LOCAL GOVERNMENT COMMISSION
Quarterly Legal Update
Issue 3, 2024

Legislative Updates:

In the previous Legal Update, we referenced several bills related to local government. There was significant movement on some of those bills since the last Update:

- **SB 945** and **SB 887**, both sponsored by the Local Government Commission, are now Acts 14 and 34 of 2024, respectively.
- **HB 1207**, eliminating the population threshold for land banks, and **HB 775**, providing for blighted property registration, both passed the House and were re-referred to the Senate Appropriations Committee in June.
- Senator Brown's EMS bill package (**SB 1132**, **SB 1133**, **SB 1134**) passed the Senate and is in the House Local Government Committee.

HB 1477, sponsored by the Local Government Commission, authorizing digital submission of certain land use documents, is now Act 44 of 2024.

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Civil Rights

Pennsylvania State Lodge Fraternal Order of Police v. Township of Springfield, 702 F.Supp. 3d 273 (E.D. Pa., Nov. 13, 2023). Police Union challenged Township resolution banning the display of the 'Thin Blue Line' stylized American flag by any township employee, agent or consultant, generally, and specifically barring the display while wearing a township uniform, or in a manner visible to a member of the public visiting the township building or on township property including vehicles. Among other things, the court granted Union's motion for summary judgment because the resolution was an unconstitutional restriction on employee speech, applying *U.S. v. National Treasury Employees Union*, 513 U.S. 454 (1995), which requires that, "[w]hen the government imposes a 'statutory restriction on [employee] expression,' it 'must show that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's necessary impact on the actual operation' of the Government." *Citing NTEU* at 468. The resolution failed to meet that standard; the court found the resolution overbroad, not tailored to address other discourse that could raise the same challenges, and vague as to the manner that the resolution would be applied by the township Manager.

Lara v. Commissioner Pennsylvania State Police, 91 F. 4th 122 (3rd Cir., Jan. 18, 2024). Plaintiff individuals, along with two gun rights organizations, sued defendant to stop enforcement of three Pennsylvania statutes which effectively banned 18-to-20-year-olds from carrying firearms outside of their homes during a state of emergency. The district court denied a preliminary injunction and granted defendant's motion to dismiss. Under the Pennsylvania Uniform Firearms Act of 1995 (UFA), an individual may not carry a concealed firearm without a license and must be at least 21 years old to apply for a license. A concealed-carry license permits the holder to carry a firearm even during a state of emergency. Ordinarily, Pennsylvanians without a concealed-carry license may carry openly, but § 6107(a) of the UFA provides that "[n]o person shall carry a firearm upon public streets or upon any public property during an emergency proclaimed by a State or municipal governmental executive[.]" When the suit was filed in October 2020, "Pennsylvania had been in an uninterrupted state of emergency for nearly three years." In 2022, the United States Supreme Court decided *New York State Rifle & Pistol Ass'n Inc. v. Bruen*, 597 U.S. 1 (2022), and the Third Circuit in this matter reversed and remanded with instructions to enter an injunction forbidding the Commissioner from arresting law-abiding 18-to-20-year olds who openly carry firearms during a state of emergency declared by the Commonwealth.

Here, in a matter of first impression for applying the *Bruen* test, the court held that, despite 18th century regulations finding that 18-20-year-olds lacked certain rights at the founding of the nation, the Second Amendment included such individuals within its definition of "the people," and they are within the amendment's scope. The court also pegged 1791, the year of the ratification of the Bill of Rights, as the appropriate era to analyze to determine the scope of the protection. Citing the Second Militia Act of 1782, which required "all able-bodied men to arm themselves upon turning 18," the court found no founding-era regulation supporting Pennsylvania's restriction of 18-to-20-year-olds from purchasing or acquiring their own guns. The court also dismissed a mootness challenge because of the likelihood of additional emergencies, as well as an Eleventh Amendment and standing argument, and a challenge to the request for injunctive relief.

