Local Government Commission
Quarterly Legal Update

Issue 3, 2023

Greetings from the Director:

Happy mid-summer, local government folks. This budget season edition of the Update contains critical cases involving stormwater fees and assessment law, as well decisions related to municipal claims, land use, and civil rights. As usual, we have also included notations of municipal law bills moving through the legislative process. As the days begin to shorten, look for our next edition of the Quarterly Legal Update in the next few months.

-David Greene, Executive Director of the Local Government Commission

Legislative Updates:

Six bills sponsored by the Local Government Commission amend the Borough Code (**HB 1232**, **SB 765**), Second Class Township Code (**HB 1230**, **SB 749**), and Third Class City Code (**HB 1234**, **SB 774**) to allow for the appointment of a partnership, corporation, or association as the municipal manager. HB 1234 passed the House unanimously.

SB 202 amends the Municipal Claims and Tax Liens Law to allow for cities of the second class, counties of the second class, and municipalities therein, including land banks to acquire property via sheriff's sale. This bill has passed both chambers and is on the Governor's Desk.

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Civil Rights

William Penn Sch. Dist. v. Pennsylvania Dep't of Educ., 294 A.3d 537 (Pa. Cmwlth., Feb. 7, 2023). Six school districts, along with some parents and their children, and two organizations, brought this action in Commonwealth Court's original jurisdiction asserting that Respondents are not investing enough, particularly in the lower-wealth school districts across the Commonwealth and, as a result, are not meeting their constitutional duties. Specifically, at issue is whether the General Assembly has provided for the "maintenance and support of a thorough and efficient system of public education to serve the needs of the Commonwealth," as the Education Clause of the Pennsylvania Constitution, PA. CONST. art. III, § 14, requires. The court found that Pennsylvania's reliance on property values to determine K-12 district funding has deprived poorer communities of the opportunities and resources enjoyed by students in more affluent school districts.

In its ruling, the court declared that the Education Clause requires that every student receives a meaningful opportunity to succeed academically, socially, and civically, and that requires that "all students have access to a comprehensive, effective, and contemporary system of public education"; Respondents have not fulfilled their obligations to all children under the Education Clause, which violates the rights of Petitioners; and Education is a fundamental right guaranteed by the Pennsylvania Constitution to all school-age children residing in the Commonwealth. Consequently, Article III, section 32 of the Pennsylvania Constitution imposes upon Respondents "an obligation to provide a system of public education that does not discriminate against students based on the level of income and value of taxable property in their school districts". Thus, the court found that students who reside in school districts with low property values and incomes are deprived of the same opportunities and resources as students who reside in school districts with high property values and incomes. Moreover, the court held that "[t]he disparity among school districts with high property values and

incomes and school districts with low property values and incomes is not justified by any compelling government interest nor is it rationally related to any legitimate government objective." As a result (of these disparities), Petitioners and students attending low-wealth districts are being deprived of equal protection of law.

Eminent Domain

Mieze v. City of Pittsburgh, 292 A.3d 634 (Pa. Cmwlth., Jan. 30, 2023).** Landowners' property was damaged by a landslide on property owned by the City. Thereafter, the City condemned Landowners' structure located on the property as unsafe for human habitation stating that "[t]he City will not permit habitation of the structure until it has been made safe." An outside geotechnical evaluation report (Outside Report) was submitted to the City and stated that a detailed evaluation of the foundation conditions of the structure was necessary. The Outside Report also recommended that the City remediate the hillside to avoid future landslides. Landowners did not submit a foundation revaluation because the City never requested one.

Moreover, the City's chief engineer reviewed the Outside Report and determined that no additional action was needed. In response, the engineering firm that submitted the Outside Report sent a letter to the City stating that the existing slope did not provide satisfactory long-term safety against a future landslide and recommended that Landowners' property not be reoccupied. Consequently, Landowners alleged that the City effectuated a *de facto* taking of their property because of its actions and inactions following the landslide.

The trial court agreed, noting that the City's inaction after the landslide created injury to the Landowners and thus, was a *de facto* taking. City appealed. On appeal, the dispositive issue was whether the trial court erred in determining that the City executed a *de facto* taking.

The burden of proof is heavy in *de facto* taking cases. The owner must allege and prove: 1) condemnor has the power to condemn under eminent domain; 2) exceptional circumstances have substantially deprived the owner of the use and enjoyment of the property; and 3) the damages sustained were the immediate, necessary, and unavoidable consequences of the exercise of eminent domain. Commonwealth Court noted that the first two criteria were satisfied but that the third criterion was disputed. "[A] de facto taking requires that the injury complained of [be] a direct result of intentional action by an entity incidental to its exercise of its eminent domain power." (Internal citation omitted.)

