant interference with the

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[1] *See Kramer v. Pittsburgh Coal Co.,* 341 Pa. 379 (1941).

[2] *Phillips v. Donaldson,* 269 Pa. 244 (1920).

[3] *Duquesne Light Company v. Pennsylvania American Water Company,* 850 A.2d 701 (Pa. Super. 2004); *Muehlieb v. City of Philadelphia,* 574 A.2d 1208 (Pa. Cmwlth. 1990). *See also* Jeff Feirick, "Pennsylvania Nuisance Law," The Agricultural Law Research and Education Center, The Pennsylvania State University, The Dickinson School of Law, 2000.

[4] *See, e.g., Com. ex rel. Shumaker v. New York & Pennsylvania Co.,* 367 Pa. 40, 47 (1951).

[5] 574 A.2d at 1211, *citing* Restatement of Torts (Second) § 821B; *see also* Feirick, *supra,* note 3.

[6] *Com. v. MacDonald,* 464 Pa. 435 (1975), *cert. denied, Pennsylvania v. MacDonald,* 429 U.S. 816 (1976); *see also* Feirick, *supra,* note 3.

[7] *Id.*

public's safety, the public peace, the public comfort or the public convenience.[8] To be a public nuisance, the conduct must be continuous and repeated, not a single isolated act. In order for the offender to be held criminally liable, the nuisance complained of must be the natural and direct result of the offender's act.[9]

Nuisance can be distinguished from trespass. Trespass is a direct infringement of one's right of property; nuisance is the result of an act that is not necessarily unlawful in and of itself, but which is harmful because of the consequences that may result from it.[10]

Also, a nuisance does not necessarily involve negligence, and whether one has exercised due care or failed to do so is not a necessary element in determining whether a nuisance exists. However, nuisance and negligence are frequently viewed as partners, with nuisance presupposing negligence "when the omission to remove the nuisance after notice constitutes negligence."[11]

Municipal Regulation

In addition to prosecution of a public nuisance as a misdemeanor under the Pennsylvania Crimes Code,[12] municipalities are authorized to provide for the prohibition of, and seek the abatement of, a public nuisance through the exercise of their police power. However, this authority is justified *only* by the ability to demonstrate that the act constituting a violation of the ordinance did in fact cause a public nuisance. Stated another way, municipalities are not authorized to simply prohibit a nuisance *per se*—that is declare that a particular act results in interference so severe that it would constitute a nuisance under any circumstance.[13]

Municipalities that enact ordinances to provide for the prosecution of public nuisances which exist within the municipalities have often sought to establish the specific conduct that would violate the ordinance. This appears to be facially supported by the special powers provisions of the various municipal codes. For example, Section 1529 of the Second Class Township Code states:

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[8] *See* 574 A.2d at 1211; *see also* Feirick, supra, note 3.

[9] 5B Summ. Pa. Jur. 2d, Criminal Law § 33:2 (2017).

[10] 341 Pa. at 381.

[11] *Reedy v. City of Pittsburgh,* 363 Pa. 365, 368 (1949).

[12] 18 Pa.C.S. § 6504:

> § 6504. Public nuisances.
>
> Whoever erects, sets up, establishes, maintains, keeps or continues, or causes to be erected, set up, established, maintained, kept or continued, any public or common nuisance is guilty of a misdemeanor of the second degree. Where the nuisance is in existence at the time of the conviction and sentence, the court, in its discretion, may direct either the defendant or the sheriff of the county at the expense of the defendant to abate the same.

[13] 23 Summ. Pa. Jur. 2d Municipal and Local § 19:22 (2017); s*ee, e.g., Com. v. Creighton,* 639 A.2d 1296 (Pa. Cmwlth. 1994); *Talley v. Borough of Trainer,* 394 A.2d 645 (Pa. Cmwlth. 1978).

> Nuisances.--The board of supervisors may by ordinance prohibit nuisances, including, but not limited to, the storage of abandoned or junked automobiles, on private and public property and the carrying on of any offensive manufacture or business.[14]

However, courts in the Commonwealth have repeatedly interpreted provisions like Section 1529, above, "as authorizing the local governing bodies to declare such activities to be nuisances when, based upon the actual conditions in the [municipality], they constitute nuisances in fact."[15] Commonwealth Court has also addressed whether a municipality not limited to express powers, but enabled by statute to "confer the greatest power of local self-government consistent with the Constitution of this State" such as a home rule municipality, would be authorized to establish a nuisance *per se*. The Court found that it could not on the basis that doing so would exceed constitutional limitations on the exercise of the municipality's police power. "What is not an infringement upon public safety and is not a nuisance cannot be made one by legislative fiat and then prohibited."[16]

Nevertheless, ordinances which appear to establish a nuisance *per se* are not necessarily void, but courts in Pennsylvania are likely to "adopt an interpretation of the ordinance which requires the [municipality] to prove that a nuisance in fact exists in any given case."[17]

Similarly, the converse is also true. Although a person is acting in compliance with other laws and regulations, such as a zoning ordinance, his or her conduct, nevertheless, may constitute a nuisance.[18]

Abatement

Where a nuisance continues at the time of the conviction and sentence, under the Crimes Code nuisance provisions, the court may direct the abatement of the nuisance either by the defendant or by the appropriate governmental authority at the defendant's expense.[19] However, "[w]here a nuisance in fact exists, neither the municipality nor the courts may devise a remedy harsher than the minimum necessary to properly abate the nuisance."[20]

Two considerations are critical in the adoption of ordinances to abate nuisances. One, the nuisance must be a nuisance in fact—not one merely defined as a nuisance by the municipality. And, two, if the remedy includes abatement as part of the penalty, such remedy should be the minimum required to eliminate the nuisance. For example, in the case of a structure, this may mean requiring a sealing or repairing before the municipality seeks to have the structure demolished.

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[14] Act 69 of 1933 (53 P.S. § 66529).

[15] *Kadash v. Williamsport,* 340 A.2d 617, 619 (Pa. Cmwlth. 1975)(*quoting Commonwealth of Pa v. Hanzlik,* 400 Pa. 134 (1960).

[16] 340 A.2d at 621 (*citing Commonwealth of Pa. v. Christopher,* 132 A.2d 714 (Pa. Super. 1957)).

[17] 340 A.2d at 621; *Dole v. Philadelphia,* 337 Pa. 375 (1940) ("Where a reasonable interpretation can be adopted, which will save the constitutionality of an ordinance, it is the court's duty to adopt it.").

[18] 23 Summ. Pa. Jur. 2d, Municipal and Local Law § 19:22 (2017).

[19] 18 Pa.C.S. § 6504.

[20] 23 Summ. Pa. Jur. 2d, Municipal and Local Law § 19:24 (2017), *citing King v. Township of Leacock,* 552 A.2d 741 (Pa. Cmwlth. 1989), *Groff v. Borough of Sellersville,* 314 A.2d 328 (Pa. Cmwlth. 1974).

In Pennsylvania, the Commonwealth has delegated authority to control public nuisances to municipalities by enabling them to enact ordinances under their respective municipal codes or the Pennsylvania Municipalities Planning Code (MPC), although the Commonwealth also controls nuisances in certain instances. Under the MPC, municipalities may adopt zoning and subdivision and land development ordinances to avoid or prevent nuisance situations. For example, a zoning ordinance can avoid or minimize incompatible land use districts, such as residential and industrial, by separating uses from each other with a transitional district, or by providing for a large setback or buffer along the border of the land use that could impact an adjacent, more sensitive land use. Also, subdivision and land development ordinance provisions can require landscaping and screening in commercial developments and larger subdivisions and compliance with environmental protection standards as a condition of approval. Relevant environmental protection standards can cover erosion and sedimentation control, natural feature (e.g., wetland, floodplain, stream, steep slope, aquifer and tree) protection, and mine subsidence or karst (sinkhole) hazards.

In addition to municipalities' ability to exercise their powers and enact and enforce ordinances to abate nuisances, the federal and state governments have the authority to do the same on a range of potential impacts, ranging from water pollution to visual impacts. For example, a transportation-related protection lies with the Junkyard and Automotive Recycler Screening Law,[21] which requires a 1,000-foot buffer from the edge of a highway right-of-way for all junkyards or automotive dismantlers and recyclers established after January 1, 1967. Generally, junkyards or automotive dismantlers and recyclers, which are within 1,000 feet of the edge of the highway right-of-way, must be screened.[22] This state law is based on Federal-Aid Policy Guide for Junkyard Control and Acquisition,[23] which "prescribes Federal Highway Administration policies and procedures relating to the exercise of effective control by the States of junkyards in areas adjacent to the interstate and Federal-aid primary systems."

Illustration: A government ordinance to abate unsafe structures is rationally related to the promotion of the public welfare and is a proper and necessary exercise of a government's police power as long as there is factual evidence to support its application to a specific structure.[24] The process to abate an unsafe structure must still be carried out in a manner that gives the property owner proper notice and the chance to abate the nuisance.[25] If the property owner fails to repair or eliminate the dangerous condition within a reasonable time, then the municipality has the ability to tear down the structure and charge the landowner the cost of disposal.[26]

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[21] Act 4, Special Session 3, of 1996 (36 P.S. § 2719.1 et seq.); *see also* 67 Pa. Code § 451.1 et seq.

[22] Junkyard and Automotive Recycler Screening Law, § 6; 67 Pa. Code §§ 451.2, 451.4.

[23] 23 C.F.R. § 751.1 et seq. (2006).

[24] 21*Herrit v. Code Mgmt. Appeal Bd. of City of Butler,* 704 A.2d 186 (Pa. Cmwlth. 1997), *citing City of Pittsburgh v. Kronzek,* 280 A.2d 488 (Pa. Cmwlth. 1971).

[25] Feirick, *supra,* note 3, *citing Keystone Commercial Properties, Inc. v. City of Pittsburgh,* 464 Pa. 607 (1975).

[26] *Id.*; 23 Summ. Pa. Jur. 2d, Municipal and Local Law § 19:25 (2017).

Some Examples of Municipal Code Sections Authorizing the Regulation or Abatement of Nuisances[1]

Third Class City Code[2]

CHAPTER 123, PUBLIC HEALTH
- Subchapter A. Board of Health
  - Section 12306. Duties of Health Officer.
  - Section 12307. Duties of Board of Health.
  - Section 12308. Powers of Board of Health.
- Subchapter B. Public Nuisances Detrimental to Public Health.
  - Section 12320. Determination of Public Nuisances.
  - Section 12321. Abatement of Public Nuisances by Designated Department.

CHAPTER 124, CORPORATE POWERS
- Section 12414. Nuisances.
- Section 12435. Local Self-Government.

CHAPTER 127A, NUISANCE ABATEMENT
- Section 127A01. Definitions.
- Section 127A02. Report and investigation of public nuisance.
- Section 127A03. Summary abatement.
- Section 127A04. Prior notice of abatement.
- Section 127A05. Abatement by owner.
- Section 127A06. Appeal after notice; hearing.
- Section 127A07. Abatement by city after notice; statement of costs.
- Section 127A08. Assistance in abatement.
- Section 127A09. Salvage of material.
- Section 127A10. Notice of assessment; appeal of charges.
- Section 127A11. Personal liability of owner.
- Section 127A12. Administrative fee and civil penalties.

[1] The municipal codes also authorize the adoption by reference of various uniform codes, such as those dealing with property maintenance, fire and buildings. Such uniform codes generally describe impermissible or nuisance violations and provide abatement procedures.

[2] 11 Pa.C.S. § 10101 et seq.

Borough Code[3]

CHAPTER 10A. MAYOR

Section 10A06. General powers of mayor. Section 10A07. Duties of mayor.

CHAPTER 12. CORPORATE POWERS

Section 1202. Specific Powers.

(4) Nuisances and dangerous structures

(5) Health and cleanliness regulations

(15) Building, housing, property maintenance, plumbing and other regulations (*see also* Chapter 32A) (20)(i)(A) Noxious and offensive businesses

(20)(i)(B) Junk yards and salvage yards

(65) Costs for removal of nuisances

Section 1203. Reserved Powers.

CHAPTER 28. CEMETERIES

Section 2805.1. Neglected or abandoned cemeteries.

Section 2809. Removal of bodies to other cemeteries.

CHAPTER 31. HEALTH AND SANITATION

Section 3105. Powers and duties of health officer.

Section 3106. Powers of board of health.

Section 3107. Entry upon premises.

Section 3108. Abatement of nuisances.

CHAPTER 32A. UNIFORM CONSTRUCTION CODE, PROPERTY MAINTENANCE CODE AND RESERVED POWERS

Section 32A03. Public nuisance.

Section 32A04. Property maintenance code.

Section 32A05. Reserved powers.

The First Class Township Code[4]

ARTICLE XV, CORPORATE POWERS

Section 1502. The corporate power of a township of the first class . . . .

XX. Building and Housing Inspectors.

XXVI. Nuisances.

LII. General Powers.

ARTICLE XVI, PUBLIC HEALTH

(a) Boards of Health

Section 1605. Duties of Health Officer.

Section 1606. Powers of Board of Health.

Section 1607. Entry of Premises.

Section 1608. Inspections.

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[3] 8 Pa.C.S. § 101 et seq.

[4] Act 331 of 1931 (53 P.S. § 55101 et seq.).

(b) Vacation of Streets Declared Nuisances by Board of Health Section 1620. Petitions to Vacate Nuisances.

ARTICLE XXXI-A, UNIFORM CONSTRUCTION CODE, PROPERTY MAINTENANCE CODE AND RESERVED POWERS

Section 3104-A. Public nuisance.
Section 3105-A. Property maintenance code.
Section 3106-A. Reserved powers.

The Second Class Township Code[5]

ARTICLE XV, CORPORATE POWERS

Section 1506. General Powers.
Section 1518. Building and Housing Inspectors.
Section 1529. Nuisances.
Section 1532. Regulation of Business.
Section 1533. Dangerous Structures.

ARTICLE XVII, UNIFORM CONSTRUCTION CODE, PROPERTY MAINTENANCE CODE AND RESERVED POWERS

Section 1703-A. Public nuisance.
Section 1704-A. Property maintenance code.
Section 1705-A. Reserved Powers.

ARTICLE XXIII, ROADS, STREETS, BRIDGES AND HIGHWAYS

Section 2326. Obstructions and Nuisances.

ARTICLE XXX, BOARD OF HEALTH

Section 3005. Powers and Duties of Health Officer and Inspectors.
Section 3006. Powers of Board of Health.
Section 3007. Entering Premises.
Section 3008. Written Order for Violation.

[5] Act 69 of 1933 (53 P.S. § 65101 et seq.).

Juvenile Curfews

Generally

The common understanding of the term "curfew"[1] is defined in Black's Law Dictionary as "a regulation that forbids people (or certain classes of them) from being outdoors between certain hours."[2] The vast majority of existing municipal curfews are juvenile curfews, requiring that children of a specified age be indoors or otherwise in the presence of a guardian during night hours.[3] According to one authority, the first juvenile curfew in the United States was enacted in 1880 in Omaha, Nebraska.[4] Curfews gained prominence in the 1890s as a response to rising crime attributed to immigrant children. According to a 1995 survey by the United States Conference of Mayors, 70 percent of 387 cities responding had curfew ordinances in place.[5] Juvenile curfews have historically attained a similar level of prominence in Pennsylvania municipalities.[6]

Absent a specific statutory delegation of power to enact curfews,[7] Pennsylvania municipalities enact juvenile curfews pursuant to their general police powers[8] for the following purposes:

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[1] The term "curfew" derives from the French, "couvre feu," to cover the fire, and is associated with public safety regulations requiring, at a given time or upon a signal such as the ringing of a bell, that fires in homes be "covered or protected for the night." Its introduction into England is attributed to William the Conqueror (reign: 1066-1087 A.D.) who reportedly used the regulation to prevent the English from gathering together at night. *See* Jeffrey F. Ghent, Annotation, *Validity and Construction of Curfew Statute, Ordinance or Proclamation,* 59 A.L.R.3d 321 (2004), *citing Thistlewood v. Trial Magistrate for Ocean City,* 204 A.2d 688 (Md. 1964).

[2] Bryan A. Garner (ed.), *Black's Law Dictionary,* 7th ed., West Group, St. Paul, Minn., 1999, p. 387.

[3] The issue of "daytime curfews," designed primarily to combat truancy in addition to the other reasons for curfews, is not addressed in this article. The Public School Code (Code) permits municipal police to enforce the truancy provisions of the Code. *See* Act 14 of 1949, § 1341 (24 P.S. § 13-1341). In any event, daytime curfews should provide adequate exceptions for home-schooled children and other potential legitimate reasons for the presence of an apparently school-aged child to be on the public streets during school hours. Because the Code contains exemptions for children in specific circumstances, enforcement of the ordinance could conflict with state law to the extent a juvenile is exempt from school attendance. *See id.* § 1330.

[4] C. Hemmens and K. Bennett, *Juvenile curfews and the courts: Judicial response to a not-so-new crime control strategy, Crime and Delinquency,* January 1999, pp. 99-121.

[5] *See* "Cities with Curfews Trying to Meet Constitutional Test," *Washington Post,* December 26, 1995.

[6] For example, the Pennsylvania League of Cities and Municipalities, now the Pennsylvania Municipal League, conducted a Juvenile Curfew Survey in October 1998. Of the 57 municipalities that participated, 42 had curfew ordinances in place.

[7] There is no current explicit statutory authorization for Pennsylvania municipalities to establish juvenile curfews. Such authorization exists for emergency curfews. *See, e.g.,* The Third Class City Code, 11 Pa.C.S. § 11203 (emergency power of mayor to declare curfew); Borough Code, 8 Pa.C.S. § 10A06 (emergency power of mayor to declare curfew).

[8] *Baker's Appeal,* 40 Pa.C. 515 (Court of Quarter Sessions of the Peace of Pennsylvania, Dauphin County 1912). In *Baker*, the court held that the Borough of Steelton could lawfully enact and enforce a juvenile curfew under its general police powers. In dismissing the argument that the ordinance unlawfully interfered with parental authority, the court cited *Ex parte Crouse,* 1839 WL 3700 (Pa. 1839) for the proposition that Pennsylvania law reflects acceptance of the doctrine of *parens patriae*, literally "parent of the country," whereby the government has both the power and the obligation to regulate for persons suffering from some legal disability, such as minors or the mentally ill. This doctrine remains well-established in Pennsylvania law. *See, e.g., In the Interest of F.C. III,* 607 Pa. 45 (2010).

- To reduce juvenile crime and thus promote the community welfare.
- To reduce perpetration of crime on juveniles that may be vulnerable during curfew hours.
- To promote and support the parent-child relationship and provide an additional layer of supervision when appropriate.

Juvenile curfew ordinances typically have a number of characteristics in common, including an age threshold, a time period within which the regulation applies, exceptions, administrative provisions and penalties.[9]

While juvenile curfews in Pennsylvania are prevalent and have not been subject to an inordinate number of court challenges, municipalities and their solicitors should carefully research and draft curfews in a manner designed to weather any number of potential challenges, usually founded on alleged constitutional violations. The need for caution is based on several factors, the foremost of which is that the United States Supreme Court has yet to establish clear guidelines regarding the constitutional validity of juvenile curfews.[10]

Furthermore, the various federal circuits that have passed on the question have established a broad spectrum of approaches. In these cases, many federal constitutional provisions have been invoked to challenge juvenile curfews.

Constitutional Implications

Curfews impact the personal autonomy of juveniles, the ability of juveniles to engage in religious, political or civic endeavors, the relationship between parents and their children, and the arrest powers of the government. Issues involving unconstitutional vagueness may also be raised.

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[9] Municipal juvenile curfews often contain provisions requiring the temporary detention of minors. Municipalities must take care to draft any ordinance provisions that involve the detention of minors in a manner that conforms with Chapter 63 (Juvenile Matters) of Title 42 (Judiciary and Judicial Procedure) of the Pennsylvania Consolidated Statutes, a statutory structure that tracks the core requirements of the federal Juvenile Justice and Delinquency Prevention Act of 2002, 42 U.S.C.A. § 5601 et seq. The acts are designed to prohibit detention of juveniles in adult lock-ups and provide other specific limitations on the time, place and manner of juvenile confinement.

[10] The state of Pennsylvania federal case law on this issue is also questionable. Pennsylvania was the first state to entertain a federal court challenge of a curfew in *Bykofsky v. Borough of Middletown,* 401 F.Supp. 1242 (M.D. Pa. 1975), *aff'd without opinion,* 535 F.2d 1245 (3d Cir. 1975) (table), *cert. denied,* 429 U.S. 964 (1976). In this case, the federal District Court for the Middle District of Pennsylvania upheld the Middletown curfew as constitutional pursuant to a more relaxed, less stringent judicial review. The case was affirmed without opinion by the Third Circuit Court of Appeals, and the United States Supreme Court declined to review the case. The latest Pennsylvania federal court decision of prominence in the field of juvenile curfews is *Gaffney v. City of Allentown,* 1997 WL 597989 (E.D. Pa. 1997), wherein the federal district court for the Eastern District of Pennsylvania struck down the curfew ordinance of the City of Allentown. In this case, the court held that the "right to roam freely" is a fundamental right under the United States Constitution. The court applied a test established by the United States Supreme Court case of *Bellotti v. Baird,* 443 U.S. 622 (1979), a case involving a minor's consent to an abortion, to hold that, in the case of the juvenile curfew, there is insufficient justification to treat the constitutional rights of minors differently than those of adults. The court, in applying strict scrutiny, persuasively proclaimed that it "joined . . . every other federal court that has recently reviewed a curfew." *Gaffney* *6. However, because *Gaffney* has limited legal precedential value and *Bykofsky* is arguably outdated because it was decided prior to *Bellotti*, it is difficult to determine exactly how any given court will examine a challenge to a municipal juvenile curfew.

Many of these issues may involve "fundamental rights," which are afforded great protection by the courts. Of the various constitutional provisions implicated by challenges to curfews, the following are of some prominence:

- **First Amendment Interests – Speech, Association and Expression:** Although the First Amendment to the United States Constitution[11] has been interpreted as not providing a right to generally "socialize," it could be impermissibly infringed upon when a curfew provides no exceptions for purposes of "protected speech," such as religious or political activities. Furthermore, a curfew ordinance could be challenged as unconstitutionally overbroad when it adversely affects a substantial amount of protected activities.

- **The Ninth Amendment – the Fundamental Right of Parents to Raise Children Without Undue Interference:** The Ninth Amendment to the United States Constitution[12] has been construed to contain a right to privacy that protects family autonomy and is related to substantive due process under the Fifth and Fourteenth Amendments. While there is disagreement in the federal circuits whether a curfew promotes or interferes with parental rights, a challenge under this amendment is more likely when a curfew ordinance prohibits activities that would be permitted or encouraged by a responsible parent.

- **Fourteenth Amendment Interests – Due Process and Equal Protection – the "Right of Locomotion"/Freedom of Movement:** For Pennsylvania purposes, courts have determined that the right to locomotion or to move freely is a fundamental right of juveniles.[13] To the extent that a curfew may affect interstate travel, freedom of movement or other fundamental rights, the Fourteenth Amendment to the United States Constitution[14] is implicated. The Equal Protection Clause of this Amendment is sometimes invoked by challengers asserting that a juvenile curfew creates an impermissible classification based on age. This amendment is used as justification for the more rigorous "strict scrutiny" standard of judicial review when an ordinance infringes on fundamental rights.

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[11] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I.

[12] "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. Const. amend. IX.

[13] *See, e.g., Bykofsky v. Borough of Middletown,* 401 F.Supp. 1242 (M.D. Pa. 1975), *aff'd without opinion,* 535 F.2d 1245 (3d Cir. 1975) (table), *cert. denied,* 429 U.S. 964 (1976).