Barris v. Stroud Township, 310 A.3d 175 (Pa., Feb. 21, 2024). Owner purchased a 4.66 acre property in township. After numerous complaints about owner discharging firearms, township enacted a firearms discharge ordinance, which, in pertinent part, only permitted "shooting ranges" in two districts, the open space and recreational districts, by special exception. Among other requirements, the special exception criteria require that a shooting range parcel be at least five acres. The result of the zoning scheme was that shooting ranges were permissible in "several hundred" parcels comprising "at least 35% of all land" in the township. Owner filed a zoning application and offered to reconfigure his shooting range, but the application was denied. Owner did not appeal to the zoning hearing board, but instead filed a claim with the trial court seeking declaratory and injunctive relief citing a violation of the Second Amendment (2A) to the United States Constitution. The complaint was dismissed, and Commonwealth Court reversed. Owner filed an amended complaint, arguing that the ordinance chills constitutional rights by "limiting experience necessary to exercise [2A] rights and…impedes the ability of persons to remain secure in their homes by limiting firearm proficiency to those willing and able to [travel and incur expenses or memberships.]" The trial court ultimately granted summary judgment in favor of the township, applying the test articulated in *Bruen* to hold that the "right to have shooting ranges on residential property" is not a "central tenet" of the 2A. The court then applied intermediate scrutiny to hold that the ordinance was "reasonably related to the important government interest of [protecting residents from injury]. On appeal, a three-judge panel of Commonwealth Court found the ordinance facially unconstitutional because the ordinance burdens more conduct than is necessary to promote the government interest, and the ordinance failed intermediate scrutiny because the township did not prove that an outright ban of ranges in all but two districts was "necessary…in order to protect the public." (summarized in the LOCAL GOVERNMENT COMMISSION QUARTERLY LEGAL UPDATE, Issue 3, 2021, p. 6) The Pennsylvania Supreme Court, with three Justices endorsing that main opinion, one concurring in the result, one abstention, and one dissent, held that the ordinance was not facially unconstitutional through its own application of the *Bruen* two-step analysis. The main opinion avoids the question of whether a right to train is ancillary to the 2A and instead satisfies the first *Bruen* step by focusing on the penalties of the ordinance: because arms could be seized for violations, the regulation impacts the right to "bear arms." With regard to the second *Bruen* prong, the opinion noted a long historical precedent for regulating where firearms could be discharged, which

> "demonstrate a sustained and wide-ranging effort by municipalities, cities, and States of all stripes — big, small, urban, rural, Northern, Southern, etc. — to regulate a societal problem that has persisted since the birth of the Nation. To put it simply, by all accounts the Township's discharge ordinance appears to be exactly the type of sensible firearm regulation the Second Amendment permits."

Justice Donohue concurred in the result, but dissented from the main opinion's reasoning, noting that none of the post-*Bruen* precedent relied on the penalty but rather focused on the allegedly protected conduct, which she analyzed as training *at home:* "There is an inherent difference between the ability to train with firearms in general and the ability to train with firearms anywhere without limitation. These distinct concepts illustrate why Barris' proposed conduct falls outside the protection of the Second Amendment."

In re Gun Range, LLC, 311 A.3d 1242 (Pa. Cmwlth., Feb. 27, 2024). In another decision this year implicating the *Bruen* test for whether a regulation violates the rights protected by

the Second Amendment (2A), owner of a gun range in the City of Philadelphia was denied a license to open a gun shop on the basis that a gun shop was not a permitted use in owner's zoning district, and gun shops were considered a "regulated use," which are prohibited to be located within 500 feet of a residential district. Owner appealed denials up to the trial court, in part, on the basis of a 2A argument. Upon further appeal to Commonwealth Court, the court remanded with instructions that the trial court address owner's 2A arguments. Rather than addressing the arguments on remand, the court decided "*sua sponte* and in a summary fashion," that owner lacked standing to assert 2A claims. Owner appealed again to Commonwealth Court, and during the pendency of the claim, *Bruen* was decided. Commonwealth Court affirmed in part, vacated in part, and remanded. The court initially held that the trial court erred because it could not raise the issue of standing *sua sponte*, and, further, relevant precedent led it to conclude that owner may assert derivative 2A standing based on the constitutional rights of potential customers. In applying the first step of the *Bruen* test, the court cited with approval a Ninth Circuit decision holding that "gun buyers have no right to a gun store in a particular location, at least as long as their access is not meaningfully constrained," and held that "we decline to extend *Bruen* to an implied right to engage in the commercial sale of arms because it is too attenuated from the right of law-abiding individuals to keep and bear arms for self-defense." The court noted that the trial court did not address whether the ordinance in question was *de facto* exclusionary, and thus unconstitutional, and remanded with instructions to address the issue.

