LOCAL GOVERNMENT COMMISSION

Quarterly Legal Update *Issue 2, 2023*

Greetings from the Director:

Happy Spring Greetings, LGC subscribers. In this edition of the Update, we offer you some interesting case summaries on land use, civil rights, unlawful delegation, and the interplay between the FMLA and collective bargaining agreements. We also note some local government legislation introduced during this busy season of new bills. Thank you for reading, and you will be hearing from us again soon.

-David Greene, Executive Director of the Local Government Commission

Legislative Update:

As a new session kicks off, our staff has begun tracking legislation addressing local government issues.

Several bills have been introduced regarding property taxes, including **HB 113**, **HB 405**, and **SB 177**. More specifically, **HB 442**, **HB 443**, and **SB 156** address property taxation for senior citizens.

Legislation focused on first responders include **HB 189**, **SB 420**, and **SB 459** (dealing primarily with police); **HB 187**, **HB 448**, **SB 354**, and **SB 368** (addressing firefighting needs); and **HB 349**, **SB 501**, and **SB 502** (for EMS issues).

Additionally, **SB 210** and **SB 249** were introduced to amend the Right-to-Know Law.

Stay tuned to future newsletters to track these bills as they move through the legislative process.

Keep up with the latest from the Local Government Commission:

www.lgc.state.pa.us

Civil Rights

Vallecorsa v. Allegheny County, 2022 WL 16950446 (W.D. Pa., Nov. 15, 2022). Plaintiff sued employer County for First Amendment violation after County terminated her employment as a 911 dispatcher due to public backlash over comments she made on Facebook. Court denied Plaintiff's motion for summary judgment, granted County's motion for summary judgment, and entered judgment in favor of County on all claims. Plaintiff, from her private Facebook account, commented while off duty on a post condemning recent protests stemming from a shooting by police. Her comments were then shared by a third party who tagged employer County. County then received several emails and phone calls from both the public and other employees complaining about Plaintiff's comments, categorizing them as racist and casting doubt on both County's and Plaintiff's integrity and ability to serve the public without bias. County also received complaints from other employees concerned about their own safety given the public backlash from the comments, and received a threat of an impending protest at the 911 center. County ultimately terminated Plaintiff's employment after determining that her Facebook comments "could be perceived as racist, violated department policies, caused a disturbance at the 911 dispatch center, and fomented public distrust in the department, including doubt that citizens would receive ambulatory care." Court held that County's public safety interests in promoting efficiency in both rendering emergency services and in its public-facing, law-enforcement functions outweighed Plaintiff's right to free speech.

Santore v. Northumberland County, 2022 WL 17326012 (M.D. Pa., Nov. 29, 2022). Plaintiff, who suffered from glaucoma with no vision in the left eye, was confined to county prison in 2018. He required multiple eyedrops to preserve the vision in his right eye. Plaintiff sued in 2022, alleging violations of civil rights under the Eighth Amendment (Denial of Adequate Medical Care), the Americans with Disabilities Act (Failure

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to Accommodate) (ADA), and the Rehabilitation Act (Failure to Accommodate) (RA) because he frequently did not receive the prescriptions while incarcerated, and as a result has lost almost all vision in his right eye. The Middle District denied County Defendants' motion to dismiss. As to the defendant municipality, the court reiterated the *Monell* standard that a municipality may only be liable in a civil rights claim if the injury results from a "policy, practice, or custom" of that municipality. Citing the relevant precedent, the court quoted: "[a] policy or custom may also exist where 'the policymaker has failed to act affirmatively at all, [though] the need to take some action to control the agents of the government is so obvious, and the inadequacy of existing practice so likely to result in the violation of constitutional rights, that the policymaker can reasonably be said to have been deliberately indifferent to the need.'" In order to recover against a municipality under this theory, plaintiff must demonstrate "a direct causal link between the municipal policy or custom and the alleged constitutional deprivation." The court noted that Plaintiff pleaded that he had made the facility aware of his issue through several administrative complaints, that he was routinely denied access to prescriptions, and that this was the result of a policy of the facility. The motion to dismiss on this claim was denied.