Commonwealth Court determined that Landowners' damages resulted from several factors, none of which could reasonably be characterized as intentional action by the City and incidental to its exercise of its eminent domain power. -- The first was the landslide itself, classified as an "act of God". The second, deeming the structure unsafe, was an exercise of police power in declaring the structure unsafe, not an act of eminent domain. Finally, the court determined that the City's failure to follow the outside recommendation to require studies of the structural safety of the foundation as part of the permitting process and remediate the hillside "simply constituted a failure to act [by the City] in order to avoid or to mitigate potential future harm resulting from a future act of God."

In its opinion, the court noted that it expressed no opinion as to whether the City's behavior amounted to an actionable wrong but concluded that Landowners failed to meet their burden to establish a *de facto* taking and reversed the trial court.

Pignetti v. Dep't of Transportation, 293 A.3d 1245 (Table) (Pa. Cmwlth., Feb. 6, 2023).** The Pennsylvania Department of Transportation (DOT) filed a declaration of taking (Taking) pursuant to the Eminent Domain Code (Code) condemning two noncontiguous parcels of land (Parcel 44 and Parcel 45, collectively the Parcels) owned collectively by the Pignettis (Pignettis). The Pignettis did not file preliminary objections to the Taking but rather filed a petition for appointment of viewers (Petition) and assess damages as if the Parcels were one parcel. The trial court determined the Pignettis had not waived their right to have Parcels 44 and 45 valued together *because they were challenging compensation, not the nature of the property interest or the extent of the taking.* The trial court also determined Parcels 44 and 45 have substantially identical ownership and the Pignettis use them together for a unified purpose. On appeal, DOT asserts damages should not be assessed as if the Parcels were one parcel because Parcels 44 and 45 do not have

substantially identical ownership and the Pignettis did not use them together for a unified purpose pursuant to Section 705 of the Code.

Commonwealth Court reversed and in doing so, looked to Section 705's legislative history and case law, noting that a 1964 Joint State Government Committee Comment to Section 705 stated that this section "codifies existing case law" for noncontiguous tracts. Section 705 of the Code provides "[w]here ... a part of several noncontiguous tracts in substantially identical ownership **which are used together for a unified purpose** is condemned, damages shall be assessed as if the tracts were one parcel." (Emphasis in original.)

Commonwealth Court agreed that the Pignettis used Parcels 44 and 45 for the same purpose, it stated that the trial court committed an error of law in using this as the legal standard. In applying the correct legal standard of whether the Pignettis have provided sufficient evidence to establish they used Parcels 44 and 45 in such a way that taking one, or a part of one, would necessarily and permanently injure the other, the court concluded that they did not. "Purported future plans" to develop the Parcels were not relevant because only the use of the property at the time of the filing "should be considered". The court held that although the evidence was sufficient to show the Pignettis used the Parcels together, this evidence was not sufficient to establish that the parcels "are so inseparably connected by the use to which they are applied that injury to one will necessarily and permanently injure the other."

Land Use

Shoemaker v. Smithfield Twp. Bd. of Supervisors, 293 A.3d 1254 (Pa. Cmwlth., Feb. 27, 2023).** A company sought zoning approval for residential drug and alcohol rehabilitation facility (Facility) in Smithfield Township (Township) from the Township zoning officer. The officer determined that the proposed use was not recognized under the Ordinance. The Facility challenged the Ordinance as exclusionary. The Township Board of Supervisors (Board) found that the Facility did not fall within any category of use within any zoning district under the Ordinance. However, to remedy the exclusion, the Board allowed Facility to proceed with a conditional use application. Neighboring property owners

"We do not condone the City's failure to resolve the engineering dispute … and proceed with necessary repairs. We express no opinion as to whether the City's behavior amounts to an actionable wrong, only that we are not here confronted with an exercise of the power of eminent domain."

- Pignetti v. Dep't of Transportation

(Objectors) objected to the conditional use grant and appealed to the trial court.

The trial court agreed that the Ordinance was exclusionary but determined that the conditional use proceeding was "an invalid procedure" for curing a defective zoning ordinance. Rather, Section 609.1 or 609.2 of the Municipalities Planning Code (MPC) (pertaining to landowner and municipal curative amendments) provided the exclusive remedial procedures. No appeal was taken, and the Facility filed a curative request pursuant to Section 609.1(c) of the MPC to utilize the facility as a conditional use in the R-1 district which was granted by the Board. Objectors appealed and the trial court affirmed the curative request.

On appeal, Commonwealth Court initially noted that the issue of the exclusionary nature of the ordinance was *res judicata,* but, nevertheless, examined the issue. It held that the trial court did not abuse its discretion in finding that the proposed facility could not be included within the ordinance definitions of health care facilities because patients in drug and alcohol treatment facilities are not in need of primary medical care. Rather, unrefuted testimony characterized a drug and alcohol treatment facility is a "step-down level of care."