[14] Section 1 of the Fourteenth Amendment provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

- **"Vagueness" Issues:** Related to the guarantees of due process and the Fourth Amendment,[15] an ordinance may be facially challenged on the basis of unconstitutional vagueness. This occurs where a citizen must speculate as to what constitutes a violation of the regulation, and where law enforcement officials are impermissibly delegated too much discretion as to what constitutes a violation of the regulation.[16] *This doctrine appears to be one of the major methods by which curfew regulations are challenged.*

Drafting Municipal Curfews

Given the history of challenges to juvenile curfews both within and outside of Pennsylvania, a prudent municipality would be well-advised to prepare for a "strict scrutiny" standard to be applied to their curfew ordinance. In other words, "strict scrutiny" implies that courts will deem a curfew unconstitutional unless it is narrowly tailored to serve a compelling governmental interest.[17] The potential application of this standard largely stems from the fact that curfews impact the fundamental rights of minors and many federal courts have determined that those rights deserve the same level of protection as those of adults. While preventing juvenile crime and protecting juveniles generally satisfy the "compelling interest" prong of the test, a lack of a statistical basis for the curfew and exceptions that inadequately allow for the exercise of constitutional rights often cause ordinances to fail the "narrow tailoring" requirement. Furthermore, strict scrutiny demands that a sufficient "nexus" exist between the goals of the ordinance and the means used.[18]

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[15] The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

[16] An excellent example of this occurred in *Bykofsky* where the court struck a provision of the Middletown ordinance that permitted the mayor to authorize a curfew exception permit "when normal or necessary night-time activities of a minor, particularly a minor well along the road of maturity, may be inadequately provided for…" *Bykofsky,* 401 F. Supp. at 1248-49. The court struck the terms "normal" and "minor well along the road to maturity" as being unconstitutionally vague. *Id.*

[17] *See Gaffney* at *8. For a discussion of the various levels of judicial scrutiny applied to regulations that allegedly violate constitutional rights, see the *Deskbook* article entitled "Substantive Due Process."

[18] This "nexus" requirement was instrumental in the striking of the Allentown ordinance in *Gaffney*. After discussing the statistics presented by the city, the court held as follows:

> In fact, in 1996, the only year in which the City enforced its curfew, . . . juvenile crime actually rose. Thus, the curfew was an ineffective tool to reduce total juvenile crime . . . . In light of the paucity of support for the City's argument that the curfew protects minors, and the inability of the City to show that the curfew protects the rest of the society by significantly reducing crimes committed by minors, this court must hold that the curfew does not meet strict scrutiny.

Gaffney at *8.

In reviewing a curfew ordinance, a municipality should consider the following questions, among others:

- Can the municipality point to specific statistics that warrant the imposition of a curfew?
- Is the proposed ordinance drafted to address these issues in the least intrusive manner possible?
- Are there adequate exceptions for legitimate activities or situations that may inadvertently be unauthorized by the proposed ordinance?
- Does the proposed ordinance contain terms that are vague?

The number of municipalities that have enacted curfews and the lack of challenges to such ordinances indicate that they remain a popular public safety tool in Pennsylvania, despite any potential constitutional difficulties. Because curfews represent a restriction on personal freedom by the state and require municipalities, in essence, to insinuate themselves in the parent/child relationship, they have sometimes been met by public resistance.[19] As one commentator suggests, "[c]urfews place not only limitations on the activities of the 2/10th of 1 percent of youths who commit serious offenses, but also on the 99.8 percent who seek to engage in legitimate interests during nighttime hours."[20]

[19] *See, e.g.,* Michael Molitoris, "Curfew proposal moves forward/Council presented with petition opposing curfew," *The Derrick,*October 29, 2002, p. 1.

[20] Robert E. Shepherd, Jr., "The Proliferation of Juvenile Curfews," *Criminal Justice Magazine,* Vol. 12, No. 1, Spring 1997.

Regulation of Animals

Municipalities may regulate animals through nuisance ordinances, as a general public nuisance or through zoning regulations. These ordinances may regulate keeping of exotic animals, dogs running at large, animal noise, and, under specific conditions, dangerous animals and, provided that a nuisance in fact can be established, the number of pets in a dwelling.

The Pennsylvania Dog Law[1] regulates dogs running at large and dangerous dogs, and provides that most municipal ordinances that regulate "dangerous dogs" are abrogated.[2] The Dog Law provisions related to dangerous dogs may be enforced by all municipalities except counties. Although a municipality may not regulate the ownership of certain breeds of dogs, the Commonwealth Court has upheld a nuisance ordinance prohibiting the frequent and habitual disruption of the comfort, repose or health of persons in the neighborhood by dogs or cats.[3] Furthermore, Title 34 of the Pennsylvania Consolidated Statutes (the Game and Wildlife Code) contains provisions relating to exotic wildlife permits, but these provisions do not preempt a municipality from obtaining injunctions to remove wildlife properly deemed to be public nuisances.

More problematic to a municipality is its ability to regulate by a nuisance ordinance the number of pets a constituent may keep. An ordinance that arbitrarily declares a number of animals a nuisance without establishing nuisance conditions has been held to be outside of a municipality's powers.[4]

In *Commonwealth v. Creighton*,[5] the Borough of Carnegie enacted an ordinance limiting the number of cats and/or dogs that a person could keep within the borough to a total of five. Violators were subject to fines and confiscation of the excess animals. Mary Creighton, who housed anywhere between 25 and 30 cats, was cited for violation of the ordinance and appealed the decision. In its analysis, the Commonwealth Court made an analogy between the authority of a municipality to limit the number of cats and dogs that a person may have and its authority to regulate other kinds of nuisances, such as the accumulation of junk. The court found that, in both cases, the critical consideration was whether the regulated activity constitutes a nuisance or is otherwise contrary to the public health, safety or general welfare.

Just as a municipal ordinance that seeks to abate the storage of wrecked, junked or abandoned vehicles cannot declare the mere presence of such vehicles on any given piece of property to be a nuisance *per se*, neither can a municipal ordinance simply declare that keeping more than a fixed number of cats or dogs is a nuisance *per se*. Rather, in both cases, the ordinances must be phrased in such a way as to require the municipality to affirmatively establish that a nuisance in fact exists. In the case of an ordinance prohibiting the keeping of junked vehicles, once a person is

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[1] Act 225 of 1982 (3 P.S. § 459-101 et seq.).

[2] *See* The Dog Law, § 507-A(c); *Lerro ex rel. Lerro v. Upper Darby Tp.,* 798 A.2d 817 (Pa. Cmwlth. 2002).

[3] *See Widmyer v. Commonwealth,* 458 A.2d 1048 (Pa. Cmwlth. 1983).

[4] *Commonwealth v. Creighton,* 639 A.2d 1296 (Pa. Cmwlth. 1994).

[5] *Id.*

found to come within the purview of the ordinance, it is necessary to look to the ordinance itself to determine if it states not only that junked vehicles may create a nuisance, but also why they are a hazard and a danger to the health and welfare of the municipality's citizens. Furthermore, the municipality should provide evidence that the conditions giving rise to the nuisance do, in fact, exist. Similarly, in the case of an ordinance regulating the number of cats and dogs, the ordinance should indicate why keeping more than a given number of cats or dogs might constitute a nuisance or a risk to the public health and safety. Furthermore, the municipality should provide some evidence that the animals did create a nuisance in fact.

As noted in *Creighton*, subject to its enabling legislation and pursuant to its police power, a municipal governing body has the authority to enact laws that it perceives necessary to protect the public health, safety and general welfare. Nevertheless, an ordinance must go further than merely declaring that the public health, safety and general welfare will be served by limiting the number of animals that may be kept by any one person. It must set forth the legitimate public health, safety and welfare goals that will be advanced by its enactment. A municipal ordinance seeking to prevent a "nuisance"—regarding the keeping of animals or otherwise—must provide sufficient information to permit a court to determine whether it represents a reasonable means to effectuate a legitimate governmental goal. It is insufficient simply to declare some thing or activity a nuisance and then to prohibit it.

Public Use of Municipal Recreational Land

Recreational facilities, open space areas and public parks are concerns of most municipalities. Certainly, they are important to a municipality's purpose of providing for the "general welfare" of its citizenry. It, therefore, becomes important to know how, and to what degree, a municipality can be held liable for injuries to members of the general public that occur on municipal recreational land. The answer lies largely in the interplay and interpretation of two important statutes commonly referred to as the Recreational Use Act (RUA),[1] or the Recreational Use of Land and Water Act, and the Political Subdivision Tort Claims Act.[2]

The Recreational Use Act was originally enacted in 1965 and intended primarily for private landowners as an incentive for them to open large tracts of land for the general public's use and enjoyment.[3] However, the act's protections also apply to political subdivisions, the Commonwealth and the United States.

The substance of the act is contained in Sections 3 and 4:

> Except as specifically recognized or provided in section 6 of this act, an owner of land owes no duty of care to keep the premises safe for entry or use by others for recreational purposes, or to give any warning of a dangerous condition, use, structure, or activity on such premises to persons entering for such purposes . . . . Except as specifically recognized by or provided in section 6 . . . an owner of land who either directly or indirectly invites or permits without charge any person to use such property for recreational purposes does not thereby:
>
> (1) Extend any assurance that the premises are safe for any purpose.
>
> (2) Confer upon such person the legal status of an invitee or licensee to whom a duty of care is owed.
>
> (3) Assume responsibility for or incur liability for any injury to persons or property caused by an act of omission of such persons.
>
> (4) Assume responsibility for or incur liability for any injury to persons or property, wherever such persons or property are located, caused while hunting…..[4,5,6]

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[1] Act 586 of 1965 (68 P.S. § 477-1 et seq.)

[2] 42 Pa.C.S. § 8541 et seq.

[3] *See* Recreational Use Act, § 1; *see also Murtha v. Joyce,* 875 A.2d 1154 (Pa. Super. 2005).

[4] "'Hunt' or 'hunting'" as defined in 34 (Game) Pa.C.S. § 102 (Definitions).

[5] Recreational Use Act, §§ 3, 4.

[6] Any negligence immunity granted by the state RUA to owner was not preempted by Federal Power Act, *Ruspi v. Glatz,* 69 A.3d 680 (Pa. Super. 2013).

The statute also provides explicit exceptions to the above-referenced general rule:

> Nothing in this act limits in any way any liability which otherwise exists:
>
> (1) For willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity.
>
> (2) For injury suffered in any case where the owner of land charges the person or persons who enter or go on the land for the recreational use thereof, except that in the case of land leased to the State or a subdivision thereof, any consideration received by the owner for such lease shall not be deemed a charge within the meaning of this section.[7]

Is the Land "Developed"? The RUA only provides immunity to landowners of "substantially undeveloped property." Therefore, the character of the municipal land where the injury occurred is important. "[C]ourts have held that the RUA did not provide tort immunity to owners of indoor swimming pools, highly developed waterfront parks, junior high school athletic fields, inner city playgrounds, and outdoor basketball courts. On the other hand, RUA tort immunity has been granted to National Parks, undeveloped portions of municipal public parks, and even parks which are somewhat developed, so long as any structures are intended to promote a recreational purpose anticipated by the RUA."[8] In determining liability under the RUA, both the tract as a whole and the exact portion of the tract where the injury occurred must be considered.[9]

In addition to the RUA, the law relating to governmental immunity, commonly referred to as the Political Subdivision Tort Claims Act, grants immunity to municipalities except under certain enumerated conditions. Section 8542(b)(3) provides that a local government unit may be liable for negligence related to the care, custody and control of real property in its possession. This liability, however, does not include acts that constitute actual malice or willful misconduct. The RUA only *imposes* liability for acts that constitute actual malice or willful misconduct.[10] Thus, it appears that a municipality has a powerful "catch-22" protection under the interplay of these two statutes: "[W]hether it acts maliciously or negligently, the municipality or other governmental unit is absolutely immune, without exception, for injuries occurring on municipally owned recreational land."[11] This blanket protection, as discussed above, would only apply if it is determined first that the land in question is deemed to be "substantially undeveloped."

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[7] Recreational Use Act, § 6.

[8] *Blake v. U.S.,* 1998 WL 111802, at *9 (E.D. Pa. 1998).

[9] *See Pagnotti v. Lancaster Tp.,* 751 A.2d 1226 (Pa. Cmwlth. 2000); *Yanno v. Consolidated Rail Corp.,* 744 A.2d 279 (Pa. Super. 1999).

[10] *See* Recreational Use Act § 6.

[11] *Wilkinson v. Conoy Twp.,* 677 A.2d 876, 879 (Pa. Cmwlth. 1996).

Pennsylvania Statutory and Regulatory Measures to Protect Agricultural Land and Open Space

Pennsylvania has a variety of laws and regulations to advance agricultural land and open space protection. In addition to the following list, supplementary resources can be accessed through the Pennsylvania Department of Agriculture's website[1] and The Pennsylvania State University Dickinson School of Law's Agricultural Law Resource & Reference Center's website.[2]

Agricultural and Open Space Protection

Governor's Executive Order for Agricultural Land Preservation Policy applies to all agencies under the Governor's jurisdiction, and it orders and directs them to seek to mitigate and protect against the conversion of primary agricultural land.[3]

Agricultural Conservation Easement Purchase Program provides a mechanism, criteria and funding for the purchase or donation of development rights of farmland in order to preserve its use in agriculture, a portion of which may be used for commercial equine activity.[4]

Agricultural Security Area (ASA) must contain at least 250 acres of viable agricultural land in one local government unit or, under certain conditions, in more than one local government unit. An ASA provides protection from nuisance ordinances and requires additional levels of review for projects involving condemnation. An ASA designation helps ensure that the farmer can continue using the farmland for agricultural purposes.[5]

Conservation and Preservation Easements Act provides for uniform conservation and preservation easements. This creates certain requirements that apply to all easements throughout Pennsylvania.[6]

Land Preservation for Open Space Uses – Act 442 of 1968 authorizes the Commonwealth, counties and other local government units to preserve, acquire or hold land for open space uses. Specific authorization is given to local governments to impose new taxes for open space purposes, subject to voter approval.[7]

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[1] Pennsylvania Department of Agriculture, Bureau of Farmland Preservation, http://www.agriculture.pa.gov/encourage/farmland/Pages/default.aspx (March 29, 2017).

[2] The Pennsylvania State University, The Dickinson School of Law, Center for Agricultural and Shale Law, https://pennstatelaw.psu.edu/academics/research-centers/center-agricultural-and-shale-law (March 29, 2017).

[3] 33 Pa. Bull. 3483 (Exec. Order 2003-2, March 20, 2003); 4 Pa. Code Part I, Chapter 7, Subchapter W.

[4] Agricultural Area Security Law, Act 43 of 1981 (3 P.S. § 901 et seq.); 7 Pa. Code Part V-C, Chapter 138e.

[5] Agricultural Area Security Law; 7 Pa. Code Part V-C, Chapter 138 l.

[6] Conservation and Preservation Easements Act, Act 29 of 2001 (32 P.S. § 5051 et seq.).

[7] Preserving Land for Open Air Spaces (32 P.S. § 5001 et seq.).

Right-to-Farm Law reduces the loss of the Commonwealth's agricultural resources by limiting the circumstances under which agricultural operations may be the subject matter of nuisance suits and ordinances.[8]

Agriculture, Communities and the Rural Environment Act (ACRE),[9] as summarized by the Pennsylvania Department of Agriculture, Bureau of Farmland Preservation:

> . . . creates a process for farmers to seek review of local ordinances believed to be more restrictive of agricultural operations than permitted under State Law. Farmers can request that the Pennsylvania Attorney General review an ordinance restricting agriculture practices. If the Attorney General determines that the local ordinance is in conflict with State Law, the municipality is notified of this finding and provided an opportunity to modify the ordinance for compliance with State Law.
>
> If the municipality fails to modify the ordinance in question, the Attorney General may bring an action in the Commonwealth Court to require the municipality to make the modifications or to repeal the local ordinance.[10]

Agricultural Lands Condemnation Approval Board (ALCAB) is an agricultural land condemnations board for land enrolled in an ASA.[11]

- Certain condemnations, such as those for widening existing highways, for underground public utility projects that do not affect the surface, for electric cooperative facilities, or for public utility projects that have received state and federal approval lie outside ALCAB's jurisdiction and do not require approval.

- In most cases, before the condemnation of land enrolled in an ASA can proceed, ALCAB must determine that the proposed condemnation would not have an unreasonably adverse effect upon the agricultural resources in the area and that there is no reasonable and prudent alternative to the condemnation.[12]

Growing Greener, enacted in 1999, initially invested hundreds of millions of dollars to preserve farmland and protect open space, eliminate the maintenance backlog in State parks, clean up abandoned mines and restore watersheds, and provide new and upgraded water and sewer systems. Growing Greener II, enacted in 2005, continued to invest hundreds of millions of dollars

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[8] Agricultural Operations - Protection from Suits, Act 133 of 1982 (3 P.S. § 951 et seq.).

[9] 3 Pa.C.S. § 311 et seq.

[10] "ACRE, Agriculture, Communities and the Rural Environment Act, Act 38 of 2005, Attorney General Review of Local Ordinances," Pennsylvania Department of Agriculture, Bureau of Farmland Preservation, http://www.agriculture.pa.gov/Encourage/farmland/Documents/ACRE%20Public%20Info.pdf (March 29, 2017).

[11] The Administrative Code of 1929, Act 175 of 1929, § 306 (71 P.S. §106); Eminent Domain Code, 26 Pa.C.S. § 101 et seq. at 207.

[12] Agricultural Area Security Law, Act 43 of 1981, § 13 (3 P.S.§ 913).

to clean up rivers and streams, take on serious environmental problems at abandoned mines and contaminated industrial sites, and finance the development and deployment of advanced energy projects; preserve natural areas and open spaces, improve state parks and enhance local recreational needs; protect working farms; revitalize communities through investments in housing and mixed-use redevelopment projects; repair fish hatcheries and aging dams; and upgrade and repair habitat-related facilities.[13] Growing Greener/Environmental Stewardship Fund dollars allocated to the Department of Agriculture are deposited in the Agricultural Conservation Easement Purchase Fund and are subject to the provisions of the Agricultural Area Security Law.[14,15]

Pennsylvania Municipalities Planning Code (MPC) contains both mandatory and enabling provisions for municipalities to protect natural resources and agricultural land, operations and activities through their comprehensive plan and zoning ordinance. It also contains a provision for municipalities, through their zoning ordinances, to encourage the viability of agricultural operations. In addition, the MPC enables municipalities to institute a municipal or multi-municipal transfer of development rights program.

If a landowner alleges that the municipality's zoning ordinance is deficient and proposes a curative amendment, the governing body must consider the impact of the proposed amendment on the preservation of agriculture.

The MPC further mandates that zoning ordinances cannot unreasonably restrict forestry activities and mineral development in a municipality, and requires that all zoning districts permit forestry by right. Finally, the MPC specifies that various state laws regulating agriculture and mining may preempt local regulations under the MPC.[16]

Century and Bicentennial Farm Program recognizes families who have been farming the same land for 100 and 200 years, respectively. The same family must own the farm for at least 100 or 200 consecutive years; a family member must live on the farm on a permanent basis; and the farm must consist of at least 10 acres of the original holding *or* gross more than $1,000 annually from the sale of farm products.[17]

Preferential Assessments or Exemptions

Clean and Green Law allows owners of agricultural use, agricultural reserve, or forest reserve land to apply for preferential assessment of their land. If the application is approved, the land

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[13] Environmental Stewardship and Watershed Protection Act, 27 Pa.C.S. § 6101 et seq.; Disposal Fee, 27 Pa.C.S. § 6301 et seq.; *see also* Pennsylvania Department of Environmental Protection, Growing Greener, http://www.dep.pa.gov/Citizens/GrantsLoansRebates/Growing-Greener/Pages/default.aspx (March 29, 2017).

[14] 27 Pa.C.S. § 6105.

[15] *See also* http://pagrowinggreener.org/issues/growing-greener/ (March 29, 2017).

[16] Pennsylvania Municipalities Planning Code, Act 247 of 1968 (53 P.S. § 10101 et seq.).

[17] Pennsylvania Department of Agriculture, Century and Bicentennial Farm Program, http://www.agriculture.pa.gov/Encourage/farmland/cbfp/Pages/default.aspx (March 29, 2017).

receives an assessment based upon its use value rather than its market value. The intent of the law is to encourage the keeping of land in one of the three categories of uses.[18]

Covenants to Preserve Land Use Under Act 515 – Property Tax Assessments. When an adopted municipal, county or regional plan designates land for farm, forest, water supply or open space purposes, counties are authorized to enter into covenants with the owner(s) of such land for the purpose of preserving it as open space for a period of 10 years. The real property tax assessment, for the period of the covenant, will reflect the fair market value of the land as restricted by the covenant.[19]

Sewer and Water Line Assessment Exemptions Under Act 71 for the cost of installation are provided to farmers who do not use newly constructed lines and continue to use the land for agriculture. The land must have been used for agricultural production for three years prior to the installation of water or sewer lines.[20]

Pennsylvania Construction Code Act,[21] also known as the Uniform Construction Code (UCC), excludes any "agricultural building," which is defined as a structure utilized to store farm implements, hay, feed, grain or other agricultural or horticultural products, to house poultry, livestock or other farm animals, or to serve as a milk house and a structure used to grow mushrooms, agricultural or horticultural products. The term includes a carriage house owned and used by members of a recognized religious sect for the purposes of housing horses and storing buggies. The term shall not include habitable space or spaces in which agricultural products are processed, treated or packaged and shall not be construed to mean a place of occupancy by the general public.[22] The UCC also exempts pole barns at agricultural fairs, except for electrical inspections and permits if there is electrical service,[23] recreational cabins meeting specified criteria,[24] and shade cloth structures constructed for nursery or agricultural purposes that do not include service systems.[25,26]

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[18] *See* Pennsylvania Department of Agriculture, *supra*, note 1; Pennsylvania Farmland and Forest Land Assessment Act of 1974, Act 319 of 1974 (72 P.S. § 5490.1 et seq.); 7 Pa. Code Part V-C, Chapter 137b.

[19] Covenants to Preserve Land Use – Property Tax Assessments, Act 515 of 1965 (16 P.S. § 11941 et seq.).

[20] Agricultural Land – Exemption from Water and Sewer Assessments, Act 71 of 1976 (53 P.S. § 1241 et seq.); 7 Pa. Code Part V-C, Chapter 136.

[21] Pennsylvania Construction Code Act, Act 45 of 1999 (35 P.S. § 7210.101 et seq.).

[22] *Id. at* §§ 103, 104(b)(4); 34 Pa. Code §§ 401.1, 403.1(b)(4).

[23] *Id.* at § 901(e); 34 Pa. Code § 403.1(b)(13).

[24] *Id.* at §§ 103, 104 (b) (7); 34 Pa.Code § 403.1 (b) (11).

[25] 34 Pa. Code § 403.42(c)(1)(ix).

[26] *See also* 34 Pa. Code § 403.1 (b), *generally*.