With regard to the ADA and Rehabilitation Act claims, Defendants asked for dismissal on grounds that the denial of medical treatment is not a program, service or activity under the ADA or RA. The court noted that courts have found a prison's denial of prescription medication is actionable under the statutes as a denial of service. Because Plaintiff pled that he was denied access to medication that had already been prescribed by a physician who provided treatment throughout the period of Plaintiff's incarceration, the court allowed the claims to proceed.

Land Use

PSIP JVI Krumsville Road, LLC v. Board of Supervisors of Greenwich Township, 284 A.3d 547 (Pa. Cmwlth., Oct. 26, 2022). Township Board of Supervisors (Board) appealed trial court's decision reversing its denial of Developer's preliminary land development plan. Commonwealth Court affirmed trial court's holding. Board denied Developer's plan on the sole basis that Developer did not seek or receive approval under township's Subdivision and Land Development Ordinance (SALDO) to acquire portion of neighboring property prior to transferring said portion of land to PennDOT for the widening of a highway right-of-way. Upon review of Developer's plan, PennDOT determined that the existing right-of-way needed to be widened, and directed Developer to purchase and subsequently transfer portion of neighboring property to PennDOT. Board subsequently denied Developer's plan due to the failure of Developer to acquire subdivision approval as required by the SALDO. Developer appealed the denial to trial court, arguing that subdivision approval was not required for the transfer of the property. Trial court held that "a conveyance of an interest in land for a public purpose is exempt from land use regulations." Commonwealth Court affirmed, holding that the public purpose rendered the SALDO inapplicable. Additionally, Developer contended that the Board acted in bad faith in its denial of the plan. "[W]hen local officials oppose development otherwise sanctioned 'by citing trifling, over-technical, or simply reasons unrelated to the law of zoning,' they act in bad faith. Decisions on land development plans that are tainted by bad faith will be set aside." (Internal citations omitted.) Township's engineer stated that the remaining property after the partial transfer was fully compliant with all zoning requirements. Further, after the Township was made aware of the property transfer, they did not communicate a perceived violation of the SALDO with Developer but rather allowed Developer to continue developing its plan. Therefore, trial court held, and Commonwealth Court affirmed, that Board acted in bad faith in denying the Developer's plan.

In re: Jaindl Land Company, 284 A.3d 1314 (Pa. Cmwlth., Oct. 27, 2022). Landowners appealed from trial court's order upholding the zoning hearing board's denial of landowners' preliminary land development application. Landowners purchased property located within a Light Industrial (LI) district. The zoning ordinance allowed industrial warehouses and distribution centers as uses permitted by right in LI districts. After the purchase, Township advertised notice of proposed zoning map amendments, including an amendment that would change the subject property's zoning from a LI district to a Transitional Commercial (TC) district, in which warehousing is not a permitted use. Landowners received notice

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of the proposed amendments. At the public hearing regarding the amendments, the Board of Supervisors opted to table the vote on the amendments. Landowners filed a preliminary land development application for an industrial warehouse on the same day as the public hearing. Board of Supervisors subsequently voted to adopt the amendments to the zoning ordinance. Township's zoning officer then notified Landowners that their application was subject to the pending ordinance doctrine, and therefore denied the application since warehouses are not permitted in TC districts. Landowners appealed to zoning hearing board, which upheld the denial, and further appealed to trial court which again upheld the denial. On appeal to Commonwealth Court, landowners argued that section 508(4) of the Municipalities Planning Code (MPC) governed, rather than the pending ordinance doctrine. Court held that the MPC established a "statutory exception to the pending ordinance doctrine". Further, the Pennsylvania Supreme Court upheld this exception in *Naylor*, stating "[t]he pending ordinance rule does not apply to applications for subdivision or land development as they are controlled by section 508(4) of the MPC, which specifically addresses this kind of proposed land use." (*Naylor v. Township of Hellam*, 773 A.2d 770, 782 (Pa., 2001)). Therefore, Court reversed trial court's order upholding the denial of Landowner's preliminary land development application.

A policy or custom may also exist where "the policymaker has failed to act affirmatively at all, [though] the need to take some action to control the agents of the government is so obvious, and the inadequacy of existing practice so likely to result in the violation of constitutional rights, that the policymaker can reasonably be said to have been deliberately indifferent to the need."