Commonwealth Court also held that in this instance the Township did not propose steps to cure the invalidity of its Ordinance (as required under Section 609.2) by creating an ED zone where the facility was permitted *before* the Facility filed its curative request pursuant to the MPC. Consequently, the Board was required to consider the Facility's

curative amendment. In other words, the Board's subsequent Ordinance correction did not override Facility's rights under the MPC.

Finally, although the Facility was already operating a drug and alcohol rehabilitation center under the existing Ordinance, the court held that the curative amendment was necessary for the Facility to legally operate the proposed use on the property in compliance with the Ordinance. "The fact that [the Facility] may have been operating the proposed use on the [p]roperty without a license in violation of the law and without conditional use approval in violation of the Ordinance did not somehow moot [the Facility's] exclusionary Ordinance challenge or otherwise obviate the need for a curative amendment."

Twp. of Marple v. Pennsylvania Pub. Util. Comm'n., 2023 WL 2421090 (Pa. Cmwlth., Mar. 9, 2023), reconsideration and reargument denied (Apr. 25, 2023). Publication ordered April 25, 2023. PECO Energy Company (PECO) entered into an agreement of sale for purchase of property (Property) and began doing construction to facilitate a connection between its liquefied natural gas facility in West Conshohocken and the Property.

PECO then submitted a zoning application to the Township's Zoning Hearing Board (Board), through which it requested a special exception that would authorize it to use the Property as the site of a gas reliability station (Station), as allowed under the Township's Zoning Ordinance (Ordinance). The Board found that PECO failed to establish that it was entitled to its desired special exception and denied PECO's zoning application on that basis.

Thereafter, PECO filed a petition (Petition) with the Pennsylvania Public Utility Commission and requested the Commission to rule that the entire project was exempt from the Ordinance under Section 619 of the Municipalities Planning Code (MPC). In the Petition, PECO asked the Commission to rule that proposed locations of the buildings on the Property were reasonably necessary "for the convenience and welfare of the public, which would have the effect of exempting the buildings from the Ordinance's restrictions."

After hearings, the Commission granted the PECO Petition. PECO filed exceptions to the decision to clarify several parts of the Commission's ruling but did not broadly challenge that ruling. The Township filed exceptions, alleging that the Commission failed to consider the project's effect on the Township's comprehensive plan and zoning ordinance and refused to consider the projects "potential negative environmental impact," including emissions, noise, and the "impact radius of a potential explosion". The Commission granted PECO's exceptions and the Township appealed the Commission's decision to Commonwealth Court.

Upon review, Commonwealth Court vacated the Commission's decision and remanded the matter to the Commission with instructions that it issue an amended decision "which must incorporate the results of a constitutionally sound environmental impact review" pertaining to the buildings to be situated on the Property.

In its decision, the court noted that by enacting the Public Utility Code, "the General Assembly intended to vest the Commission with preeminent authority to regulate utilities on a statewide basis." (Internal citation omitted.) In citing Section 619 of the MPC, the court called attention to a carve-out, which gives municipalities the ability to regulate, via local ordinance, the location of a building that a public utility wishes to build or use, "unless the Commission decides that the … location of a building is reasonably necessary for the convenience or welfare of the public."

The court went on to say that for the public utility to satisfy its burden in a Section 619 proceeding, "the public utility must show that it has made a *reasonable* decision, not the best possible decision" for the building location. (Emphasis added.) In other words, evidence of an alternative location may be the basis for questioning the reasonableness of PECO's decision, *but the mere existence of an alternative site does not invalidate PECO's judgment for building placement.* The court held that local ordinances are applicable only *after* the Commission has concluded that a public utility has not established that it is reasonably necessary to use a specific site for a proposed building. Consequently, the Commission was not required to consider how the Township's development goals would be affected by locating buildings on the Property.

However, the court noted that the Commission erred when it "flatly deemed" environmental concerns to be outside the purview of Section 619. The court stated that to the contrary,

"the Commission is *obligated* to consider 'the environmental impacts of placing [a building] at [a] proposed location,'" (emphasis in original) while also deferring to environmental determinations which were made by other agencies with primary regulatory jurisdiction over such matters. The source of this obligation is not expressly found in Section 619 of the MPC or the Public Utility Code, but rather the "Environmental Rights Amendment," Article 1, Section 27 of the Pennsylvania Constitution. In other words, a Section 619 proceeding is constitutionally inadequate unless the Commission completes an appropriately thorough environmental review of a building siting proposal *and* factors the results into its ultimate determination regarding the reasonable necessity of the proposed siting. Here, the court said the Commission not only failed to identify and defer to other agencies' determination regarding environmental issues, but also the Commission failed to identify any such outside agency determinations. The court concluded that "[t]he Commission's 'deference' … thus appears to have been nothing more than illusory and its environmental review substantively nonexistent."