Death Taxes

Valuation of Land in Agricultural Use, Agricultural Reserve or Forest Reserve for Commonwealth Inheritance and Estate Taxes. The 2012 amendments to the Tax Reform Code of 1971 provide that, with certain qualifications, real estate devoted to the business of agriculture is exempt from inheritance taxes if the farm is passed to members of the decedent's family. In addition, the amendments make it easier for farm families to transfer property into a family-owned limited liability corporation or limited partnership without the burden of paying realty transfer taxes.[27]

Grants and Loans[28]

Agricultural Land Conservation Assistance Grant Program authorizes the Department of Agriculture, in consultation with the State Agricultural Land Preservation Board, to use up to $750,000 of the funds deposited into the Agricultural Conservation Easement Purchase Fund to make grants to counties for creating a spatial mapping database; training of staff, contracting with consultants and paying for computer software; and developing and implementing agricultural zoning ordinances for municipalities.[29]

Land Trust Reimbursement Program provides for allocation of up to $200,000 annually from the Agricultural Conservation Easement Purchase Fund by the Pennsylvania Agricultural Land Preservation Board to reimburse land trusts for up to $5,000 in specified expenses incurred in acquiring an agricultural conservation easement. Eligible expenses include those for appraisals, legal services, title searches, document preparation, title insurance, closing fees and survey costs.[30]

Agricultural Technology Loan Program is a matching loan program that allows farmers in the Commonwealth to compete annually for low-cost loans. Farmers demonstrating the greatest need and proposing the most innovative use of technology are awarded low-cost loans for projects that increase productivity or provide entrance into new product markets.[31]

Next Generation Farmer Loan Program provides an effective means for federal-state-industry partnerships whereby the public sector can assist beginning and first-time farmers to purchase land, farm equipment, farm buildings, and livestock for breeding. The program uses federal tax-exempt mortgage financing to reduce a farmer's interest rate for capital purchases.[32]

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[27] *Zoning for Farming, A Guidebook for Pennsylvania Municipalities on How to Protect Valuable Agricultural Lands,* Center for Rural Pennsylvania, Harrisburg, 1995; Tax Reform Code of 1971, Act 2 of 1971, §§ 1102-C.3, 1102-C.5., 2111 (72 P.S. §§ 8102-C.3, 8102-C.5, 9111).

[28] *See also* PAgrows, Pennsylvania Department of Agriculture, n.d., http://www.pagrows.com/ (March 29, 2017).

[29] Farmland – Administration by Department of Agriculture, Act 159 of 1982 (3 P.S. § 1201 et seq.); Title 7 Pa. Code Part V-C, Chapter 138h.

[30] Agricultural Area Security Law, § 14.6; 7 Pa. Code § 138e.251 et seq.

[31] 7 Pa. Code Part V-C, Chapter 138d.

[32] 73 P.S. § 371 et seq. ("Economic Development Financing Law"); 26 U.S.C.A. §§ 144(a)(11), (12) and 147(c)(1), (2).

Exclusionary Zoning and the Fair Share Doctrine

A zoning ordinance may be exclusionary in its effect either because it excludes a use from a municipality or makes only a token allocation of land available for the use. The "fair share" doctrine is an aspect of the more general rule applied in Pennsylvania, which states that a zoning ordinance may be held invalid if it is exclusionary in its effect.

With regard to exclusionary zoning generally, Robert S. Ryan in his seminal work, *Pennsylvania Zoning Law and Practice,* states that the development of definitive principles concerning this area of the law has been difficult; nevertheless, Mr. Ryan suggests that the following analytical rules apply:

(1) A municipality must make provision not only for "basic forms" of housing, but also for business and institutional uses that are not inherently objectionable.[1]

(2) If a municipality excludes an industrial, commercial, or institutional use that is not inherently objectionable, it must justify the exclusion. A total exclusion of a basic form of housing cannot be justified.[2]

(3) Where the exclusion is not total, a challenger may still be able to prove that the municipality has not made adequate provision for the use. In cases involving "basic forms" of residential uses, the analysis will follow the *Surrick*[3] "fair share" analysis. The cases do not give any precise formulation of the standard to be applied to claims involving "partial exclusion" of industrial, commercial or institutional uses. However, it seems unlikely that the courts will invalidate an ordinance that makes provision for such uses unless that provision is clearly inadequate in light of demonstrable current demand.[4]

The *Surrick* "fair share" analysis referred to above is essentially this:

- A review is made to determine if the community is a logical area for development and population growth, including a consideration of the community's proximity to a large urban area and the region's population growth.
- After establishing that the community is in the path of growth, the present level of development within the community is examined.
- In deciding whether a community has met its "fair share" obligations, the court is to review a number of factors, including:
    - current population growth and pressures within the community and region;
    - the percentage of land available under the zoning ordinance for the use in question;

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[1] *See* Robert S. Ryan, *Pennsylvania Zoning Law and Practice,* Section 3.5.2., George T. Bisel Company, Inc., Philadelphia, Pa., 2001, Supp. 2017.

[2] *Id.*

[3] *Surrick v. Zoning Hearing Board of Upper Providence Township*, 476 Pa. 182 (1977).

[4] *Ryan*, *supra* note 1.

- the amount and percentage of undeveloped land in the particular community; and
- the extent of the use that can be accommodated under the existing zoning ordinance.[5]

Application: If, for example, the amount of land zoned as being available for a particular use, such as multifamily dwellings, is disproportionately small in relation to these factors, the ordinance will be held exclusionary.

The "fair share" analysis is inapplicable where the challenged zoning ordinance totally excludes the use in question;[6] it was designed to apply only in cases where it is alleged that the amount of land zoned as being available for a particular use is disproportionately small. Also, mere conclusions are insufficient to establish that a municipality has failed to provide its "fair share" of a particular use; data supporting such a conclusion must be provided. Nevertheless, while a landowner challenging a zoning ordinance on a "fair share" theory should provide evidence regarding the percentage of undeveloped land in the municipality or risk a determination that it has failed to meet its burden of proving the ordinance invalid, there is no hard-and-fast rule that a municipality's "fair share" of a particular use is to be based solely upon some set percentage of land being available for the use. In some circumstances, a very small allocation of land may meet the "fair share" requirement, particularly if there is no demonstration of a greater need.

In addition, Act 67 of 2000 amended the Pennsylvania Municipalities Planning Code (MPC) to allow a broadened geographic area for "fair share" where multi-municipal planning and generally consistent zoning occurs. More specifically, if a party challenges the validity of a zoning ordinance, where municipalities have adopted a multi-municipal comprehensive plan and are administering zoning ordinances generally consistent with the plan, the governing body, zoning hearing board or court on appeal shall proceed as follows: To determine whether a particular use is available within a reasonable geographic area, the administrative bodies or court shall consider the provision made for this use within the entire area covered by the zoning ordinances of the participating municipalities, not merely the municipality where the proposed use is located.[7]

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[5] Ryan, *supra* note 1, at § 3.5.2, *citing* 476 Pa. at 191-194.

[6] Rather, a zoning ordinance that provides for the total prohibition of legitimate businesses from an entire community is likely unconstitutional. *See, e.g., Girsh Appeal*, 537 Pa. 237 (1970); *Exton Quarries, Inc. v. Zoning Hearing Bd. of Adjustment,* 425 Pa. 43, 59 (1967).

[7] *See* Pennsylvania Municipalities Planning Code, Act 247 of 1968, §§ 916.1(h), 1006-A(b.1) (53 P.S. §§ 10916.1(h), 11006-A(b.1)). The Pennsylvania Supreme Court has suggested that these sections were intended to alter the rule exemplified in prior case law that required municipalities to provide for every lawful use in their individual zoning ordinances, even if they were party to multi-municipal planning. *See In re Petition of Dolinger Land Group,* 576 Pa. 519 (2003), *citing Nicholas, Heim and Kissinger v. Harris Township,* 375 A.2d 1383 (Pa. Cmwlth. 1977) (holding that a joint comprehensive plan may not be used to justify exclusion of a legitimate use because comprehensive plans are "recommendatory" rather than regulatory). While the aforementioned sections may have broadened the geographic area considered in an exclusionary analysis, there is nothing to suggest that the underlying constitutional principles applied by the courts have been altered by amendments to the MPC.

Road Law Basics[1]

A variety of questions may arise concerning municipal streets and roads.[2] Because all roads are not created equal, the details of how a road is created may be a good place to start in addressing these questions.

Primary Methods of Street or Road Creation

Most roads that currently exist were created by one of the following methods:

- **Eminent Domain.** At some time in the past, the land was taken or condemned by a unit of government through an official legal procedure. These procedures may have involved the appointment of road viewers, a specific eminent domain power, or the exercise of this general power pursuant to the Eminent Domain Code.[3]

- **Dedication and Acceptance.** Roads are routinely laid out and offered to a municipality when a proposed development is being undertaken. Just as routinely, municipalities accept these roads. However, projects sometimes fail to come to fruition, or there are extreme lapses in time that can have effects on the dedicated and accepted roads. Many times these "paper roads" appear on official maps or in ordinances, but have never been developed on the ground.

- **Continued or Constant Use.** For whatever reason, some roads have 'just always' been there or have 'just always' been maintained as public roads. Long term use and/or maintenance can give rise to the presumption that the road is legitimately a public road.[4] A road that achieves public status by virtue of continual public use is referred to as a public road by *prescription*.[5]

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[1] For a more detailed discussion of the facets of municipal road law and road law issues, see *Solicitor's Handbook,* 3rd ed., Governor's Center for Local Government Services, Pennsylvania Department of Community and Economic Development, Harrisburg, Pa., 2003, pp. 172-178.

[2] Some of these questions include: Can the road be abandoned (vacated)? How are municipal rights and responsibilities in the road eliminated? Can the road be expanded and where? What rights do utility companies or private users of the road retain? Where do the abandoned public rights in the road repose? Is the road actually a private road and not within municipal jurisdiction?

[3] Eminent Domain Code, 26 Pa.C.S. § 101 et seq.

[4] *See, e.g.,* The Second Class Township Code, Act 69 of 1933, § 2307 (53 P.S. § 67307); *Lagler v. Upper Milford Tp. Zoning Hearing Bd.,* 446 A.2d 712 (Pa. Cmwlth. 1982). ("[A] road not of record which has been used for public travel and maintained and kept in repair by the expenditure of township funds for a period of at least twenty-one years and upwards shall be deemed to be a public road of the width of thirty-three feet notwithstanding the fact that there is no public record of the laying out of such road or a dedication thereof for public use." *Id.* at 713.)

[5] *See also* 22A Summ. Pa. Jur. 2d Municipal and Local Law § 17:99 (2017); *Deskbook* article, "Title by Adverse Possession & Easement by Prescription."

- **Local or Special Laws.** During the formative years of the Commonwealth, laws often dealt with highly specific local concerns. Subsequently, laws could be enacted that impact on the parameters of local roads, such as rights and locations.

- **Other.** For example, some early public school statutes provided for public school building access, thereby creating "public" roads. Such roads may have remained public roads or reverted to underlying property owners. An exhaustive study of the origins of roads would likely uncover numerous other unlikely sources for the creation of public roads.

How Wide is the Road?

A primary issue regarding roads is: Where exactly does the road "end" and the private property of neighbors abutting the road "begin"? This issue may arise if a landowner, in good faith, builds an improvement within what is later asserted by the municipality to be its right-of-way in a public road. Initially, reference should be made to relevant law. For example, both the General Road Law and the Second Class Township Code provide for a minimum road width of 33 feet.[6] It appears, however, the simple assertion that a road width is 33 feet is actually a refutable presumption. A historic road of narrower dimensions, or a road where land is held in fee simple by the municipality, will not be automatically expanded by these provisions of law. The 33-foot standard is merely a command to municipalities that roads, henceforth, shall not be of a narrower dimension.

Vacation and Loss of Public Rights

"Vacation" of public roads is a procedure by which a municipality *voluntarily*, or by petition of citizens, severs the public's right to utilize, and the municipality's obligation to maintain, a road. The various municipal codes provide vacation procedures, usually involving public notice, a hearing, and an opportunity for affected citizens to appeal the vacation ordinance. There are instances, the circumstances of which may vary depending on the class of municipality, in which the public rights may be lost through nonuse, usually due to the municipality's failure to open a road that had been laid out.[7]

Rights Remaining After a Road Is No Longer "Public"

Generally, private rights of property owners are not lost due to nonuse or vacation. If a dedicated road loses its public character, the abutting landowners typically take title to the centerline of the

[6] The General Road Law, Section 5, dictates that "the width of a public road shall not be less than thirty-three feet." Act 169 of 1836 (36 P.S. § 1901). Similarly, the Second Class Township Code, Section 2306, provides that "the width of the right-of-way of a public road in townships shall not be less than thirty-three feet or more than one hundred and twenty feet."

[7] If the municipality obtains a road or street through a deed, nonuse may not extinguish the public character of the road or street.

road, subject to a private easement of other abutting landowners to travel the road.[8] The private easement, however, may be extinguished by adverse possession.[9]

Resolution of Road Disputes

In theory, reference to the provisions of the General Road Law, the appropriate municipal code and other relevant statutes should be sufficient to resolve most road disputes. In fact, there are occasions when truly contentious road dilemmas arise, and there may be no recourse but to institute proceedings before the county court of common pleas.[10] Historically, the courts of quarter sessions (now common pleas) played a supreme role in all road activities. The various road laws, including the General Road Law, conferred on the local courts the burden of resolving road issues. Of course, this in itself presents some difficulties in determining the outcome of some road questions because different county courts may have resolved seemingly similar cases with dissimilar remedies.

[8] *See Ferko v. Spisak,* 541 A.2d 327 (Pa. Super. 1988), *aff'd,* 522 Pa. 503 (1989); s*ee also* 7 Summ. Pa. Jur. 2d Property § 10:24 (2017).

[9] For example, if public rights are lost due to a lack of public use, an abutting landowner may attempt to plant grass, fence off, or otherwise occupy and exclude others from a portion of the road. If the land is exclusively occupied for 21 years, the landowner may be able to assert title to the road and legally prohibit passage by his or her neighbors. *See also* the *Deskbook* article, "Title by Adverse Possesion & Easement by Prescription."

[10] Such contentious issues often involve older or more arcane elements of common law and statutory law. In 1910, William Loyd commented on the historic laying out and opening of roads: "The subject has reached dimensions that can hardly be contained in a text book of reasonable size. The extraordinary number and variety of the statutes, with the decisions interpreting them, might drive a Bentham to despair . . . ." The subject, more than 100 years later, is no less daunting. William H. Loyd, *The Early Courts of Pennsylvania*, The Boston Book Company, Boston, 1910, p. 270.

Municipal Eminent Domain

The right to exercise the power of eminent domain must be conferred by the Commonwealth on its political subdivisions. The Pennsylvania Constitution, Article I, Section 10, among other things, makes it clear that "private property [shall not] be taken or applied to public use,[1] without authority of law and without just compensation being first made or secured." Importantly,"[b]ecause eminent domain is in derogation of private rights, any legislative authority for its use must be strictly construed in favor of the landowner."[2] Moreover, municipality's exercise of eminent domain can only be "called into operation by the legislative" and "exercised within the limitations established by law."[3] Even if a municipality is authorized to take property by eminent domain, the locale in which the power may be exercised may be limited. In fact, but for certain exceptions provided in the Eminent Domain Code, "no political subdivision will exercise eminent domain authority against land that is situated in another political subdivision without the approval by resolution of the governing body of the political subdivision in which the land is situated."[4]

Whenever property is "taken" by the government, the owner has a right to "just compensation."[5] In some instances, "just compensation" may be required from a governmental entity for action other than the physical appropriation of property. Such situations often are characterized as regulatory or "de facto" takings and occur where a law, ordinance or regulation so deprives a property owner of the use or value of their property that the result could properly be deemed a "taking."[6] However, not all restrictions on the use of property by a municipality require that compensation be paid. Compensation is not required in all cases wherein a municipality's legitimate exercise of the "police power,"[7] such as a reasonable zoning restriction, impacts on a landowner's use of property.

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[1] The constitutional "public use" requirement has been interpreted to mean "public *purpose*" by both federal and Pennsylvania courts, and takings have been upheld even where the public purpose involved conveyances of taken property to private parties for private use. In a controversial decision that prompted nationwide legislative responses, the United States Supreme Court in *Kelo v. City of New London,* 545 U.S. 469 (2005), held that the use of eminent domain to take property and convey it to another private party for the stated public purpose of "economic development" was valid under the public use clause of the Fifth Amendment to the United States Constitution.

[2] 7 Summ. Pa. Jur. 2d Property §11:1 (2d ed)(October 2017 update)(citations omitted).

[3] *Id.*

[4] 26 Pa.C.S. § 206. Act 34 and Act 35 of 2006 repealed the freestanding "Eminent Domain Code," Act 6, Special Session 1, of 1964, and replaced it with Chapters 1-11 of Title 26 (Eminent Domain) of the Pennsylvania Consolidated Statutes. The Third Class City Code contains specific authority for a city to condemn property outside of its corporate limits for specific purposes. *See* Act 317 of 1931, §§ 3703, 4201 (53 P.S. §§ 38703, 39201). These sections have been superseded and are repealed to the extent that they conflict with Act 34 and Act 35.

[5] "Just as the Fifth Amendment, rendered applicable to the states by the 14th Amendment, prohibits the taking of private property for public use without just compensation, the Pennsylvania Constitution provides that no private property will be taken or applied to public use without authority of law and without just compensation being first made or secured." 7 Summ. Pa. Jur. 2d Property (October 2017 update)(citations omitted).

[6] "A *de facto* taking occurs when an entity clothed with the power of eminent domain substantially deprives an owner of the use and enjoyment of his property." *In re Condemnation by Penn Hills,* 870 A.2d 400, 404 (Pa. Cmwlth. 2005). Ergo, if a regulation "goes too far," it is a taking. *Id.* at 405. *Cf. Nolen v. Newton Tp.,* 854 A.2d 705 (Pa. Cmwlth. 2004) (A regulation is not a taking merely because it deprives landowner of the most profitable use of property.).

[7] *See* related *Deskbook* article entitled "Police Power."

> . . . a prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot in any just sense be deemed a taking or an appropriation of property for the public benefit nor will the valid employment of the police power in a reasonable manner to abate a determined public nuisance be found to be an unconstitutional taking.[8]

The procedure by which the power of eminent domain is exercised and damages are recovered is governed by the "Eminent Domain Code,"[9] which was consolidated in 2006 within Title 26 of the Pennsylvania Consolidated Statutes, thus replacing, with changes, the prior "Eminent Domain Code."[10] The 2006 changes were passed in large part due to the United States Supreme Court decision in *Kelo v. City of New London,*[11] in which the Court held that an "economic development" taking that resulted in property being conveyed to a private party was valid under the United States Constitution, subject to any limitations that may be imposed by individual states. While the Eminent Domain Code in its current form still represents primarily a procedural statute and does not contain any substantive delegations of power to exercise the power of eminent domain,[12] the 2006 changes added a chapter entitled "Limitations on Use of Eminent Domain,"[13] which specifically restricts, subject to exceptions, the use of eminent domain for private purposes and imposes other substantive restrictions on the use of eminent domain by entities granted such power through other statutes.

In summary, the attempted exercise of eminent domain by a municipality or other entity generally involves a two-stage analysis. The initial stage requires an examination of whether the taking itself is legally justified, i.e., whether the entity has been granted the power to condemn, and whether such power may be exercised upon the specific property in question for the specific purpose relied upon by the entity. This stage is typically less rigorous, because the power is usually asserted well within the parameters set forth in the statute applicable to the entity. The second stage, after the condemnation itself has been deemed legal, involves setting just compensation. This stage is typically more complex, and may require the participation of viewers, appraisers or other experts in order to ascertain any and all factors that bear on the question of the precise "value" of what has been taken, along with, under specific circumstances, other "damages" that result from the taking. The Eminent Domain Code provides the procedural guidelines to be followed by all relevant parties when examining these issues.

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[8] 7 Summ. Pa. Jur. 2d Property § 11:2 (October 2017 update)(citations omitted).

[9] 26 Pa.C.S. § 101 et seq.

[10] Act 6, Special Session 1, of 1964.

[11] 545 U.S. 469 (2005).

[12] The substantive power to exercise eminent domain by political subdivisions, local authorities and other governmental entities is usually delegated within the specific municipal codes or other statutes delineating the purposes, duties and powers of those entities.

[13] 26 Pa.C.S. § 201 et seq.

Municipal Regulation of Adult-Oriented Businesses

Public officials are sometimes faced with the prospect of adult-oriented businesses (AOBs) locating in a community and the resultant outcry of constituents. These businesses often target communities that have little or no municipal AOB regulation. Citizens may, nevertheless, want to know what tools are available to municipalities to minimize the real or perceived effects[1] such businesses may have on the community. Below is an abbreviated list of some methods by which AOBs may be regulated. As the discussions below indicate, each of these regulatory methods presents certain legal challenges[2] that require research and, in all cases, careful drafting and review by a municipality's solicitor.

Regulation of AOBs through Zoning[3]

Zoning is arguably the most prevalent means of controlling AOBs. Zoning that distinguishes AOBs from other commercial uses has consistently been upheld by courts provided it is done within certain constitutional constraints.[4] There are two primary methods of zoning AOBs: "dispersion zoning," otherwise known as "anti-skid row" regulation, whereby, for example, the operation of an AOB is prohibited "within 1000 feet of any other such establishment or within 500 feet of a residential area;"[5] alternatively, "concentration zoning," also known as "red light dis-

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[1] These effects, known in the legal parlance as the "secondary effects" of adult uses, relate to statistically-supported increases in crime and nuisances and are important factors in establishing the legal justification for regulating AOBs.

[2] Often, when methods of municipal regulation of AOBs are challenged, it is on the basis that they impinge on "speech" entitled to protection under the First Amendment to the United States Constitution, and the analogous provision of the Pennsylvania Constitution, Article 1, Section 7. For example, in the case of "nude dancing," both Pennsylvania courts and the United States Supreme Court have noted that such activity constitutes "expressive conduct" entitled to some protection under the state and federal constitutions. *See City of Erie v. Pap's A.M.,* 529 U.S. 277, 284-285 (2000). In cases involving adult book stores and AOBs that sell or rent adult videos or other printed materials, the "speech" aspects of the business are more readily apparent. *See generally Young v. American Mini Theatres, Inc.,* 427 U.S. 50 (1976); *Miller v. California,* 413 U.S. 15 (1976) ("The States have greater power to regulate nonverbal, physical conduct than to suppress depictions or descriptions of the same behavior." *Id.* at 26, n.8, *citing United States v. O'Brien,* 391 U.S. 367 (1968)). An important legal distinction must be made, however, between sexually explicit or "pornographic" speech and "obscenity." As a matter of constitutional law, the former is entitled to First Amendment protection, while the latter, like "fighting words" or speech designed to incite immediate violence, is not. *See, e.g., Virginia v. Black,* 538 U.S. 343 (2003); *Miller v. California,* 413 U.S. 15 (1976). The United States Supreme Court has determined that the proper test for whether speech is obscene is "(a) whether 'the average person, applying contemporary community standards,' would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." 413 U.S. at 24 (citations omitted). This definition has been codified within the Pennsylvania obscenity law, which criminalizes creation, possession, display and distribution of obscene materials. *See* 18 Pa.C.S. § 5903 (relating to obscene and other sexual materials and performances).

[3] In Pennsylvania, zoning, as discussed *infra,* primarily dictates the *location* of defined uses of property. Subdivision and land development ordinances (SLDOs) essentially regulate the manner in which property is used. SLDO provisions, often in concert with zoning ordinances, can provide for screening and window and sign restrictions that minimize the impact of the AOB on the appearance of the community without running afoul of constitutional limitations. *See also, infra,* text accompanying notes 17 and 18.

[4] *See, e.g., City of Renton v. Playtime Theatres,* 475 U.S. 41 (1986), *Young v. American Mini Theatres, Inc.,* 427 U.S. 50 (1976).