Emergency Services

In re: Lincoln Fire Company, 308 A.3d 380 (Pa. Cmwlth., Jan. 16, 2024). After decertification by its host township, fire company requested trial court approval of its dissolution and the distribution of its remaining cash assets to two charities, a local fire academy and an organization providing meals and comfort services to fire fighters at fire scenes. Company's Articles of Incorporation state that its purpose is "maintenance and support of a company for the preservation of property in the Township of Whitemarsh, County of Montgomery and State of Pennsylvania, and its vicinity, from destruction by fire." Its by-laws provided: "In any dissolution of the Company, any surplus remaining after paying or providing for all liabilities shall be distributed to a tax-exempt Volunteer Fire, Ambulance, or other Emergency or Rescue Squad, by decision of the membership." Company sent a copy of the petition to the Pennsylvania Office of Attorney General (OAG), which supervises nonprofits and has power to intervene in actions involving those entities. OAG intervened, protesting the proposed distribution of assets to entities whose purposes were "insufficiently similar" to that of Company, and requested, in its Answer, that the court "apply *cy pres* to fulfill as nearly as possible [Company's] charitable purpose." OAG presented testimony from two other companies within the municipality who had assumed the territory of the petitioning company, and who had been deliberately denied assets because the company believed they were involved in the decertification. The trial court granted the petition to the extent of dissolution, but applied *cy pres,* the equitable doctrine permitting a court to award funds to a charity which most resembles the one the settlor intended to benefit, and awarded the assets to the two companies providing testimony, as recommended by OAG. Commonwealth Court affirmed the trial court's determination that the intended recipients were not appropriate, but reversed the grant of involuntary dissolution and distribution to the other two companies. The court held that procedurally the trial court erred by applying *cy pres* in this petition because it was brought by the company itself and the company did not request application of the doctrine. Furthermore, OAG should have brought a petition for use of the doctrine if it sought its application:

> "[T]he trial court lacked the authority to mandate, without further process, OAG's alternative selections on the [Company], a still-extant charitable organization. In addition to OAG's proposed recipients, [Company] identified six other area fire companies that may be appropriate recipients of its remaining assets. …There was no indication that [Company] could not fulfill its obligation to designate alternate, appropriate asset transferees in order to complete its dissolution."

Eminent Domain

Borough of Pleasant Hills v. Department of Transportation, 312 A.3d 389 (Pa. Cmwlth., Mar. 6, 2024). The Pennsylvania Department of Transportation (DOT) widened a highway

within the borough which purportedly undermined an adjacent slope causing a dangerous line-of-sight condition for which the borough was forced to install protective measures after DOT allegedly ignored several requests from borough to address the issue. Borough filed a complaint against DOT in the trial court seeking declaratory relief that DOT was responsible for the continued maintenance and repair of the slope and to restore the sight distance required for vehicles. DOT filed preliminary objections, arguing that the trial court lacked subject matter jurisdiction because declaratory judgment actions against the Commonwealth must be brought to Commonwealth Court. Borough filed an amended complaint, stating claims for negligence, eminent domain/*de facto* taking, alteration of lateral support, negligent alteration of lateral support, trespass, and a request for a declaratory judgment. DOT then filed preliminary objections again challenging the trial court's jurisdiction over this matter, which the court overruled. The borough filed a second amended complaint requesting a board of view for damages as well as the original counts. The trial court ultimately concluded

> "[DOT] and not the Borough…is responsible for the condition of the area and for the continued maintenance and repair of the slope…[DOT] is solely responsible to restore the stability of this slope and to restore sight distance for vehicles entering and exiting Pleasant Hills Boulevard. In addition, the Borough's request for damages…is GRANTED and this matter is referred to the Board of Viewers for an award of damages."

Commonwealth Court affirmed. The court held that the case was properly before the trial court because "the core" of the claim sounded in negligence/*de facto* takings and the single claim for declaratory relief cannot transform the claim into the narrow set of claims for which Commonwealth Court has original jurisdiction. The court also rejected DOT's claim that the State Highway Law's authorization for the agency to restrict DOT maintenance "curb-to-curb" absolved it of responsibility for the slope, endorsing the trial court's determination that "[t]hat argument simply leaves an area outside the curb but within its own right of way that [DOT] need not maintain. However, in this case, it is not a question of general maintenance but of [DOT] direct damage to the slope's lateral support that is the question." The court similarly rejected statutory arguments that DOT was not required to restore the sight distance. Finally, the court rejected DOT's assertion that the *de facto* takings claim should have been brought in a separate action and further held that the borough satisfied the high hurdle that a taking had occurred:

> "we agree with the trial court's determination that exceptional circumstances did exist that impacted the Borough's beneficial use and enjoyment of its property and that the dangerous sight distance at the intersection and erosion to the slope were caused by [DOT's] actions. Accordingly, the Borough sustained its burden of establishing that a *de facto* taking occurred with respect to its property. PennDOT's argument to the contrary lacks merit."