Municipal and Tax Claims

R&A, LLC v. Wyoming Valley Sanitary Sewer Auth., 293 A.3d 1244 (Table) (Pa. Cmwlth., Feb. 6, 2023).** R & A, LLC (Appellant) acquired title to a property (Property) via sheriff's sale/deed. At the time of the sheriff's sale, there were delinquent fees for water and sewer services to the Property. At the time of the sale the Wyoming Valley Sanitary Sewer Authority (Authority) had not yet formally filed a lien against the Property for the delinquent fees pursuant to the Municipal Claims and Tax Liens Act (MCTLA). Because the lien was not formally recorded, the delinquent fees were not satisfied from the proceeds of the sheriff's sale. The Authority attempted to collect the delinquent fees from Appellant following its purchase of the Property. Appellant responded by claiming it was not responsible for the delinquent fees, which then prompted the Authority to formally file a lien against the Property.

Appellant filed a complaint in the trial court seeking to restrain the Authority from any further collection efforts as well as a claim against the Authority for violation of the Unfair Trade Practices and Consumer Protection Law (UTPCPL). The trial court dismissed the claim for violation of UTPCPL on the grounds that UTPCPL does not apply to political subdivisions but granted the Authority's motion for summary judgment and directed that judgment be entered in favor of the Authority for delinquent sewer and water fees. On appeal, Commonwealth Court reversed in favor of Appellant.

Both parties conceded that municipal liens generally arise when the charge is imposed or assessed rather than when the claim is formally filed with the prothonotary. *See* Section 3(a)(1) of the MCTLA, ("municipal claims and municipal liens shall arise when lawfully imposed and assessed"). However, additional language in MCTLA pertains to a judicial sale of property and the effect of an intervening bona fide purchaser without notice. Specifically, Section 3(a)(1) of MCTLA provides that municipal liens:

> …shall have priority to and be fully paid and satisfied out of the proceeds of any judicial sale of said property, before any other obligation, judgment, claim, lien or estate with which the said property may become charged, or for which it may become liable, save and except only the costs of the sale and of the writ upon which it is made….

[The PUC] is obligated to consider "the environmental impacts of placing [a building] at [a] proposed location" . . . The source of [the] responsibility to conduct this type of review in a Section 619 proceeding is not the MPC itself or another statute; rather, it is article I, section 27 of the Pennsylvania Constitution, which is better known as the Environmental Rights Amendment (ERA).

- Twp. of Marple v. Pennsylvania Pub. Util. Comm'n

The court determined that while the Authority's lien arose at the time the water and sewer fees were assessed, the fees were not "paid and satisfied out of the proceeds of the sheriff's sale given the Authority's failure to timely perfect its lien by filing it with the prothonotary. Put simply, none of the parties were aware of the delinquent fees given the Authority's failure to file its lien prior to the sheriff's sale."

The court further determined that the language of Section 3(a)(1) of MCTLA does not state -- or even suggest -- that a municipal lien will survive such a sale**.** "[T]**he lien of any such claim or judgment shall not reattach against any real estate transferred to any purchaser before such claim is filed** or during the time when the lien of any such tax or municipal claim or judgment was lost ...." (Emphasis in original.)

In reading these provisions together, the court held that the three-year window to file municipal liens only keeps them alive for that period *if* there is no intervening judicial sale to a bona fide purchaser. Here, because the Authority admittedly did not formally file its lien with the prothonotary prior to the sheriff's sale, the delinquent fees were not paid out of the proceeds of that sale and the Authority lost its right to payment against Appellant as a bona fide purchaser without notice of the lien.

Right-to-Know Law

Central Dauphin School District v. Hawkins, 286 A.3d 726 (Pa., Dec. 21, 2022). School District (District) appealed order from the Office of Open Records (OOR), directing District, under the Right-to-Know Law (RTKL), to disclose to the requesting news organization video footage from a school bus camera of a disciplinary incident involving a student and another student's parent, contending that the footage was protected from disclosure under the Family Educational Rights and Privacy Act (FERPA). The trial court affirmed OOR's grant of the request. On appeal, Commonwealth Court affirmed, but the Pennsylvania Supreme Court vacated and remanded in light of an intervening decision. [232 A.3d 716]. On remand, Commonwealth Court affirmed for different reasons. District appealed. The Pennsylvania Supreme Court affirmed, with instructions.