[5] *See* 427 U.S. at 53.

trict" regulations, whereby a particular use is prohibited from locating anywhere except in a specific portion of the municipality. Both methods have been held to be constitutionally permissible as legitimate "time, place, and manner" restrictions of protected speech.[6] It is also true, however, that in distinguishing AOBs for zoning purposes, both "dispersion zoning" and "red light district" regulations are subject to a three-prong constitutional test. Under this test, a regulation must: (1) be unrelated to suppressing speech; (2) be narrowly tailored to serve a substantial governmental interest; and (3) permit reasonable alternative channels of communication.[7] The nuances of each prong of this test are complex. It is, however, useful to know what zoning *cannot* do:

- Zoning cannot completely eliminate AOBs from the municipal or jointly zoned area.[8]
- Zoning cannot exclusively permit AOBs in an area that is "commercially unavailable."[9]
- Zoning cannot force preexisting AOBs to cease operation and relocate.[10]

Municipal Licensing of AOBs

Subject to certain constitutional and statutory restraints,[11] Pennsylvania courts have upheld a municipality's ability to enact and enforce licensing requirements for AOBs and their employees.[12] These regulations have involved hours of operation, imposed a minimal distance between exotic dancers and patrons, required employee background checks, and provided for warrantless inspections of AOBs during business hours as well as reasonable administrative fees.[13] It is important for licensing regulations to provide clear and explicit standards and a ready means for

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[6] *See City of Renton,* 475 U.S. at 52. *See also,* 427 U.S. at 63, n.18 ("Reasonable regulations of the time, place, and manner of protected speech, where those regulations are necessary to further significant governmental interests, are permitted by the First Amendment.") *citing Kovacs v. Cooper,* 336 U.S. 77 (1949) (limitation on use of sound trucks); *Cox v. Louisiana,* 379 U.S. 559 (1965) (ban on demonstrations in or near a courthouse with the intent to obstruct justice); *Grayned v. City of Rockford,* 408 U.S. 104 (1972) (ban on willful making, on grounds adjacent to a school, of any noise which disturbs the good order of the school session).

[7] *See* 475 U.S. at 49-51.

[8] *See Schad v. Borough of Mount Ephraim,* 452 U.S. 61 (1981).

[9] There is little Pennsylvania state or Third Circuit federal court authority analyzing this specific issue in the context of the "time, place and manner" test for siting AOBs. Other federal appellate courts use tests that suggest that sites for AOBs must be both physically available (appropriate for development) and legally available (not excluding adult uses). *See, e.g., Diamond v. City of Taft,* 215 F.3d 1052 (9th Cir. 2000), *citing Topanga Press v. City of Los Angeles,* 989 F.2d 1524, 1530 (9th Cir. 1993).

[10] *See Northwestern Distributors, Inc. v. ZHB (Tp. of Moon),* 584 A.2d 1372 (Pa. 1991). In this case, the Pennsylvania Supreme Court held that this practice, called "amortization of a nonconforming use," amounted to a confiscation of property without compensation and thus violated Article I, Section 1, of the Pennsylvania Constitution.

[11] Some questions may be raised as to whether particular types of municipalities, i.e., boroughs, townships, towns or cities, may have proper statutory authorization to license AOBs. For example, in *Pennsylvania Pride, Inc. v. Southampton Township,* 78 F.Supp.2d 359 (M.D. Pa. 1999), the federal district court found that a township of the second class had implied power to license adult bookstores despite the fact that the explicit business licensing provision of the Second Class Township Code, Section 1532, does not enumerate AOBs within those businesses that may be licensed.

[12] *See, e.g., Paitek v. Pulaski Township,* 828 A.2d 1164 (Pa. Cmwlth. 2003); 78 F.Supp.2d 359.

[13] *See* 828 A.2d at 1167.

court review. These requirements are necessary because these types of regulations involve obtaining governmental approval prior to engaging in "protected speech" and thus are typically considered "prior restraint" regulations. As such, there is a rebuttable presumption that the regulations are unconstitutional.[14] This presumption is overcome when the regulation is determined to provide clear standards to guide the decision-making official, and prompt judicial review of the decision during which time the status quo must be maintained.[15] As with zoning regulation of AOBs, courts will require that any given licensing requirement have a reasonable correlation to preventing an "adverse secondary effect" of the AOB, rather than be based on the content of the "speech" being regulated.[16]

State Regulations and Municipal Nuisance Ordinances

In 1996, the General Assembly passed Act 120, which added Chapter 55 (Adult-Oriented Establishments) to Title 68 (Real Property) of the Pennsylvania Consolidated Statutes. In the legislative intent provisions of this statute, the General Assembly recognized the evidence of a "number of adult-oriented establishments which require special regulation by law and supervision by public safety agencies in order to protect and preserve the health, safety and welfare of patrons of these establishments, as well as the health, safety and welfare of the citizens of this Commonwealth."[17] The law provides standards for the illumination, physical configuration, restriction on the presence of minors, and ownership liability for the conduct of employees of defined "adult-oriented establishments." Furthermore, the act provides civil remedies and penalties that may be pursued by municipalities, the county district attorney or the Attorney General.[18] Municipalities facing the prospect of an incoming or existing AOB should familiarize themselves with these provisions.

As discussed elsewhere in this publication,[19] municipalities may prohibit the unreasonable interference with the public health, safety, peace, comfort or convenience. Many municipalities have nuisance ordinances that, under certain circumstances, could possibly be used to shut down AOBs, or force them to abate any conduct or condition that constitutes the nuisance. Furthermore, the Pennsylvania "Use of Property Act"[20] provides that the use of a building for the purpose of "fornication, lewdness, assignation, and/or prostitution is . . . declared to be a common nuisance."[21] The district attorney of any county wherein the nuisance lies may bring an action to

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[14] *See Southeastern Promotions, Ltd .v. Conrad,* 420 U.S. 546 (1975).

[15] "[A system of prior restraint] avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system." *Id.* at 559, *quoting Freedman v. Maryland*, 380 U.S. 51, 53 (1965).

[16] *See* 828 A.2d at 1173-74.

[17] 68 Pa.C.S. § 5501(a).

[18] *See* 68 Pa.C.S. § 5506 (relating to adult-oriented establishments, civil action to enjoin or abate violations).

[19] *See* related *Deskbook* article entitled "Public Nuisances."

[20] Act 319 of 1931 (68 P.S. § 467 et seq.).

[21] *Id.* § 1.

abate the nuisance or prosecute under the act.[22] It is important to note that *the content* of any adult materials or pornographic speech cannot constitute a nuisance in and of itself.[23] In essence, it is the "secondary effects" of the AOBs, i.e., sexual activity, indecent exposure, noise, drug activity, etc., that establish the nuisance for purposes of municipal ordinances or, where appropriate, state law.

Specific Issues

(1) Difficulties Regulating Nude Dancing in Pennsylvania

As previously discussed, municipal regulation through zoning of the location of businesses featuring nude dancing often withstands constitutional challenges. In light of recent case law, however, it may prove significantly more difficult for a municipality in Pennsylvania to totally prohibit nude dancing in "public places" through operation of "public indecency" ordinances. In *Pap's A.M. v. The City of Erie,*[24] the Pennsylvania Supreme Court held that Article 1, Section 7, of the Pennsylvania Constitution provides greater protection to speech than the First Amendment to the United States Constitution, and therefore, a total ban on "expressive conduct," such as nude dancing, must satisfy a "less intrusive means" test.[25]

Where municipalities seek to ban expressive conduct, they must prove not only that there is a compelling governmental interest in doing so, but also that governmental goals may not be accomplished by "a narrower, less intrusive method than the total ban on expression."[26]

An ordinance having the effect of totally barring nude dancing faces invalidation under the Pennsylvania Constitution because the goals of combating the "secondary effects" of nude dancing may be accomplished, in the Pennsylvania Supreme Court's opinion, by methods such as zoning, more stringent civil and criminal enforcement mechanisms, and hours-of-operation restrictions. Municipalities seeking to restrict nude dancing by way of public indecency or nudity ordinances should be very aware of the *Pap's A.M.* case and the fact that the Pennsylvania

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[22] For the use of this statute in the abatement of nuisances, *see Commonwealth ex rel. Preate v. Danny's New Adam & Eve Bookstore,* 625 A.2d 119 (Pa. Cmwlth. 1993); *Commonwealth ex rel. Lewis v. Allouwill Realty Corp.,* 478 A.2d 1334 (Pa. Super. 1984).

[23] "It has been held that obscenity cannot at once be defined and enjoined under the common law of public nuisance, because nuisance law provides too vague a standard for determining the line between protected and unprotected speech." *Ranck v. Bonal Enterprises, Inc.,* 467 Pa. 569 (1976).

[24] 571 Pa. 375 (2002). This case was the Pennsylvania Supreme Court decision issued after remand from the United States Supreme Court decision *City of Erie v. Pap's A.M.,* 529 U.S. 277 (2000). While the United States Supreme Court upheld the constitutionality of relevant provisions of the City of Erie's public decency ordinance under federal law, the Pennsylvania Supreme Court, on remand, found that the ordinance violated a heightened protection for speech contained in Article 1, Section 7, of the Pennsylvania Constitution.

[25] *See* 571 Pa. at 410.

[26] *Id.*

Supreme Court has articulated an extremely strict test for the legitimacy of regulations that regulate "expressive conduct" based on the message the conduct conveys.

(2) Sexually-Oriented Conduct in Establishments with Liquor Licenses

The language in the Pennsylvania Liquor Code prohibits licensed establishments from permitting any "lewd, immoral or improper entertainment" on the premises.[27] Two federal court decisions, however, have rendered this phrase unconstitutional, thus effectively prohibiting any enforcement of the provision.[28] Prior to these decisions, Pennsylvania case law provided that nude dancing in public bars constituted a violation of this provision.[29] In the Third Circuit decision interpreting this provision, *Conchatta v. Miller,*[30] the court held that the term "lewd" as used in Section 4-493(10) of the Liquor Code is unconstitutionally overbroad.[31] The court noted that "[t]he statutory language clearly could have been drafted more narrowly to specifically target secondary effects associated with nude or topless dancing."[32] The court's language appears to indicate the overbreadth issue could be alleviated by an appropriate revision of the Liquor Code.

The Pennsylvania State Police through its Bureau of Liquor Control Enforcement has a "nuisance bar" program that targets bars that disrupt the community or, until the recent court decisions, violated the decency provisions of the Liquor Code. Citizens can file complaints with either the Bureau or their local police if they have reason to believe the Liquor Code is being or has been violated.[33] It is important to note that the provisions relating to the nuisance bar program would not apply to "bottle clubs," i.e., establishments where alcohol is not sold, but where patrons may bring their own alcohol.

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[27] *See* Act 21 of 1951, § 493(10) (47 P.S. § 4-493(10)). Section 7329 of the Pennsylvania Crimes Code (18 Pa.C.S. § 7329) uses the same language as Section 4-493(10) of the Liquor Code, i.e., "lewd, immoral or improper entertainment," but applies only in the context of "bottle clubs" rather than licensed establishments.

[28] The federal district court for the Eastern District of Pennsylvania, in *Conchatta, Inc. v. Evanko,* 2005 U.S. Dist. LEXIS 2638 (E.D. Pa. 2005), held that the terms "immoral or improper" were unconstitutionally vague as used in the Liquor Code. A subsequent decision of the Third Circuit in the same matter, *Conchatta, Inc. v. Miller,* 458 F.3d 258 (3d Cir. 2006), held that the term "lewd" as used in the Liquor Code is unconstitutionally overbroad.

[29] *See, e.g., Purple Orchid, Inc. v. Pennsylvania State Police, Bureau of Liquor Control Enforcement,* 572 Pa. 171 (2002); *Rising Sun Entertainment, Inc. v. Commonwealth,* 829 A.2d 1214 (Pa. Cmwlth. 2003).

[30] 458 F.3d 258 (3d Cir. 2006).

[31] *See id.* at 268. The court applied the test elucidated in the United States Supreme Court case *United States v. O'Brien,* 391 U.S. 367 (1968), and determined that the use of the term "lewd" failed the fourth prong of the test because the asserted governmental interest of limiting negative secondary effects is not applicable to a large number of establishments affected by the Liquor Code and its accompanying regulations. The *O'Brien* test provides that a regulation is considered constitutional provided that: (1) "it is within the constitutional power of the Government"; (2) it "furthers an important or substantial governmental interest"; (3) "the governmental interest is unrelated to the suppression of free expression"; and (4) "the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." 391 U.S. at 377.

[32] 458 F.3d at 268.

[33] *See* separately "Nuisance Bar Program," Pennsylvania Liquor Control Board, 2014, http://www.lcb.pa.gov/ Licensing/Topics-of-Interest/Pages/Nuisance-Bar-Program.aspx (November 20, 2017).

Use of Restrictive Covenants: Community Involvement

A property owner whose property could possibly be used for an AOB has been an often overlooked method of combating AOBs. With the advice of legal counsel, a property owner could explore imposing conditions on leases and deeds, known as restrictive covenants that would limit or restrict the use of property for AOBs. Furthermore, citizens should become familiar with the appropriate state and local enactments that regulate businesses, nuisances and obscenity, and participate in local government if they feel their community is inadequately protected.

Limbs from my Neighbor's Tree Overhang my Property… What Can I Do?

Though not strictly a local government issue, this situation is often presented to local government officials.[1]

It generally is understood that an owner of realty has a cause of action against any person who has committed a trespass upon his land. What is less generally known is that this cause of action does not require that the landowner allege any actual injury or damage. The harm that is to be remedied is the right to peaceably enjoy full, exclusive use of the property, not the fact that the property is being damaged.

Moreover, a landowner generally has a right not only to the exclusive possession of the surface of his property but also to what lies above and below it. There is a property right in the air space above the land, and this property right can be invaded by overhanging objects, including tree limbs. When tree branches overhang a property line, the aggrieved landowner is not limited to seeking monetary relief for any damage that may have occurred. When tree limbs grow over onto another person's property, there is a trespass. In fact, in the case of tree limbs, there is a continuing trespass occurring by the mere fact of the overhang and the possessor of land is entitled to pursue various remedies, including self-help. With regard to self-help, an aggrieved landowner is entitled to trim the branches back to the property line, and this is true even if the overhanging branches do not damage the property. Also, if the landowner has incurred reasonable expenses in the course of exercising a self-help remedy, he may recoup those expenses from the trespasser.

Who is responsible for removing downed trees during a weather-related emergency?

To begin with, all utilities that fall under the Public Utility Commission's jurisdiction are required to "furnish and maintain adequate, efficient, safe, and reasonable service and facilities, and shall make all such repairs . . . as shall be necessary . . . ."[2] The provisions of this section provide the basis for utility companies to be required to not only respond to fallen trees that damage or threaten utility lines, but also act prospectively to attempt to prevent future damage. Nothing in this section appears to require the utility company to provide for the disposal of a tree after it has addressed the safety or repair issues.

In the case of a public road or highway, responsibility for the maintenance of a road, including the removal of a downed tree, depends on whether the road is owned by the municipality or the

[1] *See Jones v. Wagner,* 624 A.2d 166 (1993), *appeal denied,* 536 Pa. 626 (1993). *See also Koresko v. Farley,* 844 A.2d 607, 617 (Pa. Cmwlth. 2004) ("encroaching tree parts are a trespass which a landowner may remove").

[2] 66 Pa.C.S. § 1501.

Commonwealth.[3] Nevertheless, the Commonwealth Court in *Mylett* speculated that clearing a downed tree may become the municipality's responsibility if the Pennsylvania Department of Transportation (PennDOT) contracted with the municipality for the municipality to perform its maintenance functions. Further, both PennDOT on state-designated highways, and local authorities on highways within a municipality, may require abutting property owners to remove trees or other obstructions that constitute a traffic hazard even if the tree has fallen adjacent to, but not on the road, causing a hazard for visibility.[4]

Where the question of the liability for the removal of a downed tree arises between two parties (for example, the property that the tree stood upon and the property that the tree falls upon), the answer is essentially one that arises out of the law of torts. The Pennsylvania Superior Court has held in the most direct case on point, *Barker v. Brown*,[5] that whether the owner of a tree will have liability for damages resulting from a tree falling on a neighbor's property will essentially be a two part analysis. First, the court will not find liability for the landowner where the tree is part of a natural condition of land by following Section 363 of the Restatement (Second) of Torts, particularly where the properties in question are large and undeveloped. Second, a possessor of land in or adjacent to a developed or residential area is subject to liability for harm caused to others outside of the land by a defect in the condition of a tree thereon, if the exercise of reasonable care by the possessor:

- would have disclosed the defect and the risk involved therein, and
- would have made it reasonably safe by repair or otherwise.[6]

In practice, it is unlikely that a court would find liability for the owner of a tree that falls on a neighboring property unless the owner would have known through the exercise of reasonable care that there was a dangerous defect that would have led to the tree's demise and would have made it reasonably safer through repair. Where an otherwise apparently healthy tree falls during a storm, it is not likely that there would be any basis to find liability against the tree's owner. Realistically, these cases involving landowner disputes appear to be relatively rare, perhaps due to the fact that landowners who suffer actual damage from fallen trees, or simply the inconvenience of disposing of fallen trees, make a claim against their homeowner's insurance to relieve the burden. According to a press release issued by the Pennsylvania Insurance Department, "Homeowners policies should also cover damage from fallen trees or tree limbs. However, consumers should check with their insurer before removing fallen trees, to see if this cost is covered."[7]

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[3] *See e.g., Mylett v. Adamsky*, 591 A.2d 341, 345 (Pa. Cmwlth. 1991), *citing Medina v. Township of Falls*, 454 A.2d 674 (Pa. Cmwlth. 1983).

[4] 67 Pa. Code § 212.6(b).

[5] 5 340 A.2d 566 (Pa. Super. 1975).

[6] *See Restatement, Second, Torts*, § 365 (1965); *McCarthy v. Ferrence*, 358 Pa. 485 (1948); *see also, Squicquero v. Ross,* 13 Pa.D.&C.5th 58 (C.P. Lawrence 2010).

[7] Pennsylvania Department of Insurance, *Insurance Commissioner Offers Tips on Winter Weather Damage to Homes and Autos*, January 20, 2016, http://www.media.pa.gov/Pages/Insurance-Details.aspx?newsid=161 (November 20, 2017).

Landlocked Property

Easements by Implication, Necessity, and Prescription; and the Creation of Private Roads

Local governments are often approached by owners of landlocked property who believe that their local elected officials or local ordinances may provide them with assistance in obtaining desired rights-of-way. Usually, however, the remedy lies not with the local government, but with the courts. In fact, in most cases, neither municipal acquiescence nor participation are essential or required elements for establishing an owner's right to an easement of ingress and egress to landlocked property. Among the possible solutions to the problem of "landlocked" property are the establishment of an easement or the creation of a "private road."

Easements

The common law[1] provides various means whereby an owner of landlocked property might assert a right to an easement over the land of another for the purpose of highway access. Some examples are provided in *Tricker v. Pennsylvania Turnpike Commission*:[2]

> . . . An **easement by implication** may be acquired where the intent of the parties is clearly demonstrated by the terms of the grant, the surrounding property and other [things done regarding] the transaction . . . . In Pennsylvania, to determine whether an easement by implication has been created, three essential elements must exist for the creation of an easement by implication upon the severance of the unity of ownership in an estate:
>
> (1) a separation of title;
>
> (2) prior to the separation of title, that the use which gave rise to the easement had been so long continued and so obvious or manifest as to show that it was meant to be permanent; and
>
> (3) the easement was necessary to the beneficial enjoyment of the land granted or retained.
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> ***

[1] "Common law. The body of law derived from judicial decisions [caselaw precedent], rather than from statutes or constitutions. *Black's Law Dictionary*, 7th ed., West Group, St. Paul, Minn., 1999, p. 270.

[2] 717 A.2d 1078, 1081-83 (Pa. Cmwlth. 1998), *appeal denied,* 559 Pa. 684 (1999) (emphasis supplied, citations omitted, footnote added).

> . . . An **easement by necessity** is created when, after severance from an adjoining property, a piece of land is without access to a public highway. . . . To establish that an "easement by necessity" has been created, a property owner must prove:
>
> (1) the titles to the property in question and the property over which the alleged easement exists had once been held by one person;
>
> (2) this unity of title had been severed by a conveyance of one of the tracts; and
>
> (3) the easement was necessary in order for the owner of the property in question to use his land, with the necessity existing both at the time of the severance and at the time of the exercise of the easement.
>
> . . . Just as is required for an easement by implication, an easement by necessity also requires that there be "unity of ownership" of both the property that must be accessed and the property over which the easement allegedly lies . . . .
>
> . . . An **easement by prescription**[3] is created by adverse, open, continuous, notorious, and uninterrupted use of land for the prescriptive period – in Pennsylvania, that period is for 21 years . . . .

Private Roads

In addition to the aforementioned common law mechanisms, provisions of Act 169 of 1836,[4] commonly known as the Private Road Act (PRA),[5] allow owners of landlocked property to petition the court for the creation of a "private road." Procedurally, if the landlocked owner can successfully prove in court that the factual and legal requisites for a private road exist, the land of another can be "condemned" and damages for this taking are paid by the person on whose behalf the private road is created. Until recently, the constitutionality of the law had been upheld by Pennsylvania state and federal courts.[6]

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[3] *See* related *Deskbook* article entitled "Title by Adverse Possession & Easement by Prescription."

[4] This act is commonly referred to as the "General Road Law."

[5] Sections 11-16 of the General Road Law are considered the "Private Road Act."

[6] *See, e.g., Marinclin v. Urling*, 262 F. Supp. 733 (W.D. Pa. 1967), *aff'd*, 384 F.2d 872 (3rd Cir. 1967) (holding that the Private Road Act does not violate the United States Constitution); *In re Private Road in East Rockhill Tp., Bucks County, Pa.*, 645 A.2d 313 (Pa. Cmwlth. 1994), *appeal denied*, 539 Pa. 698 (1994) (upholding the Private Road Act as consistent with Article 1, Section 10 of the Pennsylvania Constitution).

In 2010, the Pennsylvania Supreme Court significantly limited the scope of the law without declaring it unconstitutional on its face.[7] In holding that the PRA is a manifestation of the power of eminent domain, the court determined that the only constitutionally permissible use of the act is if the public is the "primary and paramount beneficiary" of the taking.[8]

[7] *In re Opening a Private Rd. ex rel. O'Reilly,* 607 Pa. 280 (2010).

[8] *See* 607 Pa. at 299. Although this appears to be a significant hurdle to surmount in a typical private road proceeding, the Supreme Court in *O'Reilly* remanded with direction to Commonwealth Court to consider whether an earlier condemnation by the Commonwealth for purposes of interstate construction that allegedly caused the isolation of the property was sufficiently "interconnected" to the PRA proceeding to render the public the primary beneficiary of the taking. *See* 607 Pa. at 299-301. After further remand, the development of the record did not find that the public was the primary beneficiary of the taking because owner of the landlocked property failed to demonstrate an original taking and the use of the PRA was an "interconnected course of events." *In Re O'Reilly*, 100 A.3d 689, 694 (Pa. Cmwlth. 2014), *appeal denied*, 631 Pa. 733 (2015). Despite the questionable constitutionality of the use of the act depending on the facts of the taking, the Supreme Court has, post *O'Reilly*, decided cases under the act without discussing its constitutionality. *See O'Reilly v. Hickory on the Green Homeowners Ass'n*, 22 A.3d 291, 297 n.5 (Pa. Cmwlth. 2011), *citing In re Private Rd. in Speers Boro*, 608 Pa. 302 (2011). However, the Commonwealth Court noted in *In Re Tax Parcel 27-309-216*, 98 A.3d 750, 754 (Pa. Cmwlth. 2014), that it could not infer from the *Speers Boro* decision any retreat from its principles established in *O'Reilly*.

Title by Adverse Possession & Easement by Prescription

Adverse possession is commonly known as squatters rights. It is a legal doctrine that allows a person to acquire ownership of the property of another. Adverse possession involves the taking away of property rights by operation of law. Thus, while not typically a local government matter,[1] it is a significant issue of fundamental importance. Paramount among the elements required for adverse possession is proof of possession for 21 years. However, mere possession of the land by a claimant is not sufficient to confer title under this doctrine. The claimant also must establish by credible, clear and definitive proof that all the other constituent elements of adverse possession exist. The possession must be actual, continuous, exclusive, visible, notorious, distinct and hostile. Moreover, court opinions have provided criteria for establishing each of these elements,[2] and a person who claims title to property through adverse possession is held to strict requirements of proof.