"Firefighting is an essential public service, as consistently recognized by federal and state courts… Township, like other municipalities in the Commonwealth of Pennsylvania, has a duty to ensure that its firefighting capabilities are up to snuff. That responsibility necessarily includes the ability to regulate the operations of local firefighting entities… Municipal bodies cannot, however, disregard important procedural rules and claim ex post that the ends justify the means. Nor can municipalities enact regulations that may have infringing effects on a private entity's real and personal property interests without taking appropriate care to prevent governmental overreach."

- Ogontz Fire Company v. Cheltenham Tp.

Government Accountability

Howarth v. Falls Township, 310 A.3d 336 (Pa. Cmwlth., Feb. 14, 2024). Owner contended that stormwater pipe installed by Township caused erosion and the deposit of silt and debris into his yard. Owner filed a civil complaint against the township seeking damages, alleging continuing trespass, private nuisance, negligence, and violations of the Storm Water Management Act. The township alleged several defenses including governmental immunity, assumption of risk, estoppel, and comparative negligence.

After expert testimony indicating that "the majority (78%) of the flooding on the Property results from overland flow of water [and] approximately 22% of the flooding on the Property results from the pipe," Township filed a motion for summary judgment in its favor. Therein, it asserted that

> "(1) [Owner] had failed to produce evidence to support his claims; (2) the claims for trespass and nuisance were barred by governmental immunity; (3) the township's actions were reasonable and did not alter the quantity, quality, or flow of water discharged onto the Property; (4)[Owner] was aware of water runoff issues prior to purchasing the Property; and (5) [Owner's] claims were barred under the assumption of risk doctrine and by the statute of limitations."

Owner withdrew the continuing trespass and private nuisance claims. The trial court granted the township's motion for summary judgment, holding that while a municipality may be liable for a dangerous condition of a utility service owned by a local agency, the township could not be held liable to Owner for an inadequate storm water system because it is under no duty to build such a system in the first place, and owner had not provided evidence of negligent construction or maintenance of the pipe. With regard to the purported violation of the Storm Water Management Act by failing to manage storm water runoff, the trial court found that there was no evidence, "such as an expert report or the like," to support owner's claim that "the township had *altered or developed* the land in a way that could increase storm water runoff to the Property." Commonwealth Court reversed summary judgment, holding that expert testimony was not necessary to prove a "substantial human-created change to land" to trigger a violation of the Stormwater Management Act, and sufficient evidence of such was presented at trial. Furthermore, the court held immunity for the township did not prevail because the installation of the new pipe artificially channeling water was foreseeable and constituted "the essence of a negligence claim at common law," triggering exceptions to immunity under the Political Subdivision Tort Claims Act.

Ogontz Fire Company v. Cheltenham Tp., 2024 WL 1120105 (E.D. Pa., Mar. 14, 2024). Plaintiff fire company, a private non-profit Pennsylvania corporation, was one of five volunteer companies within the home rule township, and had executed a 1974 indenture for a 99-year lease for property within the township, as well as a 1980 20-year lease-purchase agreement for the construction of a new firehouse that concluded with the company acquiring the property for $1 after paying "$500,000 in principal and $460,986.50 in interest."

After a dispute involving the company's disciplining of a member contrary to the wishes of one member of the township board of commissioners, the chief of the company, who was the brother of the township's paid fire marshal, resigned and took a position with one of the other companies. After a series of unsuccessful attempts to fill the leadership position in proceedings before the township fire board, including a denial of a lateral move of another chief into the position, the fire marshal made a presentation to the township board of commissioners recommending the company be decertified from fighting fires within the township. The commissioners voted in favor of decertification, without any opportunity for company members to be heard. A month after the decertification vote, company filed suit in state trial court seeking a declaration that the vote was invalid, along with an emergency injunction petition which was denied (that case remained open as of this decision). Three months later, the commissioners enacted an ordinance decertifying the company. Plaintiff company and an individual member filed suit in federal court alleging a battery of federal and state claims against township, the board of commissioners, and the fire board (Defendants). The complaint alleged a conspiracy among various township personnel to decertify the company and attempts by Defendants to force conveyance of company property to the township.