- Santore v. Northumberland County

Department of Corrections v. South Heidelberg Township Zoning Hearing Board, 2022 WL 17543665 (Pa. Cmwlth., Dec. 9, 2022).** Commonwealth plaintiffs acquired township property previously used as a drug and alcohol treatment center and began using it also as a community corrections center ("Halfway House") for parolees. The township ordinance did not permit the use by right in either the district or anywhere else in the municipality. The Commonwealth was cited for violating the ordinance and subsequently filed an application with the zoning hearing board (ZHB) challenging the substantive validity of the ordinance, appealing the zoning officer citation, and applying for a variance and/or special exception. The Commonwealth also contended that the ordinance was preempted by state law. The ZHB denied relief and the trial court affirmed. The Commonwealth Court reversed. Restricting its analysis to the issue of preemption, the court noted that "conflict preemption" invalidates any ordinance that "contradicts, contravenes, or is inconsistent with a state statute," or "acts as an obstacle to the execution of the full purposes and objectives of the General Assembly." Furthermore, the court cited precedent that an ordinance banning the housing of certain offenders conflicts with the Commonwealth's determination that such offenders may safely be housed in a work-release facility. The court found that the ordinance conflicted with the state Parole and Sentencing Codes because it "undermines the Parole Board's ability to assign qualified offenders to an appropriate work-release facility…[and] unduly interferes with the efficient and timely administration of Pennsylvania's probation and parole systems." The ordinance, which banned Halfway House's use, conflicted with "the Commonwealth's determination that an offender is suitable for placement in" Halfway House.

Center Street Luxury Apartments, LLC v. Town of Bloomsburg Zoning Hearing Board, 2022 WL 17689194 (Pa. Cmwlth., Dec. 15, 2022).** Plaintiff owned property in a commercial district, the first floor of which was dedicated to commercial use and the upper floors to student housing and sought a variance to convert the first floor to student housing. During the hearing, Plaintiff's own expert testified that online and box stores made it "difficult for local businesses in the commercial district to survive." The zoning hearing board (ZHB) denied the application, finding, in part, that the hardship faced by Plaintiff was not unique to the property but, rather, common in

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the neighborhood in general. Furthermore, the ZHB determined that Plaintiff did not prove that there was "no possibility" that the property could ever be used for commercial purposes, and that the "hardship" in question was more appropriately the subject of a zoning ordinance amendment. The trial court reversed. The court, without taking additional evidence or augmenting findings of fact, found that the property was surrounded by student housing and was thus "unmarketable" as a commercial entity. The court also held that evidence on inability to find a tenant for years "demonstrat[ed] a hardship," and, consequently, "the physical circumstances" of the property are the "direct cause" of the hardship. The court also noted that other similarly situated properties had received a variance. Commonwealth Court reversed. The court cited authority for the proposition that a ZHB granting variances because of changes in the particular district that might call for reclassification would "be virtually enacting zoning legislation instead of administering…[local zoning regulations]." The court held that the ZHB rightly determined that substantial evidence supported that the hardship was shared by other commercial properties. Although the court acknowledged that "changing character of a neighborhood" is relevant to the question of hardship, a ZHB is entitled to deference in its knowledge of local conditions, and, consequently, its conclusion that rezoning is a more appropriate remedy was critical: "Where changing circumstances as a whole suggest that rezoning…is warranted…[a ZHB] exceeds its authority by granting individual variances."