The Supreme Court held that the District did not show by a preponderance of evidence that the requested footage was exempt from disclosure under RTKL or FERPA. To support a denial of access to a record within its possession, an agency has the burden of proving the record is exempt from public access by a preponderance of the evidence, which is tantamount to a "more likely than not" inquiry. "Consistent with the RTKL's goal of promoting government transparency and its remedial nature, the exceptions to disclosure of public records must be narrowly construed."

Thus, the court held that insofar as the video itself is a public record subject to disclosure under the RTKL but contains the images of school students which are not subject to disclosure, the District is obligated to redact students' images in some fashion and to subsequently provide access to the redacted video. Here, the District did not establish that it was *unable* to redact video and thus was not excused from obligation under RTKL to disclose footage with redaction of students' personally identifiable information.

The court also held that images in video footage qualified as personally identifiable information under FERPA regulations and would be exempt from disclosure even in redacted form, however, this fact-specific issue cannot be raised for the first time on appeal and decided due to a lack of sufficient context.

Finally, rather than remanding for further proceedings, the Supreme Court directed the District to disclose footage after redacting video.

> [W]e perceive no remaining reasonable expectation of a heightened privacy protection from disclosure of this school bus surveillance video which would warrant [remand]. Litigation does not progress in a vacuum, and six years later, even the youngest of the [students in issue] will turn twenty years old this year [2022]. Whatever privacy interest may still exist in a redacted video six years after the incident was highly publicized can only be speculated now. The District's obligation at this juncture is to redact the video to the extent it deems necessary to reasonably remove the students' personally identifiable information.

City of Harrisburg v. Prince, 288 A.3d 559 (Pa. Cmwlth., Jan. 3, 2023). Appellant filed a Right-to-Know Law (RTKL) request directed toward the City of Harrisburg (City), which sought the names, home addresses, check numbers, and telephone numbers of individuals who contributed to the City's Legal Defense Fund (Fund). The purpose of the Fund was to collect donations to help the City pay its insurance deductible and defend its firearm ordinances against legal challenges to the ordinances' validity.

The Office of Open Records (OOR) found in favor of Appellant. The trial court reversed, and Commonwealth Court affirmed. The Pennsylvania Supreme Court reversed and remanded to the trial court, finding that the records requested were disclosable "financial records," rather than "donor records" exempt from disclosure under Section 708(b)(13) of the RTKL. Consequently, the trial court was instructed to subject the potential disclosure of any personal information in the records to the balancing test articulated by the Court in *Pennsylvania State Education Association v. Department of Community and Economic Development*, 637 Pa. 337, 148 A.3d 142 (2016) (PSEA) After a non-evidentiary hearing, and what appeared to be a concession by counsel for Appellant to accept solely the physical addresses of the donors, the trial court conducted the balancing test and ordered the City to disclose *only* whether the donors lived in the city, county and/or the Commonwealth. Appellant, nevertheless, appealed, alleging that the purported agreement was inaccurate, and sought the names and addresses of the donors. Commonwealth Court affirmed.

In affirming the trial court, Commonwealth Court noted that the PSEA test weighs the public interest in the disclosure of information against privacy interests at issue. In applying this balancing test, the appropriate question is whether the records requested would ***potentially*** impair the reputation or personal security of another, and whether that ***potential*** impairment outweighs the public interest in the dissemination of the records at issue.

The court held that the trial court properly applied the balancing test for a variety of reasons. Unlike campaign contributions which are statutorily required to be disclosed, donors had a reasonable expectation of privacy that their information would be exempt from disclosure pursuant to Section 708(b)(13) of the RTKL, otherwise known as the donor exception. Furthermore, the articulated "public interest" of Appellant in proceedings below was to determine whether outside interests had contributed to the fund, and this was promoted by the scope of the ordered disclosure. The court also concluded Appellant's appeal was not frivolous vexatious or pursued in bad faith.

Energy Transfer v. Rebecca Moss and Spotlight PA, 288 A.3d 957 (Pa. Cmwlth., Jan. 20, 2023). Requesters sought email communications between certain staff of the Pennsylvania Public Utility Commission (PUC) and Energy Transfer (collectively, Petitioners) under the Right-to-Know Law (RTKL). The PUC denied the request, stating that the records were protected from disclosure under the Public Utility Confidential Security Information Disclosure Protection Act (CSI Act) or exempt under the RTKL law as related to a non-criminal investigation.