Before the court was Defendants' motion to dismiss, which was granted in part. On a standing challenge, the court held that Company had standing to assert claims under the First Amendment, the Takings Clause, Contract Clause, and Due Process Clause of the Fourteenth Amendment, as well as the state claims for negligence and breach of contract. The court also held that Company had standing to bring an Equal Protection claim on behalf of itself, not its unnamed members. The court dismissed the individual plaintiff's Equal Protection claim on the basis of standing, but held that he had standing to assert a First Amendment claim. The court dismissed without prejudice claims against the board of commissioners and fire board as duplicative of claims against the township. The court held that company alleged sufficient facts to make a colorable Takings Clause claim under the *Penn Central* test (*Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978)), noting that Township's decisions had a direct economic impact on Company property. The court also held that Company could proceed on its Contracts Clause claims with regard to the indenture and lease-purchase agreement. The court dismissed the First Amendment associational claims, essentially holding that decertification did not impact the company members' asserted right to engage in "a variety of civic, charitable, lobbying, fundraising" and "exchange of ideas about firefighting and fire prevention." The First Amendment retaliation claim was dismissed because the company's discipline of the member was an official act, not the speech of a citizen on matters of public concern. The Equal Protection claims were dismissed because Company was not a protected class and, under a "class of one" theory, the record contained evidence to support a rational basis for the decertification. The Substantive Due Process and Procedural Due Process claims were preserved at this stage, specifically with regard to the pre-ordinance meeting vote to decertify, on the basis that the complaint set forth facts sufficient to meet the "shocks the conscience" standard and the record was insufficient to determine whether the vote was a "legislative act" for which the Due Process claims would not prevail. The federal conspiracy claims were dismissed because no facts indicated that officials acted outside of their official capacities, and a municipality and subordinate bodies cannot be named absent a showing of an "official policy, practice, or custom." Finally, the court dismissed the state negligence claim on immunity principles, and the contract claim was preserved only as to the 99-year indenture given that the lease purchase agreement had been satisfied prior to the actions giving rise to the litigation.

Lindke v. Freed, 601 U.S. 187 (United States Supreme Court, Mar. 15, 2024). In 2008, Freed, while in college, created a Facebook profile on which he posted on various subjects including his job and family, and converted it later to a Facebook page, permitting anyone to see or comment on his postings. In 2014 he became city manager and updated his page with a picture of him in a suit with a city lapel pin, and in the "About" section, added his title, a link to the city's website, and the city's email address. He described himself as "Daddy to Lucy, Husband to Jessie, and City Manager, Chief Administrative Officer for the citizens of Port Huron, MI." He continued to post on personal matters, but also posted information related to his job, including soliciting feedback from the public. On one occasion "[posting] a link to a city survey about housing and [encouraging] his audience to complete it." He also answered city-related questions from residents in the comments. During COVID, Freed posted information, both personal and related to city functions, on his page. After posting a photograph of him and the mayor at a restaurant, a Facebook user, Lindke, commented that the city's leaders were eating at an expensive restaurant "instead of talking to the community." Freed at first deleted Lindke's comments, and ultimately blocked him from commenting on the page. Lindke filed a Section 1983 action alleging that Freed's page was a public forum and Freed's deletion of comments and blockage were impermissible viewpoint-based discrimination. The district court granted summary judgment in favor of Freed, holding that the case turned on whether he acted in a private or public capacity, and the "prevailing…quality" of the posts, the "absence of 'government involvement'" and the lack of posts conducting official business led to the decision. The Sixth Circuit affirmed, holding that an official's conduct is state action only when "the text of state law requires [the officer] to maintain a social media account, or government staff to run the account or the account belongs to an office rather than an individual officeholder." The United State Supreme Court granted the appeal and unanimously vacated and remanded.

"The bluntness of Facebook's blocking tool highlights the cost of a "mixed use" social-media account: If page-wide blocking is the only option, a public official might be unable to prevent someone from commenting on his personal posts without risking liability for also preventing comments on his official posts. A public official who fails to keep personal posts in a clearly designated personal account therefore exposes himself to greater potential liability."