Halchak v. Dorrance Township Board of Supervisors, 2022 WL 17742270 (M.D. Pa., Dec. 16, 2022). In a case discussing the application of due process principles to municipal land use decisions, Plaintiff filed substantive and procedural due process claims and a request for mandamus against Defendant Township and third-party code officer. The dispute arose from a request of plaintiff to obtain a zoning permit and an occupancy permit to convert vacant property to a used car sales business. Plaintiff inquired about municipal land development application procedures and initially provided incorrect address information and property descriptions. Upon receipt of the correct information, Township zoning officer informed Plaintiff that an approved land development plan was required for issuance of a zoning permit. Zoning officer also informed Plaintiff that a bathroom would be required to obtain an occupancy permit. Plaintiff submitted no applications or plans and no action was taken on the proposal for approximately five years. During that period, it was discovered that the property under prior ownership had been granted permits for a "garage operation," although one had never been operated and no evidence that the property was used as a sales lot was ever discovered. Plaintiff, nevertheless, obtained a zoning permit based on the discovered information. Plaintiff was then directed to code officer Defendants to obtain an occupancy permit. Plaintiff submitted a construction permit application to the code officer without construction documents and was informed that construction documents prepared by a licensed professional and proposed bathroom facilities would be required as a condition of receiving an occupancy permit. At this time, Defendant Township did not have a Uniform Construction Code board of appeals in place. Plaintiff never filed a completed application and chose instead to file a mandamus claim in state court, subsequently removed to federal court with additional due process claims. On cross filings for summary judgment, the Middle District found for Defendants. Noting that Plaintiff may not prevail on a due process claim without a protected property interest, the court held that Plaintiff's property interest in the permit itself is unclear absent a showing of clear entitlement. However, the Third Circuit has observed that the "use and enjoyment of property" is a sufficient property interest to implicate due process in a land use proceeding. With regard to the substantive due process claim, the court noted that the "shocks the conscience" standard as applied to state actors was applicable and described the standard as requiring, "only the most egregious conduct," and, in the land use context, "evidence of corruption, self-dealing, intentional interference with constitutionally protected activity, virtual 'takings,' or bias against an ethnic group on the part of local officials." The court, in granting summary judgment for Defendants, found the record devoid of any such conduct on the part of Defendants. Furthermore, the facts did not support proceeding on a procedural due process claim. As a matter of law, the Third Circuit has held that the administrative and judicial remedies available in Pennsylvania land use law satisfy due process, and no such claim lies solely because a plaintiff has "simply refused to avail himself of them." With regard to the lack of a UCC board of

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appeals, the district court treated this argument as "hypothetical," given that Plaintiff had never submitted a completed application. As to mandamus against Defendants, the court noted that federal courts have declined to provide mandamus relief on state law grounds, and even if it could, mandamus is only appropriate where the right to relief is clear.

Municipal and Tax Claims

Kaminsky v. Susquehanna County Tax Claim Bureau, 2022 WL 16984581 (Pa. Cmwlth., Nov. 17, 2022).** Owner appealed trial court's order denying his motion to set aside tax sale. Commonwealth Court affirmed. Owner failed to pay taxes on the property in 2018, 2019, and 2020, and the property was therefore scheduled for an upset tax sale. Owner scheduled third party attorney to pay the $960 owed the day before the sale was scheduled; this payment was not made. Tax Claim Bureau (TCB) subsequently sold the property at the upset tax sale. At trial court, Owner argued he had a right of redemption under the Municipal Claims and Tax Liens Law (MCTLL) and requested the court, via its equitable powers, to set aside the tax sale for a *de minimis* delinquency. The trial court held that the TCB operates under the Real Estate Tax Sale Law (RETSL), not MCTLL, and therefore no right of redemption exists. Further, trial court found that Owner received proper notice under RETSL and the failure of attorney to make payment does not justify equitable stay of tax sale. "[Owner] had more than a year after notification of the delinquency to satisfy his delinquent taxes to prevent the sale and had a month before the tax sale to make payment in order to stay the sale." Commonwealth Court affirmed trial court's denial of motion to set aside the tax sale.

Municipal Governance

Department of Environmental Protection v. Clearfield County, 283 A.3d 1275 (Pa. Cmwlth., Oct. 4, 2022). The Environmental Hearing Board (EHB) issued an order vacating a permit issued by the Department of Environmental Protection (DEP) to waste management company for a landfill in county and granted county's motion for summary judgment. In the EHB's view, the application inadequately described the origin of waste to be disposed of at the Landfill, which it believed was necessary to justify a need for the landfill. The EHB also