Requesters appealed and OOR sustained their appeal, but permitted the PUC to redact any information that could be used for criminal or terroristic purposes. Petitioners appealed to Commonwealth Court, arguing that a challenge to a public utility's designation of a record as containing confidential security information must be presented to the PUC. Petitioners also argued that the OOR erred in concluding that filing a complaint by the PUC constituted a decision or official action that required the release of investigative documents under Section 335(d) of the Public Utility Code, which states, in pertinent part, as follows:

> whenever the commission conducts an investigation of an act or practice of a public utility and makes a decision, enters into a settlement with a public utility or takes any other official action, as defined in the Sunshine Act, with respect to its investigation, it shall make part of the public record and release publicly any documents relied upon by the commission in reaching its determination, whether prepared by consultants or commission employees, other than documents protected by legal privilege[.]

66 Pa. C.S. §335(d).

On appeal, Commonwealth Court reversed. The court held that the records sought by Requesters were designated as

containing confidential security information. As such, they are excluded from the definition of public records as defined in Section 102 of the RTKL. The OOR lacked authority to rule on the PUC's application of the CSI Act. The court held that to challenge Energy Transfer's alleged lack of compliance with the CSI Act, Requesters must present their claim to the PUC and until the PUC takes action to set aside Energy Transfer's designation of "confidential security information," the designation must stand. The court also held that the mere filing of a complaint by the PUC does not constitute a decision withing the meaning of the PUC Code because it is not final.

> At best, it is an inchoate decision because the [PUC] can withdraw or amend its complaint. Section 335(d) requires a decision, settlement, or other official action, as defined in the Sunshine Act, before documents may be made available to the public.

In other words, there must be a formal resolution to the complaint by the PUC, whether by settlement, consent decree or by adjudication after a full hearing on the merits before the disclosure requirement in the PUC Code is triggered.

Taxes and Finance

The Borough of West Chester v. Pennsylvania State System of Higher Education, 292 A.3d 620 (Pa. Cmwlth., Jan. 4, 2023). On April 13, 2018, the Borough of West Chester (Borough) filed a declaratory judgment action against Respondents in Commonwealth Court's original jurisdiction, seeking to establish that a stormwater charge assessed against Respondents is a fee for service which Respondents are obligated to pay, rather than a tax, from which Respondents are immune.

Respondents argue that the stormwater charge is a form of real estate tax, which is a payment by a property owner assessed based on a condition of the property.

They contend that the stormwater charge is a tax because it compels the payment of money to aid the environment without providing any special benefit to their property. Respondents additionally assert that the stormwater charge is not reasonably proportional to the value of any product or service provided to them, such as providing gas service or garbage collection.

[F]lood control is a public benefit, and charges to pay for that benefit are typically viewed as taxes.
- The Borough of West Chester v. Pennsylvania State System of Higher Education

The Borough argues that the stormwater charge is a fee for service imposed on Respondents by authority of the Borough's Home Rule Charter. The Borough further contends that the stormwater charge is reasonably proportional to the value of the service provided to Respondents.

Commonwealth Court found that the Borough nevertheless conceded that there is no means of measuring the amount of stormwater runoff that flows from Respondents' property into the stormwater system. Thus, no direct measure of Respondents' purported use of the stormwater system exists. "The presence of a stormwater management system, and the imposition of charges to fund that system, create reciprocal benefits and burdens for nearly all owners of developed property." The stormwater charge provides "benefits that are enjoyed by the general public," such as decreased flooding, erosion, and pollution, as opposed to "individualized services provided to particular customers." In short, flood control is a public benefit, and charges to pay for that benefit are typically viewed as taxes. Consequently, Respondents are immune from paying as a matter of law.

GM Berkshire Hills LLC v. Berks Cnty. Bd. of Assessment, 290 A.3d 238 (Pa., Feb. 28, 2023). Taxpayers appealed the county board of assessment's increase of assessed value of their properties arising from appeal by school district (District), as taxing district, of previously assessed values of properties. In their appeal, Taxpayers alleged that the District's use of recent sales prices created sub-classes of properties targeted for appeal in violation of uniformity clause of state constitution. Commonwealth Court affirmed. On appeal, the Pennsylvania Supreme Court, in an equally divided court, in a matter of first impression affirmed, holding that the District's selection methodology did not violate the uniformity clause.

As the Supreme Court observed, the District sought to take into consideration the real-world costs of an assessment appeal, together with the practical limitations on the information available to it pertaining to the fair market values of the properties within its borders. The District selected properties where it possessed the necessary information to determine, first, that a particular assessment is too low, by virtue of the taxing board's report on recent arm's-length real estate sales; and second, that the extra tax revenue expected from an appeal will make the appeal cost-effective to the District.

In its decision, the court held that the Consolidated County Assessment Law does not impose a restriction that the assessment authorities must "stay their hand" on subsidiary taxing districts until prepared to reassess the whole county. Moreover, the court noted that the statute prohibiting spot reassessment clarifies that a change in an assessment occasioned by an appeal initiated by a taxpayer (or taxing district such as the District) "shall not constitute a spot reassessment. … if a 'loophole' exists, it was created by the General Assembly, not the courts."