As title to land may be acquired by adverse possession, an easement upon land may be acquired under the doctrine of prescription. As with adverse possession, a 21-year period is required in order to establish an easement by prescriptive use.[3] The other required elements for an easement by prescription are similar, but not identical, to those required to obtain ownership by adverse possession. For example, in establishing a prescriptive easement, a claimant's use does not have to be "exclusive"; other people, even the true owner, may also be using a right-of-way upon which the claimant asserts a prescriptive easement. The proof of the element of continuity also is different in the case of a prescriptive easement. Generalizing, it may be said that the requirement of continuous use for establishing a prescriptive easement is not as rigorous as the continuous possession requirement for adverse possession.[4]

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[1] *See* discussion on next page entitled, "Adverse Possession and Prescription and Government Property."

[2] While an exhaustive discussion of this topic is beyond the scope of this article, reference is made to the recent case of *Flannery v. Stump,* 786 A.2d 255 (Pa. Super. 2001). For a comprehensive discussion of adverse possession, the following secondary source provides helpful information: 7 Summ. Pa. Jur. 2d Property Ch. 13 (October 2017 update) (relating to adverse possession).

[3] Adverse possession most often is relied upon to assert complete ownership or fee title to property. On the other hand, prescription is relied upon to acquire an easement (such as a right-of-way) to use another's land, not to acquire title to it. Moreover, in the case of a prescriptive easement, it is not necessary to establish "possession" of another's land, but rather it is the "use" of the land that is important.

[4] "[A]dverse possession, unlike prescription, requires exclusivity . . . . [O]ne claiming an easement by prescription need not show an exclusive and distinct use . . . . Another factor for establishing a prescriptive easement that is somewhat less stringent than that required for adverse possession is the 'continuous use' of the property. In establishing a prescriptive easement, constant use need not be demonstrated in order to establish the continuity of the use. Rather, 'continuity is established if the evidence shows a settled course of conduct indicating an attitude of mind on the part of the user or users that the use is the exercise of a property right.'" *Newell Rod and Gun Club, Inc. v. Bauer,* 597 A.2d 667, 670 (Pa. Super. 1991) (citations omitted).

Adverse Possession and Prescription and Government Property

A person may not utilize adverse possession to acquire title to property owned by the federal or state governments. In the case of property owned by political subdivisions, except school districts which are considered agents of the state, title can be acquired by adverse possession so long as the land in question was not devoted to public use anytime during the 21-year prescriptive period. Also, land held by a county in connection with a tax sale is not subject to adverse possession.[5] Another example of how a municipality may lose an interest in property involves land or an interest therein that was dedicated to a municipality for use as a public street. If the municipality fails to open or accept the street within twenty-one years, it will lose its ability to open the street without the approval of a majority of abutting owners.[6]

[5] *See Lysicki v. Montour School Dist.,* 701 A.2d 630, 632 (Pa. Cmwlth. 1997) and *Torch v. Constantino,* 323 A.2d 278 (Pa. Super. 1974); *see also* 22 Standard Pennsylvania Practice 2d § 120:206 (2017).

[6] *See* Unused Streets, Lanes and Alleys, Act 192 of 1889, § 1 (36 P.S. § 1961), and Borough Code, 8 Pa.C.S. § 1724; *see also Estojak v. Mazsa,* 522 Pa. 353 (1989) (even though the municipality fails to accept or open dedicated street in subdivision or plan within 21 years, the owners of property within plan or subdivision retain private rights of easement by implication over unopened streets).

Real Estate Assessment Process in Pennsylvania… An Overview

Real property taxes have been and continue to be a primary source of funds for Pennsylvania's local governments. The real estate tax is the only tax authorized by law in Pennsylvania to be levied by all classes of local governments in the state. Every property owner pays real estate taxes, unless otherwise exempted, to three independent taxing districts: the county, the municipality, and the school district.[1] The property tax is not levied at the state level in Pennsylvania.

The Consolidated County Assessment law[2] (hereinafter referred to the assessment law) governs the real estate assessment process in counties of the second class A through the eighth class.[3] Philadelphia[4] and Allegheny[5] Counties primarily are subject to distinctive statutory provisions regarding the assessment of real property, as well as to unique home rule charter and administrative code requirements. The Third Class City Code sets forth procedures relating to the assessment of real property for taxation purposes in a city of the third class that choose to assess property separate from the county in which it is located.[6]

Key Definitions

"Base year." The year upon which real property market values are based for the most recent countywide revision of assessment of real property or other prior year upon which the market value of all real property of the county is based for assessment purposes. Real property market values shall be equalized within the county and any changes by the board shall be expressed in terms of base-year values. [7]

"Common level ratio." The ratio of assessed value to current market value used generally in the county and published by the State Tax Equalization Board on or before July 1 of the year

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[1] Pennsylvania Department of Community and Economic Development, Governor's Center for Local Government Services, *Taxation Manual*, 8th ed. (2002), p. 2.

[2] 53 Pa.C.S. § 8801 et seq.

[3] In addition, a school district of the first class A, second class, third class or fourth class is subject to the property tax rate restrictions and anti-windfall limitations delineated in the Taxpayer Relief Act (Act of June 27, 2006, Special Session 1, P.L. 1873, No. 1).

[4] The General County Assessment Law, Act 155 of 1933 (72 P.S. § 5020-101 et seq.); Related to Taxation; Board of Revision of Taxes, Act 404 of 1939 (72 P.S. § 5341.1 et seq.); 53 Pa.C.S. §§ 8561-8565 (relating to assessments in cities and counties of the first class).

[5] The General County Assessment Law; Second Class County Assessment Law, Act 294 of 1939 (72 P.S. § 5452.1 et seq.); Second Class County Code, Act 230 of 1953 (16 P.S. § 3101 et seq.).

[6] 11 Pa.C.S. § 12522.

[7] "'Board.' The board of assessment appeals or the board of assessment revision established in accordance with section 8851 (relating to board of assessment appeals and board of assessment revision). The term, when used in conjunction with hearing and determining appeals from assessments, shall include an auxiliary appeal board." 53 Pa.C.S. § 8802.

prior to the tax year on appeal before the board under the act of June 27, 1947 (P.L.1046, No.447),[8] referred to as the State Tax Equalization Board Law.[9]

"Established predetermined ratio." The ratio of assessed value to market value established by the board of county commissioners and uniformly applied in determining assessed value in any year.[10]

"STEB." The State Tax Equalization Board.

Uniformity

Pennsylvania has a constitutional requirement for uniformity of taxation.[11] Since 1909, the courts have held that real estate is a taxable subject of one class and taxes must be uniform upon the same class of subjects.[12] A uniform assessment rate means that all properties in a county, whether residential, commercial or industrial, will be assessed at the same ratio of assessed value to market value. The Pennsylvania Supreme Court stated:

> . . . the principle of uniformity is a constitutional mandate to the courts, to the legislature, and to the taxing authorities, in the levy and assessment of taxes which cannot be disregarded. The purpose of requiring all tax laws to be uniform is to produce equality of taxation. Absolute equality is difficult of attainment, and approximate equality is all that can reasonably be expected. Hence it has been held that where there is substantial uniformity the constitutional requirement has been met…[13]

The controlling principle in matters of valuation is that no one taxpayer should pay any more or less than their proportionate share of the cost of government.

Valuation of Property

Section 8842(a), (b) of the assessment law prescribes the method by which real property is to be valued:

> . . . In arriving at actual value, the county may utilize the current market value or it may adopt a base-year market value. . . . [T]he following apply: (i) In arriving at actual value, the price at which any property may actually have been sold, either

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[8] Repealed by the Act of April 18, 2013 (P.L. 4, No. 2). Consolidated, as amended, into the Act of June 27, 1996 (P.L. 403, No. 58).

[9] Definition from 53 Pa.C.S. § 8802.

[10] *Id.*

[11] "All taxes shall be uniform, upon the same class of subjects, within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws." Pa. Const. art. XIII, § 1.

[12] *Delaware, Lackawanna & Western Railroad Company's Tax Assessment (No. 1)*, 73 A. 429 (Pa. 1909).

[13] *Id.* at 430 (citations omitted).

> in the base year or in the current taxable year, shall be considered but shall not be controlling. (ii) The selling price shall be subject to revision by increase or decrease to accomplish equalization with other similar property within the county . . . .

The courts have interpreted actual value to mean market value.[14] Market value has been defined by the Pennsylvania State Supreme Court as "the price in a competitive market a purchaser, willing but not obligated to buy, would pay an owner, willing but not obligated to sell, taking into consideration all the legal uses to which the property can be adapted and might reasonably be applied."[15]

In arriving at the actual value, three approaches to value must be considered in conjunction with one another: cost, comparable sales and income. All property values must be equalized by the county before applying the county's established predetermined ratio (EPR). A property's assessed value, or the value upon which the millage rate is applied, is then calculated by multiplying the current market or base-year market value by the EPR.[16]

Change of Assessment[17]

The county assessment office is authorized to revise the assessment roll at any time in the year. Notification of a change of assessment must be provided to the property owner of record.[18] All additions and revisions are deemed a "supplement to the assessment roll for levy and collection of taxes for the tax year for which the assessment roll was originally prepared."[19]

Apart from a countywide reassessment, the county assessment office may only initiate a change of assessment when a "triggering event" occurs: (1) a property has been subdivided; (2) a physical change has been made to a property, such as new construction or removal or change of existing improvements; (3) a catastrophic loss has occurred to the property; or (4) a change in use of the property (e.g., tax-exempt status) has taken place.[20] The sale of the property solely cannot lawfully trigger a change of assessment by the county assessment office regardless of the indicated

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[14] *Baldwin-Lima-Hamilton Corp.*, 412 Pa. 299, 194 A.2d 434 (1963); *Buhl Foundation v. Board of Property Assessment, Appeals and Review of Allegheny County*, 407 Pa. 567, 180 A.2d 900 (1962).

[15] *Buhl Foundation v. Board of Property Assessment, Appeals and Review of Allegheny County*, 407 Pa. 567, 180 A.2d 900 (1962); *U.S. Steel Corp. v. Board of Assessment and Revision of Taxes of Bucks County*, 422 Pa. 463, 223 A.2d 92 (1966).

[16] For example: If the current market value or base year value of Property A is $100,000 and the county's predetermined ratio is 40 percent, then the assessed value is $40,000 ($100,000 x 40 percent). Hypothetically, the county may levy 5 mills for the real estate tax; the township in which the property is located may levy 10 mills for the real estate tax; and the coterminous school district may levy 20 mills for the real estate tax. The owner of Property A would, therefore, be liable to pay real estate taxes in the amounts of $200 to the county ($40,000 x .005), $400 to the township ($40,000 x .01) and $800 to the school district ($40,000 x .02). This is the general method by which property is valued and assessed throughout the Commonwealth.

[17] This does not refer to an assessment that is incorrect due to a clerical or mathematical error pursuant to 53 Pa.C.S. § 8816.

[18] 53 Pa.C.S. § 8841(c).

[19] 53 Pa.C.S. § 8844 (a), (b).

[20] 53 Pa.C.S. § 8841(c).

purchase price as this action is deemed to be "spot reassessment"[21] under the provisions of the assessment law and declared by the courts to be in violation of both the federal[22] and state[23] constitutions.

Appeal of an Assessment

Another instance in which the assessment of a property can be altered is through the appeal process. The assessment law affords the right to any property owner[24] or taxing district to annually appeal an assessment.[25]

Although the county assessment office as the assessing entity does not have the power to selectively reassess a property absent a triggering event,[26] a taxing district which does not have the power to revise assessments itself but does have the same explicit appeal rights under the law as a property owner may appeal a property assessment without a triggering event.[27] The practice by some taxing districts to target certain properties for appeal[28] has been limited by the Pennsylvania Supreme Court in its holding in *Valley Forge Towers Apartments N, LP v. Upper Merion Area School District.*[29] In this case, the court held that a school district's intentional targeting of commercial property for appeals was an impermissible sub-classification of real property prohibited by the Uniformity Clause of the Pennsylvania Constitution:

> From the . . . precepts we have discussed—that all real estate in a taxing district forms a single collective class to be treated uniformly, and that systematic disparate enforcement of the tax laws based on property sub-classification, even absent wrongful conduct, is constitutionally precluded—it follows that a taxing authority is not permitted to implement a program of only appealing the assessments of one sub-classification of properties, where that sub-classification is drawn according to property type—that is, its use as commercial, apartment complex, single family residential, industrial, or the like.

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[21] 53 Pa.C.S. § 8843.

[22] The United States Supreme Court ruled in *Allegheny Pittsburgh Coal Co. v. County Com'n of Webster County, W. Va.*, 488 U.S. 336, 109 S. Ct. 633, 102 L. Ed. 2d 688 (1989), that the practice of placing a new assessment on property which was recently sold, while effecting only minor changes to real estate which has not been sold for a number of years, was a violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution.

[23] Pa. Const. art. XIII, § 1.

[24] 53 Pa.C.S. § 8844

[25] 53 Pa.C.S. § 8855.

[26] *See Supra,* section titled "Change of Assessment."

[27] *See, e.g.*, *In re Springfield School District*, 879 A.2d 335 (Pa. Cmwlth. 2005); *Vees v. Carbon County Bd. of Assessment Appeal*, 867 A.2d 742 (Pa. Cmwlth. 2005); *Millcreek Twp. School Dist. v. Erie County Bd. of Assessment*, 737 A.2d 335 (Pa. Cmwlth. 1999); *Richland School Dist. v. County of Cambria Bd. of Assessment*, 724 A.2d 988 (Pa. Cmwlth. 1999).

[28] *E.g.*, due to a recent sale of the property or other methodology of appeals.

[29] 163 A. 3d 962 (Pa. 2017).

Homestead Exclusion

An amendment to Article VIII of the Pennsylvania Constitution,[1] approved by the voters in November 1997, gave rise to the "homestead exclusion." This exclusion provides an exception from the uniformity of taxation requirement that is also set forth in Article VIII.[2] The General Assembly implemented the constitutionally-approved homestead exclusion by enacting Act 50 of 1998.[3] Act 50 permitted "local taxing districts" which included counties, municipalities and school districts, to exclude from real estate taxation a portion of the assessed value of homestead property.[4] Act 50 also provided for a farmstead exclusion[5] using preexisting constitutional authority.

The homestead exclusion is a flat-rate uniform dollar amount, which cannot exceed 50 percent of the median[6] value of all homestead property within the taxing jurisdiction as certified by the county assessment office. If different millage rates are applied to land and buildings, the exclusion is applied first to buildings. The owner or owners of real property seeking to have such approved as homestead property or a farmstead[7] must file an application with the county assessment office no later than March 1 of each year.[8] Act 50 requires a taxing district granting a homestead exclusion to provide a similar exclusion for farmstead property by a fixed dollar amount not to exceed the amount of the exclusion for homestead property.[9] A taxing jurisdiction may not increase its millage rate on real property to pay for the homestead and farmstead exclusions.[10]

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[1] Pa. Const. art. XIII, § 2(b)(vi).

[2] Pa. Const. art. XIII, § 1.

[3] 53 Pa.C.S. §§ 8401, 8581-8588, in relevant part.

[4] A homestead is generally considered to be a dwelling and the land on which the dwelling sits, as well as any other improvements on that land so long as one of the following three situations applies: (1) an owner-occupied dwelling (land included, only if the owner of the dwelling also owns the land beneath it); (2) an owner-occupied condominium or cooperative where the assessed value is based on the individual unit or in some cases the pro rata share of the real property; or (3) if a dwelling does not otherwise qualify under the previous two situations, that portion of the real property that is occupied by the owner of that portion. An "owner" is considered to be only a natural person or natural persons rather than an organization, association or corporate entity. 53 Pa.C.S. § 8401.

[5] "The exclusion for farmstead property shall be authorized pursuant to section 2(b)(i) of Article VIII of the Constitution of Pennsylvania. This exclusion shall apply uniformly to each farmstead property within the taxing jurisdiction." 53 Pa.C.S. § 8585(a).

[6] Median assessed value is defined as the "value which is the middle point in the sequential distribution of assessed values, above and below which exist an equal number of assessed values." 53 Pa.C.S. § 8582.

[7] "Farmstead" is defined as "[a]ll buildings and structures on a farm not less than ten contiguous acres in area, not otherwise exempt from real property taxation or qualified for any other abatement or exclusion pursuant to any other law, that are used primarily to produce or store any farm product produced on the farm for purposes of commercial agricultural production, to house or confine any animal raised or maintained on the farm for the purpose of commercial agricultural production, to store any agricultural supply to be used on the farm in commercial agricultural production or to store any machinery or equipment used on the farm in commercial agricultural production. This term shall only apply to farms used as the domicile of an owner." 53 Pa.C.S. § 8582.

[8] 53 Pa.C.S. § 8584(b).

[9] 53 Pa.C.S. § 8585(b).

[10] Pa. Const. art. XIII, § 2(b)(vi); 53 Pa.C.S. § 8586(b).

Homestead and farmstead exclusions are predominately granted by school districts. Act 50, along with the successor enactments, the Homeowner Tax Relief Act (Act 72 of 2004)[11] and the Taxpayer Relief Act (Act 1 of 2006, Special Session 1),[12] exclusively granted to school districts additional taxing powers in order to fund the homestead and farmstead exclusions. Act 50, which still applies to counties and municipalities, does not grant additional taxing powers to those political subdivisions.

Municipalities are permitted to use a portion of the revenues raised from the levy of the Local Services Tax via the Local Tax Enabling Act[13] for the purpose of funding homestead and farmstead exclusions. Conditions are specified in the act.[14]

Act 1 utilizes state gaming revenues and a local shift to an earned income tax (EIT) or a personal income tax (PIT) for the purpose of funding school property tax reductions for qualified homestead and farmstead properties.[15] Most of the money used for property tax exclusions comes from state gaming revenues pursuant to the Pennsylvania Race Horse Development and Gaming Act (Act 71 of 2004).[16] The property tax relief formula used to distribute gaming revenues for property tax reduction payments for school districts is set forth in Chapter 5 of Act 1. Funds are allocated based on a school district's tax capacity, tax effort and tax burden.

All the property tax relief fund money that school districts receive must be used solely for real property tax reductions given through homestead and farmstead exclusions. If the amount of state money varies from year to year, districts are allowed to adjust the size of the exclusions to compensate.

In November, 2017, Pennsylvania voters approved an amendment to the state Constitution to change the authorized homestead/farmstead exclusion offered by local taxing authorities from one-half of the median assessed value of all homestead property within a local taxing jurisdiction to one hundred percent of the assessed value of each homestead property within the jurisdiction.

> [Effectively,] the ballot question would allow the General Assembly to pass a law increasing the amount of assessed value that local taxing authorities may exclude from real estate taxation for homestead property…. The ballot question, by itself, does not authorize local taxing authorities to exclude up to one-hundred percent (100%) of the assessed value of each homestead property from real estate taxation. Local taxing authorities could not take such action unless and until the General Assembly passes a law authorizing them to do so. The ballot question authorizes the General Assembly to pass that law.[17]

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[11] Act 72 of 2004 (53 P.S. § 6925.101 et seq.), repealed by Tax Payer Relief Act, Act 1, Special Session 1, of 2006 (53 P.S. § 6926.101 et seq.), eliminated the ability of school districts to opt into Act 50 of 1998.

[12] Tax Payer Relief Act, modified by Act 25 of 2011.

[13] Act 511 of 1965 (53 P.S. § 6924.101 et seq.).

[14] *Id.* at § 330 (53 P.S. § 6924.330).

[15] *See Deskbook* article entitled "Taxpayer Relief Act."

[16] 4 Pa.C.S. § 1101 et seq.

[17] Plain English Statement of the Office of Attorney General regarding the November 2017 amendment to the Pennsylvania Constitution, Pennsylvania Department of State Public Notice. *Available at* http://www.dos.pa.gov/VotingElections/CandidatesCommittees/RunningforOffice/Documents/ConstAmend-10.5x17.pdf (November 21, 2017).

Clean and Green

The Pennsylvania Farmland and Forest Land Assessment Act of 1974,[1] better known as "Clean and Green" or Act 319, provides a real estate tax benefit to owners who have land in "agricultural use," "agricultural reserve" or "forest reserve" and are enrolled in the "Clean and Green Program." In essence, land enrolled in Clean and Green is assessed according to its use value rather than its prevailing market value.[2] Act 319 applies to all counties in Pennsylvania. Each county assessment office is responsible for administering the program within its jurisdiction.

Clean and Green uses:

Agricultural Use. Land which is used for the purpose of producing an agricultural commodity[3] or is devoted to and meets the requirements and qualifications for payments or other compensation pursuant to a soil conservation program under an agreement with an agency of the Federal Government. The term includes:

- Any farmstead land on the tract.
- A woodlot.
- Any land that is rented to another person and used for the purpose of producing an agricultural commodity.

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[1] Act 319 of 1974 (72 P.S. § 5490.1 et seq.).

[2] *Id.* at § 4.1.

[3] Act 319, Section 2, defines "agricultural commodity" as any of the following:

(1) Agricultural, apicultural, aquacultural, horticultural, floricultural, silvicultural, viticultural and dairy products.

(2) Pasture.

(3) Livestock and the products thereof.

(4) Ranch-raised furbearing animals and the products thereof.

(5) Poultry and the products of poultry.

(6) Products commonly raised or produced on farms which are:

(i) intended for human consumption; or

(ii) transported or intended to be transported in commerce.

(7) Processed or manufactured products of products commonly raised or produced on farms which are:

(i) intended for human consumption; or

(ii) transported or intended to be transported in commerce.

(8) Compost.

- Any land devoted to the development and operation of an alternative energy system if a majority of the energy generated annually is used on the tract.[4]

The land must be comprised of 10 or more contiguous acres,[5] including the farmstead land, or and have an anticipated yearly gross income of at least $2,000 from the production of an agricultural commodity.[6]

Agricultural Reserve. Noncommercial open space lands used for outdoor recreation or the enjoyment of scenic or natural beauty and open to the public for use, without charge or fee, on a nondiscriminatory basis. The term includes any land devoted to the development and operation of an alternative energy system if a majority of the energy annually generated is used on the tract.[7] The land must be 10 or more contiguous acres in area, including the farmstead land.[8]

Forest Reserve. Land, ten acres or more, stocked by forest trees of any size and capable of producing timber or other wood products. The term includes any land devoted to the development and operation of an alternative energy system if a majority of the energy annually generated is used on the tract.[9]

The Pennsylvania Department of Agriculture (PDA) is responsible for determining the land use subcategories and issues to county assessors annual use values for each land use subcategory. The PDA must provide these land use subcategories and use values to each county assessor by May 1 of each year.[10] The county assessor is responsible for determining the total use value of land enrolled in Clean and Green and calculates the preferential assessment for the property.[11] Under the provisions of Clean and Green and supplementary regulations,[12] the county assessment office establishes preferential assessments for land enrolled in Clean and Green by one of three manners: (1) adopting the annual land use subcategories and current use values (current year) issued by the PDA;[13] (2) adopting base year use values (a previous year) issued by the PDA;[14] or (3) developing its own use values.[15] As amended by Act 89 of 2016, Section 4.2(c.4) of

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[4] Act 319 of 1974, § 2.

[5] Land area that is burdened by a public or private road, right-of-way or easement must be included in determining whether the condition of minimum contiguous area for Agriculture Use, Agriculture Reserve or Forest Reserve has been met. Section 3(a.2).

[6] Act 319 at § 3(1).

[7] *Id.* at § 2.