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> ***- PSIP JVI Krumsville Road, LLC v. Board of Supervisors of Greenwich Township***

required that the application contain contracts for waste disposal. The EHB also found the applicant's analysis that the landfill site was "at least as suitable" as other locations deficient. Finally, EHB concluded that DEP's Pennsylvania Bulletin notice of approval of PA Waste's application failed to provide reasons for overriding County's objections to the Landfill. The EHB remanded the matter to DEP for further proceedings including the submission of additional materials by applicant related to the origin of the waste and alternative locations. DEP and applicant appealed the interlocutory order to Commonwealth Court. As a threshold matter, the court held that appellate jurisdiction was appropriate because otherwise the EHB's original basis for vacating the permit would evade review. On the merits, the court agreed with the EHB that applicant's compliance with the "Origin Regulation," was inadequate. DEP argued that the application "in general terms," did identify the origin of the waste and that the purpose of the regulation was to provide it with sufficient information to determine whether the proposed facility would comply with the county's existing waste management plan. Furthermore, DEP argued that the term was ambiguous, and thus the EHB erred by supplying its own definition. Although the court acknowledged that DEP was entitled to deference with respect to its interpretation of regulations, the court found that DEP's interpretation was at odds with the "plain terms of the regulation" and was inconsistent with a purpose of the underlying acts which requires DEP to "protect the public from the dangers associated with the transportation and disposal of municipal waste." In applying a "dictionary meaning" to the term, the court noted that applicant "declared that it did not know the origin of waste that would

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be disposed of at the Landfill," and then "arguably contradicted itself by noting that in 'general, waste will be delivered from surrounding jurisdictions, as well as from sources outside of Pennsylvania[.]'" Consequently, DEP was entitled to no relief on the question of the Origin Regulation. On the issues of demonstrating "need" for the facility and the requirement to append contracts, however, the court agreed with DEP and applicant: the regulations made the demonstration of need optional, and there was no regulatory requirement that the application contain waste management contracts. With regard to the "alternative locations" issue, the court found that DEP itself, rather than the applicant, conducted the analysis, which the court found contrary to regulatory requirements. Finally, the court agreed with the EHB that the Pennsylvania Bulletin notice did not contain a narrative that justified or showed the reasons why the county's recommendation regarding the application were rejected. Consequently, the court affirmed the order of the EHB with instructions for the application to be completed and reviewed in a manner consistent with the opinion.

County of Northumberland v. Township of Coal, 288 A.3d 138 (Pa. Cmwlth., Oct. 19, 2022) (*reargument denied* Dec. 16, 2022).** Township appealed from trial court's order granting County's motion for summary judgment and directing Township to refund County $267,320.98. Commonwealth Court affirmed. County filed building applications with Township to convert existing property into a County prison. Township charged County $161,724.00 for State Inspections and Plan Review, and $220,801.00 for Coal Township Permit, per Township Ordinance 408 requiring a permit fee equal to 1% of total construction estimate of the project. County made both payments, but included a letter with the Permit Fee payment requesting proof of Township expenses actually incurred and proof that Permit Fee amount related to costs Township incurred related to the permitting of the prison. The letter further cited several Commonwealth Court cases which allegedly supported the County being eligible to recoup amounts in excess of actual expenses by the Township, and warned Township that County would file suit against Township if the requested proof was not provided. County then filed suit and sought relief in assumpsit for the refund of fees in excess of Township's actual costs. Township argued that County failed to file the written and verified claim for a refund as required by the Refund Act (1943, P.L. 349, No. 162). Trial court held that letter accompanying Permit Fee payment satisfied the Refund Act's requirements. Township appealed to Commonwealth Court, again averring that County failed to adhere to Refund Act requirements, and also that County failed to prove the fees were unreasonable. Court held that the "written and verified claim requirement's purpose…is 'to notify a municipality that a claim may be pending against it'." Court also held that although the letter was not verified, it satisfied the notification requirement's purpose therefore affirming trial court's order granting summary judgment in favor of County. Court found that County made several requests during discovery for information regarding Township's actual costs, which Township failed to provide. Further, Township was unable to provide evidence of costs which justified the charging of $161,724.00 for State Inspections when the Township was only charged $113,204.02 for those inspections. Court affirmed trial court's order for Township to refund County $267,320.98, representing the difference between the actual and charged costs for State Inspections (excepting $2,000.00 for potential administrative costs) and the Permit Fee charge.