-Lindke v. Freed

The Court initially noted that the Sixth Circuit approach differed from that of the Second and Ninth Circuits, where the focus was less on authority and more on whether the "appearance and content looked [of the page] official." The Court then articulated a new test for whether conduct constituted state action in the context of social media: the official must (1) possess actual authority to speak on the state's behalf, and (2) purport to exercise that authority when he spoke on social media. The "appearance and function" of the social media are relevant to the second step, but "cannot make up for a lack of state authority at the first." As to the first step, the Court instructed that actual authority would exist through state or local enactments or custom and usage, i.e., past managers have purported to speak for the city and the conduct was recognized, "permanent and well settled." It does not hinge on the status of the official, who has his or her own rights to speak on matters related to their employment. The Court cautioned against "excessively broad job descriptions" – not whether the official statements *could* fit in the job description, but whether they were *actually* part of the job. As to the second element, the Court acknowledged the difficultly in Freed's case because the page was not specifically designated either public or private, but rather appeared to be "mixed use." In such cases, a fact specific analysis is warranted, and "specific posts" must be examined to determine whether the official is purporting to exercise state authority. Importantly, the Court acknowledged that the nature of the social media activity matters in the analysis: for the deleted comments, the analysis would apply to the individual posts, but the blocking would require application of the test to "any post on which Lindke wished to comment."

Land Use

Chaffier v. Hellertown Borough Zoning Hearing Board, 313 A.3d 471 (Pa. Cmwlth., Jan. 10, 2024).** Owner held 6.7 acres containing two residential dwellings, with 4.86 acres in the borough, and the remaining acreage located in an adjoining township. Owner requested the borough council to rezone the portion of the Property in the borough from R-1 Residential to R-2 Residential. The planning commission reviewed the application and voted 4-3 to recommend that the borough council deny the request. The Lehigh Valley Planning Commission also reviewed the application and opined that the zoning amendment was "generally consistent with the County Comprehensive Plan." On January 21, 2020, the borough council reviewed Owner's application and voted 5-1 (with one abstention) to grant Owner's application, and adopted a zoning map change of Owner's Property from R-1 Residential to R-2 Residential. Owner then requested a preliminary opinion from the borough's Zoning Officer as to whether single-family attached homes (townhomes) are permitted on the Property in the R-2 zone, to which the Zoning Officer responded that townhomes are permitted.

On April 21, 2021, Objectors, whose various properties are adjacent to or near the Property, filed a zoning appeal with the zoning hearing board challenging the substantive validity of the zoning change, alleging that the rezoning of the Property from R-1 to R-2 constituted illegal spot zoning. The board conducted three public hearings regarding Objectors' appeal, with legal representation for the board, borough, Owner, and Objectors in attendance. The board found that the rezoning constituted illegal spot zoning, noting that an adjoining road had previously separated the R-1 district from the R-2 and the new zoning of Owner's property created a new R-2 district "jutting out" from the west side of the road,

severing the "R-1 district into two separate and distinct areas." Owner appealed to the trial court which found "no legal error or abuse of discretion." Owner appealed to Commonwealth Court, which affirmed the trial court. Owner contested that the board abused its discretion by finding the property "indistinguishable" from surrounding properties because it did not account for the size of the parcel and the fact that his parcel was the only one directly adjoining the road, making it conducive for townhouses permitted across the street. Commonwealth Court, citing precedent, found the size of the parcel inconsequential to the analysis. The court also held that although frontage may distinguish a parcel, it is not decisive, and there was substantial evidence in the record to support a finding that the road appropriately divided districts. As to the second prong in a spot zoning analysis, the court found no error in the trial court's determination that the rezoning was not rationally related to the health, safety and welfare of the borough, but was done to benefit a single owner. Noting that it is bound by the board's determination of the credibility and weight of testimony, the court found sufficient evidence that there was no "need" for additional townhomes, that the creation of a "transition zone" in this matter was not a gain for the municipality, and the consistency with a comprehensive plan was not determinative.

Plum Borough v. Zoning Hearing Board of the Borough of Plum, 310 A.3d 815 (Pa. Cmwlth., Jan. 29, 2024). Landowner has operated a production gas well on property zoned as Rural Residential per the borough's amended zoning ordinance and was granted site-specific approval to operate an underground injection control well (UIC well) on the property. Landowner later submitted an application to the borough for an expansion of the nonconforming use for an additional UIC well. The zoning hearing board (ZHB) approved the application, stating that the zoning ordinance gives landowners the right to apply to expand preexisting nonconforming uses made "necessary by the natural expansion and growth of trade." Borough appealed, and the court of common pleas affirmed the ZHB's determination. The court did not take any new evidence nor analyze the extent to which the special exception requirements applied. Borough further appealed to the Commonwealth Court, which vacated the trial court's order and remanded for further proceedings. The court found that the doctrine of natural expansion was implicated, but noted insufficient findings in the record: "We are unable to meaningfully review the ZHB's legal conclusion as to necessity of the expansion because the ZHB made no specific findings to support that conclusion, nor did it spell out its reasons for arriving at it." Consequently, the matter was remanded to the trial court with instructions to remand to the ZHB to make adequate findings of fact, and in its discretion, to take additional evidence, to support its conclusions.