[8] *Id.* at § 3(2).

[9] *Id.* at §§ 2, 3(3).

[10] *Id.* at § 4.1.

[11] *Id.* at § 4.2.

[12] 7 Pa. Code Chapter 137b.

[13] Act 319 of 1974, § 4.1; 7 Pa.Code §§ 137b.51, 137b.53.

[14] *Id.* at § 4.2; 7 Pa.Code § 137b.53. *See also* the Pennsylvania Department of Agriculture's publication, "Clean and Green Use Values" under "Publications" at the department's website: http://www.agriculture.pa.gov/Encourage/farmland/Pages/default.aspx (December 12, 2017).

Act 319 prohibits the application of a use value by a county assessment office that is greater than: (1) the assessed value that would apply if the land were not enrolled in Clean and Green, or (2) the county-specific use values established by the Pennsylvania Department of Agriculture. The use values may only be updated when there is countywide reassessment or when the use values drop below the base year figures established by the county. The values must be applied uniformly to all land eligible for preferential assessment under Act 319.[16]

Frequently Asked Questions

The Pennsylvania Department of Agriculture, Bureau of Farmland Preservation, has developed a series of questions and answers[17] to better clarify the provisions of Clean and Green, some of which include:

What is the penalty for a change in use of land?

A landowner who breaches the covenant is subject to seven years of rollback taxes at 6 percent interest per year. The rollback tax is the difference between what was paid under Clean and Green versus what would have been paid if the property had not been enrolled, plus 6 percent simple interest per year.

Can I remove my property from clean and green after it has been enrolled?

Landowners may voluntarily remove their land from Clean and Green by notifying the county assessor by June 1 of the year immediately preceding the tax year for which removal is requested. Rollback taxes are due upon submission of the request.

May I sell or divide my property without having to pay rollback taxes?

The program allows for two types of divisions or conveyances: split-offs and separations. A split-off is a division of land, by conveyance or other action of the owner, into two or more tracts for use of constructing a residence. No more than two acres may be split-off per year except if the municipality requires a minimum three-acre subdivision to construct the residence. Cumulative split-offs may never exceed the lesser of 10 acres or 10 percent of the total land originally enrolled. Rollback taxes would be due only with respect to the land split-off. Separation is a division of land, by conveyance or other action of the owner, into two or more tracts that continue to be in Agricultural Use, Agricultural Reserve or Forest Reserve. The tracts usually must be at least 10 acres in size and continue to meet the qualifications. No rollback taxes would be due.

May I build an additional home on my clean and green property?

The split-off provision provides for the construction of a residence on enrolled property. Please check with the county assessment office.

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[15] Act 319 at § 4.2.

[16] *Id.* ; 7 Pa. Code § 137b.51.

[17] *See* http://www.agriculture.pa.gov/Encourage/farmland/clean/Pages/default.aspx (December 12, 2017).

May I conduct nonagricultural activities on my clean and green property?

The act allows for a "rural enterprise incidental to the operational unit." This is defined as a commercial enterprise or venture that is conducted on two acres or less of enrolled land, and when conducted, does not permanently impede or otherwise interfere with the production of an agricultural commodity on that portion of enrolled land not subject to roll-back taxes. The two acres on which this enterprise is conducted would be removed from preferential assessment. Rollback taxes would be due with respect to those two acres.

May I engage in energy development on my clean and green property?

The program was recently amended to provide for oil and gas development with a limited rollback tax penalty. Rollback taxes are only due with respect to those areas of the property devoted to the activity as determined by the county assessor upon submission of a well production report to the Pennsylvania Department of Environmental Protection. Similarly, commercial wind production is now permitted with rollback taxes limited to those areas devoted to the activity. Tier one alternative energy systems, such as solar and biomass, are permitted without any rollback tax penalty if the majority of energy is utilized on the enrolled tract.

May I engage in mining on my clean and green property?

The program was recently amended to allow for one small noncoal surface mining permit on enrolled land. Rollback taxes are due on the affected areas.

Must I allow public access to my clean and green property?

Agricultural Reserve is the only category that needs to remain open to the public for passive recreational uses, free-of-charge on a nondiscriminatory basis. Nevertheless, a landowner may place reasonable restrictions, such as limiting access after dark, prohibiting hunting and restricting use of motorized vehicles.

For further information on Clean and Green, contact your local county tax assessment office. For more general information, you may also contact the Pennsylvania Department of Agriculture, Bureau of Farmland Preservation, 2301 North Cameron Street, Harrisburg, Pennsylvania 17110-9408, (717) 783-3167.

Pennsylvania Charitable Exemptions

Background

The Pennsylvania Constitution empowers the General Assembly to provide for exemptions from taxation. Article VIII, Section 2(a) of the Pennsylvania Constitution provides, among other things, that the General Assembly may exempt from taxation "[i]nstitutions of purely public charity…."[1] The General Assembly implemented the provisions of Article VIII, Section 2(a)[2] through the enactment of the General County Assessment Law[3] and the Consolidated County Assessment Law.[4] The General Assembly is constitutionally constrained to exempt only those charitable organizations that are institutions of purely public charity.[5] The assessment laws extend real property tax exemptions to qualifying institutions of purely public charity.[6]

Although the Constitution and the assessment laws provide, generally, for real property tax exemptions for "institutions of purely public charity," neither defines what constitutes this type of institution. Thus, since the term was first incorporated in the Pennsylvania Constitution of 1874,[7] the courts have had to delineate the features of what constitutes institutions of purely public charity.

The state Supreme Court in *Hospital Utilization Project v. Commonwealth*, 507 Pa. 1 (1985) (*HUP*) developed a five-part test based on over 100 years of judicial precedent[8] for the purpose of defining a purely public charity. The Court stated:

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[1] Section 2(v) states that real property tax exemptions granted for institutions of purely public charity may only be granted for that portion of real property that is actually and regularly used for the purpose of the institution.

[2] The Pennsylvania Supreme Court has noted, "The Constitution does not, of itself, exempt any property; it merely permits the legislature to do so within certain limits." *Donohugh's Appeal*, 86 Pa. 306, 309 (1878).

[3] General County Assessment Law, Act 155 of 1933 (72 P.S. §§ 5020-1 – 5020-602), generally. Section 204(a)(9) specifically addresses institutions of purely public charity.

[4] Consolidated County Assessment Law, 53 Pa.C.S. § 8801 et seq.; *see* § 8812, generally. Section 8812(a)(11) specifically addresses institutions of purely public charity.

[5] 27 *Summ. Pa. Jur.* 2d, Taxation § 18:1.

[6] In order to qualify for a property tax exemption, the real property owned by the institution of purely public charity must be ". . . necessary for the occupancy and enjoyment of such institutions so using it." General County Assessment Law, § 204(a)(9); Consolidated County Assessment Law, § 8812(a)(11).

[7] Pa. Const. art. IX, § 1 (1874).

[8] In the *HUP* case, the Court reviewed decades of case law beginning with *Episcopal Academy v. Philadelphia*, 150 Pa. 565, 573 (1892). In this 1892 case, the Supreme Court reviewed prior law and held:

> [It] may be safely said that whatever is gratuitously done or given in relief of the public burdens or for the advancement of the public good is a public charity. In every such case as the public is the beneficiary, the charity is a public charity. As no private or pecuniary return is reserved to the giver or any particular person, but all the benefit resulting from the gift or act goes to the public, it is a 'purely public charity,' the word 'purely' being equivalent to the word 'wholly.'

> Although the term "purely public charity" has not been defined with exactness under Pennsylvania law, case law has provided criteria by which we can set forth the parameters of a "purely public charity."[9]

The five-part test established in *HUP* sets forth requirements that became the method of identifying institutions of purely public charity. The five factors are:

- Advances a charitable purpose.
- Donates or renders gratuitously a substantial portion of its services.
- Benefits a substantial and indefinite class of persons who are legitimate subjects of charity.
- Relieves the government of some of its burden.
- Operates entirely free from private profit motive.

Even with the creation of the five-part "test" by the Pennsylvania Supreme Court in *HUP*, varying court decisions followed due, in part, to difficulty in reconciling the various exemption provisions in the assessment laws.

In 1997, the General Assembly passed the Institutions of Purely Public Charity Act (IPPCA).[10] The General Assembly's purpose in enacting this statute was to eliminate the inconsistent application of eligibility standards for charitable tax exemptions by creating specific legislative standards that would define the term institutions of purely public charity.[11] The General Assembly found:

> …[there is] increasing confusion and confrontation among traditionally tax-exempt institutions and political subdivisions to the detriment of the public. There is increasing concern that the eligibility standards for charitable tax exemptions are being applied inconsistently, which may violate the uniformity provision of the Constitution of Pennsylvania.[12]

The IPPCA superficially incorporates the five-point *HUP* test, but significantly redefines the method by which each of the five tests is met and adds other requirements. The IPPCA states that an institution that meets the five criteria enumerated in the law shall be considered to be founded, endowed and maintained by public or private charity.[13]

The IPPCA also created new procedural provisions for challenging the tax-exempt status of an organization. Under the IPPCA, if a political subdivision challenges the tax-exempt status of an organization, and the organization possesses a valid sales and use tax exemption from the

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[9] *HUP*, 507 Pa. at 13

[10] Act 55 of 1997 (10 P.S. §§ 371-385).

[11] IPPCA, § 2.

[12] *Id.* §§ 2(a), (4), (5).

[13] IPPCA, § 5(a).

Pennsylvania Department of Revenue and has an annual program service revenue less than $10 million, then the organization is entitled to assert a "rebuttable presumption" that it has satisfied all of the criteria for qualification as an institution of purely public charity. If the organization's annual service revenue is equal to or exceeds $10 million, the organization may assert the presumption only if it possesses a valid sales and use tax exemption and has a voluntary agreement[14] with the political subdivision in which it conducts substantial business operations.[15] If an organization asserts a presumption, then a political subdivision challenging that organization before a government agency or court will bear the burden of proving, by a preponderance of the evidence, that the organization does not comply with the requirements of the act.[16]

Purely Public Charity Status: Relationship of Constitutional Standard to Statutory Standard

The Pennsylvania courts have considered the relationship of the constitutional requirements for establishing a purely public charity under Article VIII, Section 2 of the Pennsylvania Constitution and the requirements for establishing a purely public charity under the IPPCA. The Pennsylvania Supreme Court addressed the General Assembly's statutory constraints in providing for charitable exemptions in *Alliance Home of Carlisle v. Board of Assessment Appeals,*[17] noting:

> [The General Assembly] could elect to provide for charitable exemptions on a basis that was more limited than is constitutionally authorized . . . however, the constitutional command restrains the scope of exemption that may be legislatively authorized. . . . [T]he General Assembly cannot authorize an exemption that would go beyond what is permitted by the constitutional text and, if an exemption were deemed to exceed what is authorized, the courts would be duty-bound to strike it down.[18]

Since the codification of the IPPCA, the Pennsylvania courts have held that the General Assembly may enact legislation regarding that which is intended to be exempt from taxation, "but it cannot lessen the constitutional minimums by broadening the definition of "purely public charity" in the statute."[19] In order to be deemed an institution of purely public charity and receive an exemption, an institution must first satisfy the judicially created *HUP* test. If it does so, then the institution

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[14] An agreement in which the organization agrees to make contributions to the political subdivision for the purpose of defraying some of the cost of various local government services.

[15] IPPCA, § 6.

[16] *Id.*

[17] 591 Pa. 436 (2007).

[18] *Home of Carlisle*, 591 Pa. 436, 463 (2007).

[19] *Mesivtah Eitz Chaim of Bobov, Inc. v. Pike County Board of Assessment*, 615 Pa. 463, 465 (2012); *Fayette Res., Inc. v. Fayette Cty. Bd. of Assessment Appeals*, 107 A.3d 839 (Pa.Cwmth. 2014), *appeal denied*, 125 A.3d 778 (Pa. 2015).

may qualify for an exemption if it meets the requirements of the IPPCA. However, if an institution fails the *HUP* test, the statute is not applied.[20]

Use of the Property Affecting its Exempt Status

Even if an entity qualifies as a purely public charity, the particular property in question (or part of the property) *might not qualify* for a real property tax exemption if the property is *not actually and regularly used for the purposes of the institution*. The Pennsylvania Constitution provides that the General Assembly may by law exempt from taxation: "[i]nstitutions of purely public charity, but in the case of any real property tax exemptions *only that portion of real property of such institution which is actually and regularly used for the purposes of the institution*."[21]

Applicable provisions of the General County Assessment Law regard the use of the property in determining the taxability of a real property. Section 204 states:

> (a) The following property shall be exempt from all county, city, borough, town, township, road, poor and school tax, to wit:
>
> . . .
>
> (9) All real property owned by one or more institutions of purely public charity, used and occupied partly by such owner or owners and partly by other institutions of purely public charity, and *necessary for the occupancy and enjoyment of such institutions so using it.*[22]

A similar provision exists in the Consolidated County Assessment Law.[23]

Ownership of property, then, is not the sole determiner of taxable status. The use of the property must be in support of the purpose/mission of the tax-exempt institution. Consequently, an institution of purely public charity, though itself tax exempt, may find certain property owned by it to be liable for real estate taxes if the property is not used to advance the purpose of the institution in question.

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[20] *See Mesivtah*, *Fayette Res., Inc.*, *supra*, note 19; *Alliance Home of Carlisle*, and *Community Options, Inc. v. Board of Property Assessment*, 571 Pa. 672 (2002).

[21] Pa. Const. art. VIII, § 2(v) (emphasis added).

[22] Emphasis added.

[23] 53 Pa.C.S. § 8812(a)(11).

Taxpayer Relief Act

Overview

The Taxpayer Relief Act, or Act 1, Special Session 1, of 2006[1] (hereinafter referred to as Act 1), utilizes state gaming revenues and a local shift to an earned income tax (EIT) or a personal income tax (PIT) for the purpose of funding school property tax reductions for qualified homestead and farmstead properties.[2] Act 1 also provides for property tax and rent rebate assistance for low-income senior citizens, and affords wage tax relief in cities of the first class.

In addition to property tax relief, Act 1 stipulates that a school board (except Philadelphia) may not raise property taxes more than its adjusted index[3] unless a referendum question is approved by the electorate or a "backend referendum" exception is approved by the Pennsylvania Department of Education (PDE).

Act 1 further requires school districts (except Philadelphia and Pittsburgh) to enable owners of approved homestead and farmstead property and small business owners[4] to remit property tax payments in installments.

Referenda – Municipal Election Years

In the 2007 primary election, voters in every school district (except Philadelphia, Pittsburgh and Scranton) were asked whether they wanted to raise either an EIT or PIT and use that revenue to immediately cut property taxes. The amount of property tax relief could be between half of the maximum homestead and farmstead exclusion allowed by law and the full maximum exclusion allowed, with limitations.[5,6]

Beginning with the 2009 municipal election and any municipal election thereafter, each school district (except Philadelphia) may propose a referendum question asking voters to authorize an increase in the EIT or PIT up to the maximum homestead exclusion allowed by law for the

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[1] 53 P.S. § 6926.101 et seq.

[2] *See Deskbook* article, "Homestead Exclusion."

[3] "Each September, PDE publishes the index for use in the determination of allowable tax rate increases in the following fiscal year. The base index is the average of the percentage increase in the statewide average weekly wage, as determined by the PA Department of Labor and Industry, for the preceding thirty-six months ending December 31 and the percentage increase in the Employment Cost Index for Elementary and Secondary Schools, as determined by the Bureau of Labor Statistics in the U.S. Department of Labor, for the previous 12-month period ending June 30. For a school district with a market value/personal income aid ratio (MV/PI AR) greater than 0.4000, its index equals the base index multiplied by the sum of 0.75 and its MV/PI AR for the current year." Excerpt from "Referendum Exception Submitted to PDE Guidelines for the 2017-2018 Fiscal Year," Pennsylvania Department of Education, January 6, 2016, http://www.education.pa.gov/Documents/Teachers-Administrators/Property %20Tax %20Relief/ReferendumExceptions/PropTax%20Referendum%20Exception%20Guidelines.pdf (January 9, 2017).

[4] Act 1, § 1502(e) defines "small business" as a business that has no more than 50 employees.

[5] Act 1, § 331.2.

[6] 53 Pa.C.S. § 8586. *See also* Pa. Const. art. XIII, § 2(b)(vi).

purpose of annually funding homestead and farmstead exclusions[7] School districts that levy an EIT or PIT specifically designated for property tax reduction will combine this revenue with the gaming revenues[8] to determine the total property tax relief for each homestead and farmstead.

If the referendum to increase the EIT or PIT is rejected, qualified homeowners will still benefit from gaming revenues unless the school district opts-out of receiving its state allocation of funds. Voters may reverse the district's decision to opt-out by approving a mandatory referendum question at the next general or municipal election.[9]

Property Tax and Rent Rebate Program

Act 1 expands the Senior Citizens Property Tax and Rent Rebate (PTRR) Program[10] to benefit eligible Pennsylvanians age 65 and older, widows and widowers age 50 and older, and people with disabilities age 18 and over. The income eligibility requirement for PTRR is $35,000 a year for a homeowner and $15,000 for a renter, with a maximum standard rebate of $650, annually.[11]

The PTRR payment schedule is streamlined to provide the following payments based on a claimant's eligibility income, which excludes one-half of Social Security, Supplemental Security Income and Railroad Retirement Tier 1 benefits, and federal and state veterans' disability payments.[12] Homeowners whose income falls between $0 and $8,000 will receive $650; homeowners whose income falls between $8,001 and $15,000 will receive $500; homeowners whose income falls between $15,001 and $18,000 will receive $300; and homeowners whose income falls between $18,001 and $35,000 will receive $250. Renters with income between $0 and $8,000 will receive $650, and renters whose income falls between $8,001 and $15,000 will receive $500.[13]

Rebate Supplement and Credits

In addition, Act 1 affords more tax relief to certain seniors with particularly limited incomes. Seniors who live in Philadelphia, Pittsburgh or Scranton, where local wage/income tax rates are high, thereby precluding tax shifting, will have their property tax rebate increase by an additional 50 percent if their income is under $30,000.[14] Seniors in the rest of the state who pay more than

[7] Act 1, § 332.

[8] *Id.* § 505 (State Property Tax Reduction Allocation).

[9] *Id.* §§ 903-904.

[10] The PTRR Program was established pursuant to the Senior Citizens Rebate and Assistance Act (Act 3 of 1971), which was repealed by Act 1.

[11] Act 1, § 1304.

[12] *Id.* § 1303.

[13] *Id.* § 1304.

[14] Act 1, § 704.

15 percent of their income in property taxes will also have their property tax rebate increase by an additional 50 percent if their income is under $30,000.[15] Furthermore, suburban Philadelphia school districts impacted by the Philadelphia wage tax will be reimbursed for revenue lost due to the tax.[16]

Mandatory Backend Referendum/Spending Controls

Unless a referendum question is approved by the electorate or a backend referendum exception is approved by PDE, a school board may not raise property taxes more than its adjusted index.[17] Section 333 of the Taxpayer Relief Act, as amended by Act 25 of 2011, provides for four exceptions that require the approval of PDE:

> (1) costs to pay interest and principal on indebtedness incurred prior to September 4, 2004, for Act 72 schools and prior to June 27, 2006, for non-Act 72 schools; (2) costs to pay interest and principal on electoral debt; (3) costs incurred in providing special education programs and services (such costs shall be net of State special education payments); and (4) costs due to increases of more than the index in the school's share of payments to PSERS taking into account only the increase in the PSERS contribution rate.[18]

Property Tax Reduction Payments and Reserve Fund

The property tax relief formula used to distribute gaming revenues for property tax reduction payments is set forth in Chapter 5 of Act 1. Funds are allocated based on a school district's tax capacity, tax effort and tax burden. Act 1 requires the budget secretary to certify the actual balance in the fund by April 15 of each year and to project gaming revenue coming into the fund in the next six months. All school districts are guaranteed a minimum of 10 percent and up to 40 percent tax relief when $750 million is available for property tax relief, and a minimum of 12.5 percent and up to 50 percent relief when $1 billion is available from gaming to fund property tax cuts. All homeowners will receive tax relief once gaming generates $400 million for distribution statewide. The amount required to be deposited in the Property Tax Relief Reserve Fund is 25 percent of the amount of property tax reduction payments for that year, up to $150 million.[19]

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[15] *Id.* § 1304.

[16] *Id.* § 324.

[17] *See* footnote 3. *See also* the definition of "Index" in Act 1 §302.

[18] "Fiscal Note," Pennsylvania House Committee on Appropriations, June 30, 2011, http://www.legis.state.pa.us/WU01/LI/BI/FN/2011/0/SB0330P1459.pdf (January 9, 2017).

[19] Act 1, § 503.

Property Tax Installment Payments

Act 1 requires school districts (except Philadelphia and Pittsburgh)[20] to afford the option to owners of approved homestead and farmstead property and small business owners[21] to pay property taxes in installments. School districts are required to notify the aforesaid property owners of this option as component of their property tax bills. A taxpayer who elects this option and who is delinquent by more than 10 days on two or more installment payments will be ineligible for the installment option in the following year.[22]

[20] Philadelphia and Pittsburgh permit installment payments of property taxes under separate enabling authority. Philadelphia, *see* 53 Pa.C.S. § 8564 added by Act 106 of 2013. Pittsburgh, *see* "Real Estate FAQ's," Pittsburgh Department of Finance, http://pittsburghpa.gov/finance/real-estate-faq (January 9, 2017).

[21] Added by Act 25 of 2011.

[22] Act 1, § 1502.

Local Services Tax

Act 7 of 2007 amended the Local Tax Enabling Act, Act 511 of 1965,[1] to change, among other things, the name of the emergency and municipal services tax (EMST)[2] to the Local Services Tax (LST). Municipalities and school districts[3] are authorized to impose the LST on persons employed within the jurisdiction a combined annual rate of no more than $52 per year.[4] The LST can be levied at any time during the fiscal year.

If the LST is levied at an annual combined rate exceeding $10, the tax must be withheld on a pro rata share basis by an employer. The pro rata share of the LST assessed on an individual for a payroll period is determined by dividing the combined rate of the LST levied for the calendar year by the number of payroll periods established by the employer for the calendar year.[5] For example, if a political subdivision levies a $52 LST and an employee has 24 pay periods in a year, then the employee's pro rata share would be $2.16[6] per pay period ($52 divided by 24).

Act 511 requires every political subdivision levying the LST at a rate exceeding $10 per year to exempt individuals having income from all sources[7] of less than $12,000. Every political subdivision levying the LST at a rate of $10 or less has the option of exempting persons whose income is less than $12,000 per year.[8] Disabled veterans or any reservist or national guardsman called to active duty are also exempt from payment of the LST.[9]

An individual may annually claim an exemption from the LST if he or she reasonably expects to receive earned income and net profits from all sources of less than $12,000 in a calendar year. To claim an exemption, an individual must annually file an exemption certificate with the political subdivision levying the LST. If an individual's income subsequently exceeds $12,000 in a calendar year, or if a person becomes ineligible for the exemption for some other reason, the employer must withhold the LST for the remainder of the calendar year as follows: (1) a lump sum

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[1] 53 P.S. § 6901 et seq.

[2] Act 222 of 2004 amended Act 511 to change the name of the Occupational Privilege Tax to the EMST and permitted municipalities and school districts to impose on persons employed within the jurisdiction a combined annual EMST of no less than $10 and no more than $52 beginning on or after January 1, 2005.

[3] A school district may levy that LST only if it had levied an Occupational Privilege Tax and subsequently an EMST, but the maximum amount is $5, and the municipality must provide the tax to the school district out of the maximum LST collected. Act 511, § 301.1(f)(9).