Clean Air Generation, LLC and Anthracite Ridge, LLC v. Schuylkill County Board of Commissioners, 288 A.3d 142 (Pa. Cmwlth., Oct. 26, 2022) and *Clean Air Generation, LLC and Anthracite Ridge, LLC v. Schuylkill County Board of Commissioners*, 288 A.3d 144 (Pa. Cmwlth., Oct. 26, 2022).** Landowners appeal from trial court's dismissal of their complaint in mandamus against the Schuylkill County Board of Commissioners (Board) to compel the Schuylkill County Planning and Zoning Commission (Commission) to review their zoning application. Board adopted Commission's Zoning Ordinance Substantial Invalidity Resolution (Resolution), which declared portions of the Zoning Ordinance invalid pursuant to section 609.2 of the Municipalities Planning Code (MPC). Landowners submitted a zoning application one week later, and Board returned the application as "unfiled", with a letter stating that "the filing may not be accepted in accordance with the Resolution…". Landowners filed a mandamus claim against the Board, seeking an order directing the Commission to review their permit, arguing that the "Commission's refusal to accept and act on their permit application left them without a legal remedy" and

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"that they could not properly appeal the…letter to the Zoning Hearing Board 'as a denial as there was no action taken on the application.'" Board argued that the letter was an effective denial, and as such, the Landowners failed to exhaust all administrative remedies under the MPC and therefore were not entitled to mandamus relief. Trial court upheld Board's argument and dismissed Landowners' complaint in mandamus.

The MPC grants jurisdiction to zoning hearing boards to, among other things, hear appeals "from the determination of the zoning officer, including…denial of any permit, or failure to act on the application…" (1968, P.L. 805, No. 247 §909.1 (a)(3)). Had the Landowners appealed the Board's letter to the zoning hearing board, the zoning hearing would have had to answer the questions of whether Resolution was lawful and whether the Board could lawfully return an application due to Resolution. Commonwealth Court held that an appeal to the zoning hearing board would have been inappropriate because the questions raised would have been outside their jurisdiction as authorized in the MPC. Landowners' failure to appeal to the zoning hearing board did not therefore equate to a failure to exhaust all administrative remedies, and Commonwealth Court reversed the dismissal and remanded to trial court to determine merits of Landowners' mandamus claims.

> ***[Because the regulation] does not prescribe the manner in which an NGDC must exercise PUC-granted discretion…[the right to challenge utility actions] cannot serve as the PUC's standard to prevent "arbitrary, ad hoc decision making."***
>
> ***- City of Lancaster v. Pennsylvania Public Utility Commission***

In a separate but related appeal, Landowners also appealed trial court's order denying their procedural validity challenge seeking to void a curative amendment enacted by the County. In this instance, County advertised notice of a public hearing to adopt a curative amendment to the Zoning Ordinance to address wind energy projects. Landowners, with their counsel, attended and participated in the public hearing, where only one of the three County Commissioners was in attendance. The public hearing was recessed and reconvened for the following day, prior to the regularly scheduled meeting of the Board. Board approved curative amendment, and Landowners filed procedural validity challenge due to public meeting not being attended by quorum of Board. Trial court held that a quorum was not required for the public hearing. Landowners appealed, arguing that the County Code requires a quorum in order for the Board to "transact business," such as the public hearing under the MPC. Court found that the MPC does not contain quorum requirements for the public hearing. In reading the County Code *in pari materia* with the Sunshine Act, the court also found that to "transact business", some form of deliberation, decision making, or rendering judgments is required, none of which occurred at the public hearing. Therefore, Commonwealth Court affirmed lower court's denial.