Johnson v. Pocono Township Zoning Hearing Board, 310 A.3d 836 (Pa. Cmwlth., Feb. 7, 2024). Appellant landowner appealed zoning hearing board decision denying to certify the nonconforming preexisting use under which landowner had been utilizing vacation home as a short term rental. The township's rules related to short term rentals shifted several times, most recently by enacting an ordinance limiting short-term rentals in two non-residential zoning districts after the Pennsylvania Supreme Court held that a single-family use need not essentially provide for the short-term rentals of that single-family residence. Appellant contended that the ordinance limiting short-term rentals was exclusionary, because it would not allow for short-term rentals of residential properties anywhere in the township. Commonwealth Court rejected this both as an attempt to define the exclusion in the narrowest possible terms and inaccurate as there are residential short-term rentals within the recreation and commercial districts. That said, the township did move from permitting short-term rentals in the residential district by license to permitting them in the non-residential districts only, thus the Appellant was entitled to a continue the preexisting non-conforming use.

E&R Partners, LP v. Robinson Township Zoning Hearing Board, 311 A.3d 1191 (Pa. Cmwlth., Feb. 20, 2024). Owner was sent a letter in October of 2017 from Township's solicitor indicating that Owner was in violation of the zoning ordinance. After failure to comply, a November 2017 letter was sent to Owner's counsel indicating that citations would be issued for the violations, and subsequently non-traffic criminal citations were issued. In February of 2018, a magisterial district judge (MDJ) found Owner guilty and imposed a fine. On March 9, 2018, the solicitor sent correspondence indicating that Owner was found guilty, and, in addition, Owner was

in violation of other ordinance provisions. The March letter did provide that "[if] you believe you are not in violation of the provisions of the Zoning Ordinance…you have the right to file an appeal to the [ZHB] and to the [trial court] within thirty (30) days of February 15, 2018." On March 15, 2018, Owner appealed to the trial court, which dismissed the appeal as inappropriately filed. On September 10, 2018, Owner filed an appeal with the ZHB, which prompted a September 20, 2018, letter from the solicitor indicating that the owner failed to file a timely appeal with the ZHB, and, consequently, owed the original fine, and was on notice that failure to cease operations without an occupancy permit would result in daily fines. Owner then filed an appeal of the September letter with the ZHB, which found that it lacked jurisdiction because owner failed to timely appeal the October 2017 letter or the MDJ decision. On May 31, 2019, Commonwealth Court reversed the trial court's dismissal of the March court appeal, holding that the October and November 2017 letters did not satisfy the enforcement notice requirements of Section 616.1 of the Municipalities Planning Code (MPC). On June 30, 2022, the trial court concluded the ZHB had jurisdiction and remanded for an appropriate hearing. The ZHB filed an appeal to Commonwealth Court. Commonwealth Court affirmed. Despite the ZHB's argument that the letters were "cease and desist orders" and, thus, "determinations" which required an appeal within 30 days, the court held that enforcement of a zoning ordinance requires compliance with the express content requirements contained within Section 616.1. Furthermore, the court held that the policy behind the MPC to promote expeditious resolution of land use disputes is not frustrated by its holding because the mandatory time limits in the MPC are intended to "protect an applicant from dilatory conduct by the municipality."

Sechrist v. Danish, 311 A.3d 91 (Pa. Cmwlth., Feb. 20, 2024). At issue was the existence of a private road across the property of Danish for the benefit of Sechrist, specifically whether a private road existed prior to 1963. In 1963, the host township passed an ordinance opening the road, and parties stipulated that the road was public between 1963 and 1995, at which time the township passed an ordinance "[vacating] any and all right, title[,] and interest it has in the section of [Ridge] Road…*such that all right title and interest thereto reverts to the owners of any properties* which either adjoin or totally encompass that section of the former township road." (Emphasis in original.) The road was gated thereafter, but a dispute over the intended use of the road remained and led to litigation when the Sechrist property was subdivided with an intent to use Ridge Road for access. The Sechrist owners filed a declaratory judgment action seeking confirmation that the private road existed upon vacation, relying on Section 1 of the Private Road Act. The trial court declared that a private road existed across the Danish Property. The court rejected the argument that pursuant to Section 1 of the Private Road Act, the vacation automatically rendered Ridge Road a private road, because the ordinance here did not contain specific language designating the vacated road as a private road. Nonetheless, the trial court determined that the language that *is* included in both the 1963 and 1995 ordinances, along with the evidence of use in the period prior to 1963, results in a finding that a private road existed. The court held that the 1963 ordinance created a public road by dedication, and, upon vacation, the reversionary interests of the parties included the encumbrance of a private road.