[4] Act 511, § 301.1(f)(9)(vi). However, with court approval, a distressed municipality may levy a local services tax at a rate of up to $156 per year. *See* Municipalities Financial Recovery Act, Act 47 of 1987, § 123. *See also, Deskbook* article "Municipal Fiscal Distress and Recovery."

[5] *Id.* § 301.1(f)(9)(i).

[6] Employers are to round down the amount collected to the nearest 100th of a dollar.

[7] For purposes of the LST, "income from all sources" would be defined as and limited to earned income and net profits earned within a political subdivision.

[8] Act 511, § 301.1(d).

[9] *Id.* § 301.1(c).

amount equal to what would have been withheld had the exemption not been claimed in that year will be withheld from the employee's first paycheck immediately following notification that he or she is no longer eligible for an exemption from the LST; and (2) subsequent to the withholding of the lump sum payment, the LST will be deducted on a pro rata share basis considering the number of the employee's remaining paychecks for the rest of that calendar year. In the event the employment of the individual subject to LST is later severed in that calendar year, the person will be liable for any outstanding balance of the LST.[10]

LST funds must be used by a municipality[11] for: (1) emergency services, which include emergency medical services, police services and fire services; (2) road construction and maintenance; (3) reduction of property taxes; or (4) property tax relief through the use of homestead/farmstead exclusions.[12] A municipality is required to use at least 25 percent of LST revenue for police, fire and emergency medical services.[13]

Only one municipality may levy the LST per payroll period against an individual, except when a school district also levies the tax subject to the restrictions noted above.[14] The municipality of the employee's primary employment has priority in levying the tax. No taxpayer is liable for more than $52 in LST in any calendar year, regardless of the number of taxing jurisdictions in which he or she is employed.[15]

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[10] Act 511, § 301.1(e).

[11] Act 511, § 330(c) excludes school districts from use of the LST.

[12] In accordance with 53 Pa.C.S. Ch. 85 Subch. F (relating to homestead property exclusion).

[13] Act 511, § 330.

[14] *See also* Act 511, § 301.1(f)(9).

[15] In the case of concurrent employment, the priority for the imposition of the LST by a taxing jurisdiction is as follows: (1) where the person is primarily employed or has his or her principal office; (2) where the person resides and works; and (3) where the person is employed closest to his or her place of residence.

Eliminating Occupation Taxes

The Local Tax Enabling Act, Act 511 of 1965,[1] provides a mechanism by which school districts and municipal corporations can abolish their occupational assessment tax or flat rate occupation tax and replace lost revenues with an earned income tax levied at a rate above the current limits otherwise prescribed by the act.[2] The authorization to eliminate occupational assessment taxes in exchange for an optional levy was previously contained in the Optional Occupation Tax Elimination Act (Act 24 of 2001).[3] Act 24 was subsequently amended into Act 511 by Act 130 of 2008.[4] The former provisions of Act 24, as amended, are now contained in Chapter 4 of Act 511, "Optional Occupation Tax Elimination."

Proceedings under Act 511 to abolish the occupational assessment tax are begun solely at the discretion of the governing body of the school district or municipality.[5] Action cannot be initiated by the voters; however, after the governing body chooses to start the process, actual elimination of the occupation tax is dependent on voter approval through a referendum.[6]

Procedure

Act 511 specifies the manner in which to determine the total amount of earned income tax and the new earned income tax rate that will be needed if the occupational assessment tax or the flat rate occupation tax is replaced.[7]

(1) In the case of a school district that opted to eliminate the occupational assessment tax prior to the fiscal year (FY) ending in 2007, the new earned income tax rate would be the sum of the following two rates:

   (i) The rate of an earned income tax that would be needed to generate an additional amount of earned income tax equal to the amount collected from the occupational assessment tax or occupation tax for the fiscal year (FY) ending in 2002, using actual revenue collections.

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[1] 53 P.S. § 6924.101 et seq.

[2] *See* Act 511, Chapter 4, "Optional Occupation Tax Elimination" (53 Pa.C.S. §§ 6924.401-6924.409).

[3] Act 50 of 1998 (53 Pa.C.S. §§ 8401, 8581-8588, in relevant part), gave school districts the authority, either on their own initiative or through voter mandate, to explore a revision of its system of taxation. A subsequent referendum could then propose the imposition of a higher earned income tax rate along with the repeal of various other local taxes and possibly homestead and farmstead property tax relief. Act 72 of 2004, the Homeowner Tax Relief Act (53 P.S. § 6925.101 et seq.), repealed Act 50, thereby eliminating the ability of school districts to utilize its provisions after September 3, 2004.

[4] Act 130 of 2008 repealed Act 24 of 2001.

[5] Act 511, § 406.

[6] *Id.* at § 407.

[7] *Id.* at § 404.

(ii) The rate of the earned income tax collected by the school district for FY 2001-2002 under the Act.[8]

A school district that levied an occupation tax for the fiscal year ending in 2009 and opted to eliminate the occupational assessment tax thereafter would use the same procedure as above, but the calculation of the maximum income tax rate would be based on the revenue data and rate for the fiscal year ending in 2009.[9]

(1) In the case of a municipality which opted to eliminate the occupational assessment tax prior to 2007, the new earned income tax rate would be derived by adding the following:

(i) The additional rate increase for earned income tax that would be needed to generate an additional amount of earned income tax equal to the amount received from the occupational assessment tax or occupation tax collected by a municipality for the calendar year ending December 31, 2001, using actual revenue collections.

(ii) The rate for the earned income tax collected by the municipality for FY 2001 under Act 511.[10]

A municipality which that levied an occupation tax for the calendar year ending December 31, 2008 and opted to eliminate the occupational assessment tax thereafter would use the same procedure as above, but the calculation of the maximum income tax rate would be based on the revenue data and rate for the calendar year ending December 31, 2008.

Generally, if the earned income tax is imposed only under Act 511, Section 311(12) of the act provides that, in cases in which a taxpayer is subject to an earned income tax imposed both by a school district and a municipality, the rate of earned income tax that each taxing district can collect will be limited, either by operation of law or by agreement, so that the total earned income tax burden on the taxpayer does not exceed one (1 percent) percent. If either the school district or the municipality opts to utilize the provisions of Chapter 4 of Act 511, the other taxing district will remain subject to the limits on its earned income tax that were previously established, either by operation of law or by agreement.[11]

The Taxpayer Relief Act, or Act 1, Special Session 1, of 2006 (hereinafter referred to as Act 1) replaced the General Assembly's prior effort to provide property tax relief, the Homeowner Tax Relief Act (Act 72 of 2004). Like Act 72, Act 1 provides authorization for a school district, through voter approval, to increase its earned income tax rate or convert its earned income tax to a personal income tax in order to provide property tax relief to school district residents

[8] Act 511, § 404(b).

[9] *Id.* at § 404(b.1).

[10] *Id.* at § 404(b).

[11] Taxpayer Relief Act, Act 1, Special Session 1, of 2006 (53 P.S. § 6926.101 et seq.) § 304.

through homestead and farmstead property tax exclusions.[12] Act 1 provides that any attempts to increase earned income tax rates pursuant its provisions shall not preclude a school district from utilizing (Act 511) to eliminate occupation taxes, even if both referenda questions occur during the same election. If, however, voter approval is sought to convert an earned income tax to a personal income tax under Act 1, an Act 511, Chapter 4, question may not occur during the same election.[13]

Although the municipal governing body initiates the process to eliminate the specific occupation tax, final implementation is contingent upon voter approval in a referendum to be held at the general or municipal election preceding the fiscal year when the maximum rate of the earned income tax will possibly be increased. The county board of elections is required to place the question on the ballot at the first municipal or general election occurring at least 90 days after receipt of the resolution approved by the governing body of the school district or municipality.[14] If the voters approve the ballot question, the additional earned income tax will be collected the first fiscal year after the successful referendum, and the occupational assessment tax or flat rate occupation tax will be abolished.[15] Under Section 405 of Act 511, once the occupation tax is eliminated, it cannot be levied during subsequent fiscal years. However, the taxing districts may continue to collect delinquent occupation taxes without regard to this restriction.

County assessment offices are not required to maintain occupational assessment rolls if all taxing districts within the county have abolished the tax.

Example: School district "A" raised $500,000 from the occupational assessment tax during FY 2001-2002, which ended on June 30, 2002. The business administrator for the district has calculated that this amount would be equivalent to a 0.3 percent earned income tax levy. During FY 2001-2002, the school district collected the maximum permissible earned income tax under Act 511 at 0.5 percent since its coterminous municipality also levied the tax at a rate of 0.5 percent. In most cases, the maximum rate permitted by Act 511 is 1 percent. This tax is subject to sharing by the school district and municipality. Therefore, the maximum rate at which a school district could levy its earned income tax would be 0.8 percent. However, in this example, the amount of earned income tax that would be actually paid by an individual taxpayer would be 1.3 percent since the municipality would still be collecting its 0.5 percent.

[12] *See Deskbook* article, "Taxpayer Relief Act," for a more detailed discussion of Act 1.

[13] Act 1, § 303.

[14] *Id.* § 407.

[15] *Id.* §§ 404-405.

Earned Income Taxes

Local income taxes, also known as earned income taxes, wage taxes, net profits taxes, or a combination of these terms, provide the chief source of nonproperty tax revenue for municipalities and school districts. Act 511 of 1965, the Local Tax Enabling Act,[1] authorizes local earned income taxes for most municipalities and school districts.[2] The tax is levied on wages, salaries, commissions, net profits, or other compensation of people subject to the jurisdiction of the taxing body. Municipalities and school districts levying earned income taxes may exempt people whose income from all sources is less than $12,000 per year from payment of the earned income tax. The exemption must be adopted as part of, or as an amendment to, the municipal tax ordinance or the school district's resolution authorizing the tax.

With some exceptions, municipalities and school districts subject to Act 511 may, by ordinance or resolution, enact an earned income tax limited to 1 percent.[3] Where both a municipality and a school district impose the tax on the same wage earner, the 1 percent maximum rate is divided evenly between the two taxing districts unless they agree otherwise.

Municipalities may tax residents as well as nonresidents employed in their municipality subject to the crediting provisions of Act 511, which require the place of employment to grant a credit for

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[1] 53 P.S. §§ 6924.101 et seq.

[2] Local income taxes were first adopted by Philadelphia in 1939, making it the first municipality in the United States with a local income tax. The Sterling Act, Act 45, Special Session 1, of 1932 (53 P.S. § 15971 et seq.), is the general tax enabling law for the City of Philadelphia. It is the source of the city's authority to impose the wage and net profits tax, as well as other taxes. A restriction has been placed on Philadelphia's power to tax wages of nonresidents. The Pittsburgh School District is authorized by Section 652.1 of the Public School Code, Act 14 of 1949 (24 P.S. § 1-101 et seq.), to impose an earned income and net profits tax. This authorization also gives the school district access to certain tax subjects authorized by Act 511, but the district may not use this authority to increase its earned income tax above the limit established in Act 14. The earned income tax rate is limited to 2 percent for the Pittsburgh School District as provided by Section 652.1 of Act 14. A special provision of Act 511 allows the Scranton School District to levy the tax at 1 percent without the sharing requirement mandated for other school districts under Act 511.

[3] Earned income taxes also are subject to the overall limits on taxes enacted under Section 320 of Act 511 (53 P.S. § 6924.320). Not all taxing jurisdictions are limited to the 1 percent limit on the rate of the earned income tax. Other laws and provisions allow the Act 511 limit for earned income taxes to be exceeded under seven circumstances:

(1) Home rule municipalities.

(2) Financially distressed municipalities.

(3) Municipalities with financially distressed pension systems.

(4) Municipalities that purchase open space.

(5) School districts that have adopted an increased earned income tax (EIT) under Act 50 of 1998 (53 Pa.C.S. § 8581 et seq.) prior to the repeal of Act 50's provisions addressing the levy of the EIT by Act 72 of 2004 (53 P.S. § 6925.101 et seq.), which was subsequently repealed by Special Session Act 1, Special Session 1, of 2006 (53 P.S. § 6926.101 et seq.).

(6) Municipalities and school districts that adopt the provisions of Chapter 4 (Optional Occupation Tax Elimination) of Act 511 (53 P.S. §§ 6924.401 et seq.).

(7) School districts that adopt Act 1, Special Session 1, of 2006 provisions to levy or increase earned income taxes.

any earned income tax levied at the place of residence.[4] Because there is often a tax imposed at a wage earner's place of residence, municipalities do not derive significant revenue from nonresidents. School districts are not permitted to tax nonresidents. A resident is defined as a taxpayer domiciled within the taxing district. "Domicile" is defined as "[t]he place where a person lives and has a permanent home and to which the person has the intention of returning whenever absent. Actual residence is not necessarily domicile, for domicile is the fixed place of abode which, in the intention of the taxpayer, is permanent rather than transitory. . . ."[5]

When Pennsylvania residents are employed in another state and pay a state or local income tax in that other state, they are entitled to a credit against any earned income tax imposed by any political subdivision where they reside. The same dollar of the out-of-state tax cannot be credited against both state and local taxes in Pennsylvania, but courts have held that the credit can be divided between the state and the municipality. Thus, a Pennsylvania resident paying a 5 percent tax to another state could apply a credit first against the Pennsylvania income tax of 3.07 percent with part of the remainder being credited against the 1 percent local wage tax. Tax payments made voluntarily to another state do not qualify for the credit, and this credit does not extend to taxes paid to foreign countries.[6]

The definitions of "earned income" and "net profits" in Act 511 reference the definitions of "compensation" and "net profits" that are used for the personal income tax in state law[7] and regulations.[8] Earned income taxpayers are permitted to deduct from compensation the same employee business expenses that are deductible from compensation for state income tax purposes.

Taxable compensation at the local level is almost identical to taxable compensation at the state level, except that housing allowances provided to members of the clergy are not taxable at the local level. The General Assembly adopted another exception through the passage of Act 6 of 2016, which amended Act 511 to exempt from the local earned income tax wages or compensation paid to individuals on active military service, regardless of whether it is earned for active military service inside or outside the Commonwealth.

While the definition of "net profits" in Act 511 includes net income from the operation of a business, profession or other activity, it does not include income from corporations. In addition, net profits do not include income that is "not paid for services provided," or that is in the nature of earnings from an investment.

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[4] The exception to the priority given to the place of residence is persons subject to the Philadelphia wage tax. Act 511 requires municipalities to credit their residents for taxes paid to Philadelphia on income earned within the city. This credit, like the other credits provided in Section 317 of Act 511, is a direct reduction against the liability for tax owed by the taxpayer.

[5] Act 511, § 501 (53 P.S. § 6924.501).

[6] *Id.* at § 317 (53 P.S. § 6924.317).

[7] The Tax Reform Code of 1971, § 301 (72 P.S. § 7301). Note: Act 166 of 2002 and Act 24 of 2004 changed the definitions of "earned income" and "net profits" for purposes of the earned income tax imposed under Act 511 by adopting, with certain exceptions, the definitions of "compensation" and "net profits" for state personal income tax purposes.

[8] 61 Pa. Code §§ 101.6, 103.11-103.12.

For taxpayers engaged in farming, net profits do not include interest earned on the monetary accounts of the farming business and gains from the sale of farm machinery, most livestock and the capital assets of the farm.

State law provides for sharing of income tax information between the Internal Revenue Service and the state Department of Revenue. The Department of Revenue also shares state tax information with school districts. School districts are authorized to share this information with their constituent municipalities.

Act 32 of 2008 extensively amended Act 511. Among other things, the amendatory act created 69 county-wide tax collection districts for the purpose of consolidating the collection of earned income and net profits taxes. A county tax collection district exists in each county, except in Philadelphia and Allegheny Counties. The geographic boundaries of a tax collection district are coterminous with the county in which it is created, with some exceptions.[9] Allegheny County is divided into four tax collection districts, as specified.[10] Countywide tax collection began no later than January 1, 2012.

The tax collection district is supervised by a tax collection committee.[11] The committee is comprised of delegates appointed by the governing body of each political subdivision within a tax collection district. Among other things, each tax collection committee was required via Act 32 to create a tax bureau and provide for its operation and administration. The committee is also charged with appointing a tax officer[12] for the tax collection district and establishing the compensation for this officer.[13]

Persons and entities seeking or maintaining appointments as tax officers are required to complete mandatory education as a prerequisite for their appointments and not less than annually for continuing appointments. The Pennsylvania Department of Community and Economic Development (DCED) is charged with providing the mandatory education and must adopt regulations, guidelines and procedures to do so.[14]

DCED is required to maintain a Tax Register and an Official Register.[15] The Tax Register includes tax rates for all county, municipal and school taxes. The Official Register, which will be part of the Tax Register, only includes rates and tax collector information for local taxes that must be withheld by employers. The Official Register is released on June 15 for taxes that must be withheld on and after July 1 of each year, and on December 15 for taxes that must be withheld

[9] Act 511, § 504 (53 P.S. § 6924.504).

[10] *Id.*at § 504 (b).

[11] *Id.* at § 505 (53 P.S. § 6924.505).

[12] Two or more tax collection districts may appoint the same tax officer. If two or more tax collection districts form a joint tax collection committee, the joint tax collection committee shall appoint a single tax collection officer.

[13] Act 511, § 507 (53 P.S. § 6924.507).

[14] *Id.* at § 508 (53. P.S. 6924.508).

[15] *Id.*at § 511 (53 P.S. § 6924.511).

on and after January 1. Employers are permitted, but not required, to withhold based on the information in the Tax Register rather than the information in the latest Official Register.[16]

Act 511 requires every employer having a factory, workshop, branch, warehouse or other place of business within the taxing jurisdiction that employs one or more persons, other than domestic servants, to register with the earned income tax officer. Employers are required to withhold taxes from all of their employees and remit those taxes only to the tax collector for the tax collection district where their facility is located. Deductions from the employee's compensation will be the greater of the employee's resident tax or the employee's nonresident tax as released in the official register.[17]

DCED provides detailed information about Act 511 as amended by Act 32 on its website.[18]

[16] *Id.*

[17] *Id.* at § 512 (53 P.S. § 6924.512).

[18] http://dced.pa.gov/local-government/local-income-tax-information. (November 22, 2017).

Local Elected Tax Collectors … An Overview[1]

In General

The various municipal codes[2] provide for the election of the local tax collector. The local tax collector is charged with the responsibility of collecting municipal and school real estate taxes as well as personal taxes levied pursuant to the municipal codes. In most instances, the municipal tax collector also collects county real estate and personal taxes as well.[3] The Local Tax Collection Law (LCTL)[4] governs the powers, duties and responsibilities of the local elected tax collector.

A municipality or school district may also designate the elected tax collector to collect most taxes levied under the Local Tax Enabling Act.[5] The elected tax collector may not collect the local earned income tax or net profits tax.[6]

Tax Payment Accounts

Act 38 of 2017 prohibits the deposit of tax payments into an account bearing only the tax collector's name. The tax collector is required to open an account that includes the name of the office, title or position and may include the name of the municipality for which the tax collector was elected or appointed. Further, the account may not be opened using the tax collector's social security number. In addition to LTCL tax payments, any taxes collected pursuant to the Local Tax Enabling Act (Act 511 of 1965) must be deposited into the account. A tax collector for a joint taxing district or a county treasurer collecting taxes under an agreement pursuant to the LTCL may open one account for the deposit of tax payments if the account does not bear the name of an individual and includes the name of the joint tax collection district or, in the case of a county treasurer, includes the name of the office, title or position.

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[1] The Governor's Center for Local Government Services in the Pennsylvania Department of Community and Economic Development authors a comprehensive publication, *Tax Collector's Manual*, which delineates the powers, duties, responsibilities and compensation of local elected tax collectors. Available at https://dced.pa.gov/download/Tax%20Collectors%20Manual/?wpdmdl=56412 (November 22, 2017).

[2] To view or download the municipal codes, visit the Local Government Commission's website at http://www.lgc.state.pa.us/paMunicipalCodes.cfm. (November 22, 2017).

[3] Third Class City Code, 11 Pa.C.S. § 11402.1; Borough Code, 8 Pa.C.S. § 101 et seq. § 1086; The First Class Township Code, Act 331 of 1931 (53 P.S. § 55101 et seq.) § 801-B; The Second Class Township Code, Act 69 of 1933 (53 P.S. § 65101 et seq.) § 1001.

[4] Act 394 of 1945 (72 P.S. § 5511.1).

[5] Act 511 of 1965 (53 P.S. § 6924.101) § 313.

[6] Income taxes are collected and administered by one tax officer in each tax collection district as per § 506 of Act 511. *See Deskbook* article, "Earned Income Taxes."

Basic and Continuing Education Programs

The LTCL was amended several times from 2000 to 2015[7] to establish, and modify, basic training and education, examination and qualification guidelines for elected tax collectors. Among other things, Act 164 of 2014 amended the LTCL to require tax collectors to complete the basic training program developed by the Department of Community and Economic Development (DCED) and pass a basic qualification exam pursuant to conditions set forth in the act. Act 48 of 2015 modifies the requirements set forth by Act 164 with regard to basic and continuing education for tax collectors. Act 48 extended the effective date for mandatory participation in permanent basic and continuing education from October 22, 2015, to January 1, 2017.[8] Voluntary interim basic and continuing education programs were in effect until December 31, 2016.

Under Act 48, a person passing the basic qualification examination will be designated a "qualified tax collector." Once certified, an individual will not be required to retake the basic education qualification exam. Act 48 provides that if an individual is not a qualified tax collector on the date he/she is scheduled to take the oath, then the office of tax collector will be deemed vacant.[9]

DCED, in consultation with specified participants, is required to adopt and implement programs of basic training, examination and qualification for a qualified tax collector, as well as programs for continuing education and renewal of qualification requirements.[10] Each qualified tax collector is required to obtain two hours of mandatory continuing education during their four-year term of office. If a tax collector fails to successfully complete the continuing education requirements, he/she is deemed ineligible to be placed on the ballot for the office of tax collector at the end of his/her current term of office.

Criminal Background Checks

Act 164 of 2014 requires any individual who files a nomination petition or papers for the office of tax collector to submit delineated criminal history record information to the county board of elections. Once elected, an individual will not be required to submit criminal background information with his/her nomination petition or papers for a subsequent term in the office of tax collector. An individual who fails to meet the requirements relating to the criminal history record information will not be not be qualified to hold the office of tax collector.

Act 48 of 2015 requires an individual elected to the office of tax collector for the term beginning January 1, 2016, to submit to a criminal background check to the municipality for which the tax collector was elected before the individual is scheduled to take the oath of office as prescribed

[7] Act 104 of 2000, Act 25 of 2001, Act 80 of 2006, 164 of 2014 and Act 48 of 2015.

[8] Certain tax collectors are grandfathered from varying provisions of the act.

[9] If an individual is appointed to fill a vacancy in the office of tax collector, the individual shall have 60 days to become a qualified tax collector. If the appointee fails to become a qualified tax collector within the time specified, the office shall be deemed vacant. A county treasurer collecting taxes in the case of a vacancy in the office of local tax collector is not required to complete the basic training and continuing education programs.

[10] Fees charged for the training, testing and qualification of a tax collector may not exceed $250.

by law. If the tax collector does not submit the required information before the date the individual is scheduled to take the oath, the office of tax collector will be deemed vacant.[11]

Auditing and Settling of Accounts

Act 169 of 1998 amended the LTCL for the primary purpose of preventing the opportunity for embezzlement by segregating funds and by providing for improved auditing of a tax collector's accounts, records, returns and payments. Among other things, Act 169 requires a tax collector to file with the taxing district a reconciled report and a verified statement of all taxes collected for the previous month on a standardized form provided by DCED, at least on a monthly basis. Act 169 permits a taxing district to require the tax collector to file this statement more frequently if directed to do so by ordinance or resolution. Act 169 also provides for the complete and final settlement of the duplicate for the previous year by January 15. The settlement on January 15 is to show the status of all accounts as of December 31 of the prior calendar year.