"[W]hile every tax is a burden, it is more cheerfully borne when the citizen feels that he is only required to bear his proportionate share of that burden measured by the value of his property to that of his neighbor."

- GM Berkshire Hills LLC v. Berks Cnty. Bd. of Assessment, citing Delaware, L. & W.R. Co.'s Tax Assessment, 73 A. 429, 430 (Pa. 1909).

The court further noted that it is understandable that while the Taxpayers felt as though they were subjected to non-uniform treatment because other properties within the District have not been appealed, but here, Taxpayers had to defend an appeal and suffered an increase in assessment. However, "while every tax is a burden, it is more cheerfully borne when the citizen feels that he is only required to bear his proportionate share of that burden measured by the value of his property to that of his neighbor." The court stated that:

> [u]nless there is a systemic deficiency where the [common-level ratio] does not in fact represent the average assessment ratio of the properties in the district, *the subject property's assessment has been adjusted to become as uniform as possible with the properties in the district as a whole.* (Emphasis added.)

Finally, the court held that there was no discrimination by the District in selecting Taxpayer's property to appeal the assessed value of Taxpayer's property, as long as the appeal was fundamentally aimed at equalizing the targeted property's assessment ratio with those otherwise prevailing in the District.

Opinions in Support of Reversal. The PA Supreme Court wrote two opinions in support of reversal, each of which was joined in by other Justices in favor of reversal.

In the first opinion in support of reversal, the court noted that the opinion in support of affirmance disregarded the cornerstone of the Uniformity Clause when it gave its approval on a "blatant subclassification of property for tax assessment appeal purposes." The court noted that as a result, "a citizen has no reason to feel that he is bearing his proportionate share of the tax burden measured by the value of his property to that of his neighbor." Consequently, "the promise of the Uniformity Clause has been broken".

As previously held by the court, the Uniformity Clause does not permit the government, (including taxing authorities), to treat different property sub-classifications in a disparate manner. This prohibition applies to "any intentional or systematic enforcement of the tax laws and is not limited solely to wrongful conduct."

The court noted that selecting only newly purchased properties for an assessment appeal creates a subclassification of properties because this subclassification excludes most properties in the school district. The court explained by example:

> A newly purchased townhouse, identical to the townhouse of a neighbor in a contemporaneously built development will be subject to an assessment appeal and the neighboring townhouse will not. The owner of the recently purchased townhouse bears a disproportionate share of the tax burden in contravention of the Uniformity Clause.

In pointing out this example, the court stated that the opinion in support of affirmance "cannot explain in a principled way why a 'newly-purchased' subclassification is materially different from impermissible subclassifications such as property type, use or location in a certain neighborhood", concluding that the property assessment scheme employed by the District creates a subclassification of property in violation of the Uniformity Clause.

Justice Dougherty joined the first opinion in support of reversal but wrote separately to explain his slightly different rationale (joined by Justice Donohue) – suggesting a legislative remedy for what he identifies as the underlying problem in matters challenging individual property reassessments, "stagnant, artificially low overall property value in a taxing district resulting from infrequent, sometimes decades old, county-wide property assessments."

The Justice noted that twenty-two of our "sister states" require annual assessments and twenty-six permit reassessments be conducted at intervals over one year, "Pennsylvania is one of only two states that does not have statutorily mandated reassessments on a fixed cycle.... Pennsylvania is the **only** state where legislation allows the use of a base year **indefinitely**." (Internal citation omitted.) (Emphasis in opinion.)

Reasoning that because an indefinite base year assessment method cannot capture and reflect market fluctuations and other trends affecting property values, "the legislature would do well to repeal its indefinite use, and enact an assessment period encompassing a sound interval of years."

Election Law

Ball v. Chapman, 289 A.3d 1 (Pa., Feb. 8, 2023). Pennsylvania law allows qualified electors to vote by mail, whether on an absentee basis or on a no-excuse basis. The Election Code sets forth instructions for those processes. An elector must mark his or her ballot before 8:00 p.m. on Election Day, place the marked ballot in a secrecy envelope marked "Official Election Ballot," and then deposit the secrecy envelope in a ballot return envelope. The ballot return envelope bears a pre-printed declaration that contains "a statement of the [elector's] qualifications, together with a statement that such elector has not already voted in such primary or election." The Election Code states that electors "shall ... fill out, date and sign" the declaration. In September 2022, the Acting Secretary of the Commonwealth of Pennsylvania issued guidance that directed county boards of elections to count undated or incorrectly dated ballots.

King's Bench power in this case was granted by the Pennsylvania Supreme Court.