Municipal Services

City of Lancaster v. Pennsylvania Public Utility Commission, 284 A.3d 522 (Pa. Cmwlth., Oct. 11, 2022). Three municipalities challenged the validity of Pennsylvania Public Utility Commission's (PUC) Regulations mandating outdoor gas meter locations but permitting a natural gas distribution company (NGDC) to consider indoor gas meter locations when a gas meter is, among other things, located in a building within a locally designated historic district. The municipalities argued that the regulation violated Article I, Section 27 of the Pennsylvania Constitution, and also represented an improper delegation of the PUC's authority to private parties - NGDCs. The court sustained the PUC's preliminary objection as to the Article 1, Section 27 argument and overruled its objection to the second argument. The municipalities filed an application seeking summary relief as to the improper delegation count. Commonwealth Court granted summary relief to the municipalities. The court concluded that the regulation "imposes no burden on the NGDC, no presumption of an indoor meter location, and no requirement that an NGDC attempt to maintain an indoor meter location unless it 'cannot safely' do so." The PUC noted that the law provides for a review of a NGDC through complaints of how a utility provides

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service, but the court rejected this argument noting that the regulation itself provides no standard by which the choice of the NGDC could be adjudicated: "[Because the regulation] does not prescribe the manner in which an NGDC must exercise PUC-granted discretion regarding whether to order an existing interior gas meter in a historic district be relocated to an exterior location, [the right to challenge utility actions] cannot serve as the PUC's standard to prevent 'arbitrary, ad hoc decision making.'" Because a delegation of legislative authority is only permissible when "concrete measures to channel the delegatee's discretion and safeguards to protect against arbitrary, ad hoc decision making" exist, and because the regulation vested "absolute discretion" in the location of meters in historic districts with the NGDCs, the court granted the application of the municipalities finding the regulation unconstitutional and unenforceable.

Public Employment

Towamencin Township v. Pennsylvania Labor Relations Board, 288 A.3d 136 (Pa. Cmwlth., Oct. 7, 2022).** Pregnant township detective sought pre-birth leave for health issues in 2016. During this period, officer used short- and long-term disability for income, and chose to use Family and Medical Leave Act (FMLA) time for care of her infant. Upon the birth of her child in October of 2016, Township informed detective that she was entitled to 12-weeks of FMLA time, and approved her leave through December, 2016. Detective was informed that the Township had erred in the application of FMLA because detective had not accumulated enough work time prior to leave, but, nevertheless, granted her time. Detective became pregnant again in 2017, and sought pre-birth medical leave for health reasons. She began her leave November 27, 2017, and was informed by Township that her FMLA time would *begin on that date*. Detective sought to apply the same procedure used in her first pregnancy, i.e., beginning FMLA time upon the birth of her child. Township refused, and notified Detective that she would be required to use paid time off during her FMLA leave. During this entire period a collective bargaining agreement (CBA) was in place; it did not include provisions related to FMLA and granted members unlimited qualified sick time. The Union filed a charge with the Pennsylvania Labor Relations Board (Board), alleging a violation of the Pennsylvania Labor Relations Act and "Act 111" (Police and Fire Collective Bargaining) because Township "changed a policy" on a matter that was a subject of collective bargaining. The hearing officer and Board agreed. In a 2-1 panel decision (subsequently resulting in a 4-4 split among active judges and filed pursuant to Rule 256(b)), Commonwealth Court reversed. On the issue of the application of the FMLA, after an analysis of case law and Department of Labor regulations and Opinion Letters, the court held that Township was required to begin imposing FMLA upon its recognition of a "qualifying event" and that Detective was entitled to a total of 12 weeks in any 12-month period. Consequently, her FMLA time was appropriately began during her pre-birth health issues and only time remaining after that could be used for infant care, notwithstanding her wishes to "defer" use of the FMLA time. Furthermore, Township could require that paid time off be used concurrently with the FMLA time. On the issue the violation of state law, the court held that the federal "mandate" to begin FMLA upon qualification precluded it from being a subject of collective bargaining. Furthermore, the court agreed with Township that its option under federal law to require the use of paid leave concurrently with FMLA time was a managerial prerogative because it directly implicated staffing decisions related to public welfare, and was thus not subject to collective bargaining. Finally, the court held that Township did not "unilaterally change a policy," because Detective's first pregnancy was not a qualifying event under the FMLA, and when she did qualify, Township followed federal law.