The duplicate constitutes the tax collector's authority or warrant to collect taxes. It is used by the tax collector to notify the persons whose names appear thereon of the valuations and identification of the properties or persons taxed, the rates of taxes and the amount of tax due.

After receiving the duplicate, the tax collector generally sends out tax notices within 30 days. Taxpayers are given a two-month period during which time they can pay taxes at a discount of at least 2 percent, followed by another two-month period during which time they may pay taxes at face value. After this four-month period, a penalty period ensues during which a penalty of up to 10 percent may be imposed. In many cases, the penalty period throughout which the tax collector continued to collect real estate taxes extended to the date that unpaid taxes were "returned" to the county tax claim bureau (under the Real Estate Tax Sale Law). The date selected for the return to the tax claim bureau, depending on the county, might be any time from January 15 to April 30. Evidently, the date the tax collectors "settled" with the taxing districts (under the Local Tax Collection Law) often coincided with the selected "return" date under the Real Estate Tax Sale Law.

Thus, historically, for example, in a county where taxes were not returned to the tax claim bureau until April 30, taxpayers had until April 30 of the year after the year in which the tax notice was sent to pay the tax collector. Also, if the taxing district had authorized installment payments, such payment could extend to the April 30 or other established return/settlement date as determined by ordinance of the taxing district. Due to the establishment of the January 15 settlement date by Act 169, and the interplay generally between the Local Tax Collection Law and the Real Estate Tax Sale Law, there was some opinion that the tax collector had no authority to accept any tax payments (installment or otherwise) after January 15 (or even December 31, the date to which the settlement refers). This concern was addressed by Act 104 of 2000.

[11] Act 48 also requires criminal history record information for a person appointed to fill a vacancy in the office of tax collector. This provision does not apply to a joint tax collection district or to a county treasurer who is collecting municipal taxes due to a vacancy the office of tax collector.

Act 104 of 2000, among other things, retained the January 15 settlement date. However, the act affords taxing districts the option of permitting installments after the settlement date and up to the date that taxes are returned to the tax claim bureau. This is done by reissuing to the tax collector the duplicates for those properties whose owners have chosen to pay by installments, where permitted. Municipalities that allow for installment payments are to follow provisions contained in the Local Tax Collection Law.

Taxing districts, however, remain free not to have any payments by installments, or to have installments but require that they be made prior to the December 31 or the January 15 settlement date.

Delinquent Tax Collectors and Tax Collection Districts

Act 14 of 2002 mandates that the elected tax collector will automatically serve as a delinquent tax collector, without the necessity of appointment, but only until the date established by Section 306 of the Real Estate Tax Sale Law for the return to the county tax claim bureau.

In addition, Act 14 provides for the creation joint tax collection districts. When a vacancy exists in the office of the tax collector in a taxing district, the governing body of a taxing district may enter into an agreement with the governing body of an adjoining or conveniently located taxing district for the joint collection of taxes. The tax collector must agree to serve as the tax collector for the joint tax collection district for the remainder of the individual's term. Thereafter, a person shall be elected as tax collector by the electors of the joint tax collection district.

Deputies

While Section 22 of the act under prior law made the appointment of a deputy discretionary, Act 164 of 2014 requires tax collectors to appoint a deputy to collect and settle taxes in the event of the tax collector's incapacitation. Section 22 was further amended by Act 48 of 2015 to specify that the tax collector's bond covered taxes collected by the deputy.

Municipal Investments[1]

Municipalities are authorized to invest all funds of the municipality. They are required to invest funds consistent with sound business practice. The governing body can adopt rules and regulations to govern the investment of municipal funds.

There is no single set of authorized investments for all local governments in Pennsylvania, so it is essential that the statutory investment be followed. The respective municipal codes (i.e., the First Class Township Code,[2] Second Class Township Code,[3] Borough Code,[4] Third Class City Code,[5] County Code,[6] Second Class County Code,[7] and the Public School Code of 1949[8]) each authorize at least six types of investments. Act 53 of 1973, amended by Act 10 of 2016, authorizes seven types of investments for "public corporations" and municipal authorities, a few of which the municipal codes also authorize. Act 53 defines a "public corporation" to include any county, city, borough, township, school district, or other municipality or incorporated district of this Commonwealth. For purposes of pension or retirement funds, the municipal codes authorize additional investment options.[9]

Investment Products Authorized by the Municipal Codes

Each municipal code authorizes six types of investments. Additionally, the County Code and Second Class County Code authorize investment in commercial paper:

(1) Treasury bills, which are investment instruments issued by the United States (U.S.) Treasury. Treasury bills are backed by the full faith and credit of the U.S. government's ability to levy and collect taxes.

(2) Short-term obligations of the U.S. government or its agencies or instrumentalities, which are typically considered to be any U.S. government-issued investment instrument. Short-term obligations usually refer to financing instruments of less than 13 months maturity. However, these may or may not include those backed by the full faith and credit of the federal government. Many instruments of the U.S. government do not have the full faith

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[1] *Fiscal Management Handbook*, 10th ed., Governor's Center for Local Government Services, Pennsylvania Department of Community and Economic Development, Harrisburg, Pa., 2016 at https://dced.pa.gov/download/fiscal-management-handbook/ (November 22, 2017).

[2] Act 331 of 1931 (53 P.S. § 55101 et seq.), § 1705.1.

[3] Act 69 of 1933 (53 P.S. § 65101 et seq.), § 3204.

[4] 8 Pa.C.S. § 101 et seq., § 1316.

[5] 11 Pa.C.S. §10101 et seq., §11804.1.

[6] Act 130 of 1955 (16 P.S. § 101 et seq.), § 1706.

[7] Act 230 of 1953 (16 P.S. § 3101 et. seq.), § 1964.

[8] Act 14 of 1949 (24 P.S. § 1-101 et seq.), § 440.1.

[9] *See* footnotes 2-7; 20 Pa.C.S. Ch. 73 (relating to municipal investments).

and credit backing (i.e., Federal National Mortgage Association [FNMA or Fannie Mae] and Federal Home Loan Mortgage Corporation [FHLMC or Freddie Mac] bonds). Full faith and credit backing has been granted to Government National Mortgage Association (GNMA or Ginnie Mae) bonds.

(3) Deposit accounts, which include savings accounts and certificates of deposit as well as other time deposit type accounts available at banks, savings and loan associations, or credit unions. These must be insured by one of the federal deposit insurance organizations. When the value of the taxing district's deposits exceeds the insurable limits, the additional sums must be secured by collateral pledged by the depository pursuant to Act 72 of 1971.[10]

(4) Obligations of the U.S. government (other than Treasury bills) or its agencies or instrumentalities backed by full faith and credit. As previously discussed, Ginnie Mae investments have been determined to have such backing. Other similar instruments, such as Fannie Mae and Freddie Mac bonds, do not.

(5) Obligations of the Commonwealth of Pennsylvania or its agencies or instrumentalities backed by the full faith and credit of the Commonwealth or its political subdivisions, which include any bonds issued by the Commonwealth of Pennsylvania, a municipality or a school district. These issues must carry the backing of the taxation powers of the governmental unit issuing the debt.

(6) Shares of an investment company registered under the Investment Company Act of 1940, whose shares are registered under the Securities Act of 1933, provided that the only investments of that company are in the authorized investments for municipal funds.

Investment Products Authorized by Act 53 of 1973[11]

Under Act 53, in addition to products otherwise authorized by law, a public corporation or municipal authority may invest and reinvest money of the public corporation or municipal authority in any of the following financial products:

(1) Obligations, participations or other instruments of any Federal agency, instrumentality or United States government-sponsored enterprise, including those issued or fully guaranteed as the principal and interest by Federal agencies, instrumentalities or United States government-sponsored enterprises, if the debt obligations are rated at least "A" or its equivalent by at least two nationally recognized statistical ratings organizations.

(2) Repurchase agreements with respect to United States Treasury bills or obligations, participations or other instruments of or guaranteed by the United States or any Federal agency, instrumentality or United States government-sponsored enterprise.

[10] Standardizing the Procedures for Pledges of Assets.

[11] As amended by Act 10 of 2016.

(3) Negotiable certificates of deposit or other evidences of deposit, with a remaining maturity of three years or less, issued by a nationally or State-chartered bank, a Federal or State savings and loan association or a State-licensed branch of a foreign bank. For obligations with a maturity of one year or less, the debt obligations of the issuing institution or its parent must be rated in the top short-term rating category by at least two nationally recognized statistical ratings organizations. For obligations with a maturity in excess of one year, the senior debt obligations of the issuing institution or its parent must be rated at least "A" or its equivalent by at least two nationally recognized statistical ratings organizations.

(4) Bills of exchange or time drafts drawn on and accepted by a commercial bank, otherwise known as bankers' acceptances, if the bankers' acceptances do not exceed 180 days' maturity and the accepting bank is rated in the top short-term category by at least two nationally recognized statistical ratings organizations.

(5) Commercial paper issued by corporations or other business entities organized in accordance with Federal or State law, with a maturity not to exceed two hundred seventy days, if the issuing corporation or business entity is rated in the top short-term category by at least two nationally recognized statistical ratings organizations.

(6) Shares of an investment company registered under the Investment Company Act of 1940 (54 Stat. 789, 15 U.S.C. § 80a-1 et seq.) whose shares are registered under the Securities Act of 1933 (48 Stat. 74, 15 U.S.C. § 77a et seq.), if all of the following conditions are met:

(i) The investments of the company are the authorized investments under this subsection.

(ii) The investment company is managed in accordance with 17 CFR 270.2a-7 (relating to money market funds).

(iii) The investment company is rated in the highest category by a nationally recognized rating agency.

(7) Savings or demand deposits placed in accordance with the following conditions:

(i) The money is initially deposited and invested through a federally insured institution having a place of business in the Commonwealth, which is selected by the public corporation or municipal authority.

(ii) The selected institution arranges for the redeposit of the money in savings or demand deposits in one or more financial institutions insured by the Federal Deposit Insurance Corporation, for the account of the public corporation or municipal authority.

(iii) The full amount of principal and any accrued interest of each such deposit is insured by the Federal Deposit Insurance Corporation.

(iv) On the same date that the money is redeposited pursuant to paragraph (ii), the selected institution receives an amount of deposits from customers of other financial

institutions equal to or greater than the amount of money initially invested through the selected institution by the public corporation or municipal authority.[12]

Act 53 further stipulates that the provisions authorizing investment or reinvestment of money in certain financial products, as delineated in the act, shall not be construed to supersede or preempt other investment powers of public corporations or municipal authorities as authorized by law.[13]

Additional Investment Authorizations and Considerations

In addition to investments authorized by the municipal codes and Act 53 of 1973, the Local Government Unit Debt Act provides for the investment of bond proceeds in sinking funds by local governments (except municipal authorities).[14] Moneys in sinking funds may be invested in accounts and certificates of deposit in banks and savings and loan associations. Deposits and certificates above the limit of federal deposit insurance agencies must be secured by collateral. Sinking fund moneys can also be invested in any security the Commonwealth is using for investment at the time of the investment.

Monies from more than one fund may be combined to purchase a single investment, provided money of each of the funds is accounted for separately and earnings are separately computed, recorded and credited to each of the funds. Municipalities may also join with other political subdivisions and municipal authorities for joint investments, provided separate accounting, recording and crediting are maintained for each unit's funds. Furthermore, the Intergovernmental Cooperation Act[15] permits cooperative investment pools, such as the Pennsylvania School District Liquid Asset Fund, the Pennsylvania Local Government Investment Trust, and the State Treasurer's Invest Program.[16]

Thus, it is imperative that municipal investors utilize only those investments that comprise allowable investment options. Public investors should be aware of all of the investment options available to them and avoid purchasing any securities that may be questionable.

However, when evaluating investment options, municipal investors must be aware of other criteria to ensure that they achieve their investment goals. Specifically, to make the most effective use of idle funds, public investors must try to earn the best returns possible without sacrificing the safety of their funds or subjecting their portfolios to undue risks. Investors must achieve this goal within the constraints of applicable laws, investment policies and other internal practices. In addition, investors must make their decisions within the overriding principles of safety, liquidity and yield.

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[12] Act 53 of 1973 (53 P.S. § 5410.1), § 1.1.

[13] *Id.*

[14] 53 Pa.C.S. § 8001 et seq., § 8224.

[15] 53 Pa.C.S. Ch. 23.

[16] For more info about the Pennsylvania Treasurer's INVEST Program for Local Governments, *see* http://www.painvest.gov/pages/index.asp (November 22, 2017).

Municipal Fiscal Distress and Recovery

Background

The Municipalities Financial Recovery Act,[1] or Act 47, was enacted in 1987 as the product of a Local Government Commission-sponsored task force convened to look for solutions to growing financial problems among municipalities in Pennsylvania. Many municipalities faced, and still struggle with, financial challenges related to changes in the business cycle, shifts in population and economic opportunity, as well as poor local management and rising legacy costs, and other cyclical and structural issues. Act 47 is an effort to provide a process for these "distressed" municipalities to work with the Pennsylvania Department of Community and Economic Development (DCED) and reestablish financial stability. In 2013, the Local Government Commission authorized the creation of a new task force to examine the efficacy of the Act 47 program and recommend revisions where warranted.[2] Many of the resulting recommendations were adopted in a comprehensive enactment amending Act 47 in 2014.[3]

Early Intervention

A municipality that is experiencing financial challenges that threaten to develop into distress if unaddressed has the opportunity to participate in a voluntary early intervention program (EIP) with DCED. Participating municipalities are eligible for matching grants to develop multiyear fiscal plans and establish both short-term and long-term objectives. According to existing guidelines established by DCED, the EIP is "designed to offer a preemptive step for municipalities who feel as if their financial situations, while not yet formally declared distressed, are realizing difficulties and seek to improve their financial position."[4]

To participate in the EIP, a municipality must undergo a financial audit performed by an independent auditor or firm to provide an accurate picture of the municipality's fiscal situation. DCED is able to provide resource assistance to assist a municipality in identifying, prioritizing and addressing financial difficulties; engaging in a review of management operations and service delivery; implementing a multi-year financial management plan; implementing a financial trend analysis;

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[1] Act 47 of 1987 (53 P.S. § 11701.101 et seq.).

[2] Additional information regarding the task force process and recommendations is available in detail in the *Act 47 of 1987 Municipalities Financial Recovery Act 2013 Task Force Report,* Local Government Commission, October 16, 2013, available at http://www.lgc.state.pa.us/Reports/act47/101713/Act%2047-of-1987-2013-Task-Force-Report-FINAL-10-16-2013.pdf (November 22, 2017).

[3] *See* "Summary of House Bill 1773 (Act 199 of 2014)" available at http://www.lgc.state.pa.us/Reports/act47/summary-of-hb1773.pdf (November 22, 2017).

[4] *Early Intervention Program Guidelines,* Governor's Center for Local Government Services, Department of Community and Economic Development, February 2016, p. 2, https://dced.pa.gov/download/early-intervention-program-guidelines-01-09-pdf/?wpdmdl=58178 (November 22, 2017).

promoting multimunicipal and regional planning and strategies, including cost sharing; adopting best management practices; and integrating community and economic development strategies.[5]

Declaration of Distress

Ideally, the tools provided by the Early Intervention Program allow a municipality to reestablish sound financial footing without any additional intervention, but where the program is unsuccessful or not utilized, the act provides a set of criteria by which the Department can assess whether a municipality is in defined fiscal distress. Distress can vary in nature from a multiyear deficit, to missed payments on existing payroll or debt obligations, to inability to maintain governmental services from revenues derived based on the legal limitation of existing tax authority. Specified parties have the ability to go to DCED and seek a determination that a situation of distress actually exists. DCED's findings, after considering the request and holding a hearing and investigation, could lead to a declaration of distress under the act,[6] or a municipality's attempt to file for bankruptcy would cause an automatic declaration of distress.[7]

Appointment of Coordinator and Formation of Plan

After distress is declared, a coordinator is appointed by DCED to assess the financial situation, issue a report on findings, and propose a plan for recovery. The coordinator is given broad authority[8] to inspect records related to the municipality's operations and finances, as well as those records held by authorities that serve the municipality.

The coordinator's recovery plan may recommend changes to the municipality's staffing, assets or services, and may also propose multimunicipal cooperation, privatization, debt restructuring and disposition of assets, among other things.[9] In addition, where recommended by a plan, distressed municipalities may be able to petition the court of common pleas for special authorization to increase the real estate tax, the earned income tax on residents and nonresidents, as well as the local services tax, where the court finds that appropriate conditions are met.[10] In addition, an Act 47 municipality may permanently replace its mercantile/business privilege tax with the payroll preparation tax.

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[5] *See generally,* "Summary of HB 1773," Chapter 1-A, pp. 5-7, *supra,* note 3.

[6] *See generally* Act 47 of 1987, Ch. 2, Subch. A.

[7] *Id.* at § 261.

[8] *See generally id.* Ch. 2, Subch. B.

[9] *Id.* at § 241.

[10] *See id.* at § 123 for details. Eligibility for certain taxing options depends on municipal classification, taxes currently levied and objective need for additional revenues, among other things.

Frequently Asked Question: The municipality in which I work raised my taxes even though I don't live in a distressed municipality. How does this happen?

Answer: Under certain circumstances, and after receiving court approval, a distressed municipality may be authorized to levy a higher tax on earned income. Where a person works in a municipality with a higher rate of tax on earned income than the rate levied where he or she lives, the municipality where that person works is entitled to collect the difference in rates. Alternatively, a distressed municipality may petition to levy a local services tax of up to $3 per week. The local services tax is a payroll tax paid to the municipality where a person is employed. Ordinarily, the local services tax is capped at $1 per week.

Application: Carl is a resident of Pickelsburg, a borough located in Oak County Pennsylvania, but he works in distressed Cabbageville, a neighboring borough in the same county. Upon recommendation in its recovery plan, Cabbageville petitions the Oak County Court of Common Pleas for an increase in the rate of its tax on earned income, to which the Court approves a rate of 1.5 percent on residents and nonresidents alike. Because Pickelsburg levies a tax of 1 percent (to the benefit of Pickelsburg and Carl's local school district), Carl will continue to pay not only 1 percent tax on earned income to Pickelsburg, but also an additional 0.5 percent to Cabbageville.

Administration of Plan and Enforcement

A distressed municipality is required to adopt a recovery plan, either as proposed by the coordinator or as developed by the governing body of the municipality with the Secretary of DCED's approval.[11] Where a municipality fails to adopt or implement a plan, DCED may suspend certain funding sources to the municipality from the Commonwealth or, in some cases, determine that the municipality is experiencing a fiscal emergency.[12] Once adopted, the plan must be implemented by the coordinator, by another specified person or with the coordinator's oversight.[13] During the course of plan implementation, the coordinator is also required to participate in the municipality's budget process to ensure that the annual budget is compatible with the plan's provisions.[14]

Time Limits, Exit Plans and Options

Under the amendments adopted in 2014, distressed municipalities will be eligible for Act 47's tools and assistance for a limited period of time to ensure that distressed municipalities do not delay difficult fiscal planning and decision-making by artificially balancing budgets with special tax levies under the act. Newly distressed municipalities will be eligible to adopt an initial recovery plan for a period of five years. For municipalities in distressed status as of the effective date of the 2014 revisions, the five-year period would begin to run from the effective date of the most recent recovery plan or amendment.[15] For municipalities in their last year of a recovery

[11] *See generally* Act 47 of 1987, Ch. 2, Subch. C.

[12] *See id.* at §§ 248, 602.

[13] *Id.* at 247.

[14] *Id.* at 247.1; *see also* "Summary of HB 1773," p. 9.

[15] Act 47 of 1987, § 254.

plan on the effective date, the date for the termination of distressed status would be three years from the termination date of the current plan. During the first half of the final year of the recovery plan, the coordinator is required to prepare a report assessing the ongoing distressed status of the municipality and making one of the following recommendations:

- That the distressed status of the municipality be terminated.
- That the municipality be disincorporated (*see* below).
- That the municipality, because of noncompliance with recovery recommendations, should be declared in a state of fiscal emergency with the possibility of receivership (*see* below).
- That a three-year exit plan be adopted.[16]

The Secretary of DCED is responsible for reviewing the coordinator's report and determining whether the coordinator's recommendation is appropriate, or whether another option should be selected. If a three-year exit plan is selected, at the end of the three years, the Secretary will determine whether the municipality's distressed status should be terminated, a fiscal emergency should be declared or in extremely rare circumstances, the municipality should be disincorporated.[17] Although not explicitly listed as an option, a municipality also has access to the federal municipal debt adjustment process through bankruptcy where insolvent and the Secretary of DCED has granted the municipality's application to file for bankruptcy.[18]

Fiscal Emergency and Receivership

Amendments adopted in 2011 added chapters 6 and 7 to Act 47, which provided for the Governor to declare a state of fiscal emergency in a city of the third class under certain circumstances. The 2014 amendments expand eligibility for fiscal emergency and receivership to any municipality, other than Philadelphia,[19] where the municipality is either in current or imminent danger of insolvency or the municipality fails to adopt or implement a recovery plan necessary to address its distress.[20] Following a declaration of fiscal emergency, which may result in the appointment of a receiver, the municipality is to negotiate a consent agreement with DCED to ensure the continued provision of vital and necessary services. A receiver is charged with creating a plan to address the municipality's distress; however, the receiver's plan overseen by the Commonwealth

[16] Act 47 of 1987, § 255.

[17] *Id.* at § 256.

[18] *See generally id.* Ch. 2, Subch. C.1.; *see also* "Summary of HB 1773," pp. 10-14.

[19] Act 47 does not apply to Philadelphia due to the adoption of the Pennsylvania Intergovernmental Cooperation Authority Act for Cities of the First Class in 1991, which is intended to provide recovery assistance to Philadelphia's financial challenges.

[20] Act 47 of 1987, § 602.

Court, is legally binding against the municipality, and is enforceable in Commonwealth Court over the objection of the governing body of the municipality where necessary.[21]

Disincorporation

Under very rare circumstances, some municipalities may have an inadequate tax base to continue to function as a municipality.[22] Upon such a recommendation of "nonviability" by a coordinator or receiver under Act 47, the Secretary of DCED is required to consider whether:

(1) the municipality is unable to provide necessary municipal services;

(2) the municipality has experienced a collapse of its tax base such that all reasonable efforts to recover have failed; and

(3) merger or consolidation of the municipality with a neighboring municipality is either unachievable or insufficient to establish viability.[23]

Where the Secretary finds that such conditions of nonviability exist, a municipality is authorized through its governing body, or by a citizen petition, to ask a court of common pleas to initiate the process of disincorporation of the municipality. With the court's approval, DCED would appoint an administrator charged with planning for winding down and terminating the municipality's affairs, and would provide for state administration of services through the establishment of an unincorporated service district, which would replace some municipal functions but operate as a corporate body of the Commonwealth. The long-term goal of disincorporation is to provide for the eventual reestablishment of a municipality or the consolidation of the district's territory into a neighboring municipality.[24]

If you believe that your municipality or a municipality you represent may be distressed or is in need of financial consultant assistance, you should contact the Governor's Center for Local Government Services within the Department of Community and Economic Development. Additional information on Act 47 and the Early Intervention Program are also accessible on DCED's website at www.newpa.com.

The Governor's Center may be contacted at:

- 4th Floor, Commonwealth Keystone Building, Harrisburg PA 17120.
- 1-888-223-6837.

[21] *See generally* Act 47 of 1987, Ch. 6 and 7; "Summary of HB 1773," pp. 22-24.

[22] *See* Act 47 of 1987, § 102 (b).

[23] Act 47, § 431.1.

[24] *See generally id.* Ch. 4, Subch. C and D; "Summary of HB 1773," pp. 14-22.