In response, the Acting Secretary challenged Petitioners' standing and opposed their claim that the Election Code required disqualification of undated and incorrectly dated absentee and mail-in ballots. Moreover, she argued that failing to count ballots which do not comply with the Election Code's date requirement violates federal law, specifically, the "materiality provision" of the Civil Rights Act of 1964.

Date Requirement. The Election Code requires dating of the return envelope for an absentee or mail-in ballot and the date must be the day on which voter signs declaration. Additionally, the Supreme Court stated "[c]onsistent with our approach in [prior case law], we recognize that although the court's rationale was expressed in serial opinions, an undeniable majority already has determined that the Election Code's command is unambiguous and mandatory and that undated ballots would *not* be counted…" (Emphasis in original.) Thus, Pennsylvania's candidates, electors, and local officials therefore were on notice that ballots must be dated, and that failure to provide a date would result in disqualification.

Materiality Provision. The court was evenly divided on the question of the federal materiality provision. Consequently, it issued no order on that basis, but stated that for an equally divided court, disqualification of absentee and mail-in ballots that arrive in undated or incorrectly dated return envelopes would deny the right to vote, as element for violation of materiality provision of Civil Rights Act of 1964.

Municipal Governance

Landlord Serv. Bureau, Inc. v. City of Pittsburgh, 291 A.3d 961 (Pa. Cmwlth., March 17, 2023). Pittsburgh enacted a rental ordinance (Ordinance), to "ensure rental units meet all applicable building, existing structures, fire, health, safety, and zoning codes," to provide a system "for compelling both absentee

and local landlords to correct violations and maintain rental property." The Ordinance required "*the registration of residential rental units* within the City ... so that an inventory of rental properties and a verification of compliance can be made by City officials." Under the Ordinance, no rental unit can be leased, rented, or occupied without the owner first obtaining a permit from the City and designating a "responsible local agent."

Challengers filed suit against the City seeking declaration that the Ordinance was ultra vires, void and unconstitutional. The trial court held that the City had authority to enact the Ordinance. On appeal, Challengers argued that the trial court erred because the Ordinance imposes affirmative duties, responsibilities, and requirements upon the conduct of its business, which regulation is expressly prohibited under the Home Rule Law.

Commonwealth Court held that the Ordinance imposed numerous affirmative duties upon rental unit owners. Consequently, in light of the express limitations in Section 2962(f) of the Home Rule Charter and Optional Plans Law, the court concluded that the City was without authority to enact the Ordinance. Section 2962(f) of the Home Rule Law prohibits a home rule municipality from regulating the conduct of a business enterprise unless expressly authorized by another statute. The City argued that the Ordinance is authorized by its broad police power to protect the health and safety of rental housing residents and thus, does not implicate Section 2962(f).

In reversing the trial court, Commonwealth Court noted that it and the Pennsylvania Supreme Court have addressed the application of Section 2962(f) to several rental ordinances. Here, the Ordinance imposed "numerous affirmative duties upon rental unit owners". The court determined that requiring the registration of rental units is not the problem with the Ordinance. It is the inspection without permission of an owner and lessee, together with the obligation of rental unit owners to hire a responsible local agent, to follow best practices, to attend a landlord academy, and to have their registration and inspection information put on a public, online database that place affirmative "duties, responsibilities [and] requirements" on rental unit owners and thus violated Section 2962(f).

Author's Note: Because the court concluded that the Ordinance violated the Home Rule Law, it did not address Challengers' constitutional issues. (A court should refrain from deciding constitutional issues when a dispute can be resolved on a statutory basis.) [Internal citation omitted.]

Legislative Updates: *(Continued from page 1)*

SB 671 amends the Local Tax Enabling Act to require Philadelphia to reimburse school districts and municipalities for credits against local wage taxes claimed by their residents who work in Philadelphia. This bill also repeals the Sterling Act. This bill passed the Senate and was referred to the House Finance Committee.

HB 1216 establishes a Municipal Grant Assistance Program and related grant fund within the Department of Community and Economic Development to partner in-need municipalities with professional grant writers and grant writing training. This bill passed the House on June 29, 2023.

HB 1062 amends Title 53 (Municipalities Generally) of the Pennsylvania Consolidated Statutes to create a statewide blight data collection system, to be managed by the Department of Community and Economic Development. Municipalities are responsible for reporting property maintenance code violations to the department and can request violation information on applicants who submit permit applications. This bill has received first consideration in the House and was re-committed to the House Rules Committee.

HB 1231, sponsored by the Local Government Commission, amends the Administrative Code to add a representative from the Pennsylvania Emergency Management Agency and the Pennsylvania Historical and Museum Commission to the State Planning Board. This bill passed the House on June 28, 2023.

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