City of New Castle v. International Association of Firefighters, Local 160, 286 A.3d 404 (Pa. Cmwlth., Nov. 22, 2022). City appealed order denying petition to vacate arbitration award. Union asserted that City violated collective bargaining agreement (CBA) by reducing survivor benefits, and arbitrator upheld Union's argument. City filed motion to vacate arbitration, which trial court denied. Commonwealth Court affirmed, upholding arbitration award. City and Union entered into a 4-year CBA, effective January 1, 1998, which set retirement benefits at 75% of the participant's average compensation, and was silent on survivor benefits but provided that "existing benefits…currently enjoyed by all members…but omitted from this Agreement are hereby retained as if the same had been specifically set forth herein." Prior to the CBA, Union retirement benefits were governed by the Third Class City Code,

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which provided for survivor benefits equal to the pension of the deceased spouse. In December 1997, City enacted Ordinance 7343 which set the survivor benefit at 50% of the deceased firefighter's average compensation. Additionally, in 2007, City was designated financially distressed under the Municipalities Financial Recovery Act (1987, P.L. 246, No. 47).

Union filed grievance after member died, and his surviving spouse only received 50% of his average compensation and not the 75% that he received while he was alive. Arbitrator found that City had changed the survivor benefits with the passage of Ordinance 7343, a change to which the Union did not agree. Arbitrator awarded surviving spouse 75% benefit, equal to what her spouse had been receiving. City filed petition to vacate the award, arguing that the award would require the City to perform an illegal act by violating both the Municipal Pension Plan Funding Standard and Recovery Act's (1984, P.L. 1005, No. 205) requirement for an actuarial study prior to the adjustment of municipal pension terms, and Act 47's prohibition on new municipal contracts impeding the implementation of the recovery plan. Trial court held that arbitrator's award was derived from the CBA, and that City underwent actuarial study in 1996 prior to the CBA negotiations and therefore would not violate Act 205. Further, the CBA was enacted prior to City entering into Act 47 recovery, and adhering to the 75% interpretation would not be counter to the recovery plan. As such, Commonwealth Court affirmed the trial court's denial of City's petition to vacate the arbitration award.

Taxation and Finance

Chester-Upland School District v. Chester City Board of Revision of Taxes and Appeals, 286 A.3d 402 (Pa. Cmwlth., Sept. 28, 2022).** Property owner appealed two orders of the trial court finding that a community hospital and convent it owned were not tax exempt. In 2014 the properties were designated as tax exempt and owned by nonprofits. The school district challenged the assessment of the properties for the triennial period of 2015-2017 to the city tax board. In its challenge the school district cited that "the property is underassessed" as its basis for the challenge. The city tax board denied the school district's appeal, informing owners by letter that "[the board] has denied any change at this time and the above captioned property will remain assessed [as is]." School district appealed to the trial court in 2015, alleging that the board erred by "placing the [Properties] into exempt status" because the owners were not purely public charities and the use and occupancy of the properties did not advance a charitable purpose. In July of 2016 the properties were acquired by a for-profit corporation, and the trial court permitted property owner to intervene in the school district appeal. On January 21, 2021, the trial court determined that the school district had preserved the issue of exemption and that property owners operation of the property disqualified it from exemption. Property owners appealed on three separate grounds: 1. The trial court orders should be vacated because the trial court judge held a position on the Philadelphia Tax Board at the same time he adjudicated the case; 2. The school district had waived the issue of exemption by not raising it before the tax board; and 3. The trial court erred because the properties qualified as tax exempt. The Commonwealth Court affirmed the trial court orders on the first two arguments. Citing another adjudication regarding the judge's forfeited office (*see, e.g., In re Prospect Crozier LLC*, 2022 WL 4490477 (Pa. Cmwlth., Sept. 28, 2022), the court held that the issue was identical regarding the judge's decisions, and that he had forfeited his judicial office no later than June, 2019. Consequently, the trial court orders were void. The court also endorsed the second argument: the trial court had no jurisdiction to adjudicate exemption status because the school district had waived the issue. Citing provisions of the Third Class City Code making the city tax board subject to the procedural requirements of the Consolidated County Assessment Law, the court held that the trial court could not adjudicate exemption status if it was not the basis of the appeal below.

** Indicates that this case is UNREPORTED.
See 210 Pa. Code § 69.414

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