Commonwealth Court reversed. Although the court agreed that a vacation does not automatically create a private road, it pointed out that the vacation of the road gives no title to the

"Requiring the recipient of a defective enforcement notice to appeal or forfeit attendant appeal rights where the municipality has not complied with mandatory MPC provisions provides no [applicant protection from dilatory municipal conduct]. Rather, it would protect a municipality from its own misdeeds."

-E&R Partners, LP v. Robinson Twp. Zoning Hearing Bd.

road in excess of what existed prior to 1963, and noted that "the trial court's analysis equates any pathway that is not a public road with a 'private road' and the mere use of such a rural roadway with its 'opening,' thus overlooking the fact that the Private Road Act establishes a method for opening a private road." The court held that because the record was devoid of any evidence of the opening of a private road in accordance with the Private Road Act and because no evidence establishing an easement by necessity or implication existed, the trial court erred and the order was reversed.

Shyam Ventures LLC v. Zoning Hearing Board of the Borough of Castle Shannon, 313 A.3d 314 (Pa. Cmwlth., Mar. 7, 2024), *reargument denied* (May 6, 2024). Borough updated its zoning ordinance, and subsequently Landowner purchased vehicle rental business and laundromat located in a residential zoning district. The business became a nonconforming use within the district when the borough updated its zoning ordinance. The borough's Zoning Officer was made aware that there was a significant expansion of retail operations at the business, and informed Landowner that the additional retail items needed to be removed, and that Landowner was only permitted to have "one coin-operated soda pop machine, a coin-operated soap machine, and one coin-operated snack machine…" Landowner appealed from the Zoning Officer's determination to the zoning hearing board, arguing that the retail operations were a natural expansion of the preexisting nonconforming use. The board affirmed the Zoning Officer's determination, and Landowner appealed to trial court, which upheld the board's decision. Upon appeal to the Commonwealth Court, Landowner argued that the board erred in determining that the retail operations were not a natural expansion of the lawful nonconforming use. Borough's zoning ordinance allows a laundromat to provide "related retail products" for sale. Commonwealth Court vacated the trial court's order and remanded to the trial court with direction that it remand to the board to determine the meaning of "related retail products" in the zoning ordinance.

Municipal and Tax Claims

In re Sale of Tax Delinquent Property on October 19, 2020, 308 A.3d 890 (Pa. Cmwlth., Jan. 4, 2024). Owner held two properties, her home (1260 Property) and an adjoining property leased to a commercial auto repair business (1262 Property). In March 2019, the tax claim bureau notified Owner that she owed $809.25 for the 2018 taxes on the 1262 Property. In 2018, 2019, and 2020, Owner paid the taxes on the 1260 Property and the 1262 Property, but mistakenly believed the delinquent 2018 property taxes on the 1262 Property were current. On July 6, 2020, the bureau posted the 1262 Property with notice. On August 24, 2020, Owner paid $1,000.00 in person at the bureau office to satisfy the delinquent 2018 taxes and a portion of the 2019 taxes on the 1260 Property, believing that she was in jeopardy of losing her home. On September 25, 2020, the Bureau sent Owner notice 10 days in advance of the tax sale (10-Day Letter). On October 19, 2020, purchaser bought the 1262 Property at the tax sale. Thereafter, the bureau notified Owner that the 1262 Property had been sold at the tax sale. The next day, Owner filed the Exceptions and the Petition in the trial court. On November 10, 2020, purchaser filed a petition to intervene, which the trial court granted on November 13, 2020. After a hearing, trial court granted the Petition, and set aside the tax sale pending owner's payment of the delinquent 2018 taxes, holding, in part,

> "[Owner] went to the [bureau] on three separate occasions in 2020 in order to pay [the] taxes on her [P]roperties. The [Bureau] apparently never informed…[owner] while she was there that she should pay for her delinquent 2018…taxes for the 1262 Property. This is even more frustrating as [owner paid] her 2019 and 2020 county and local taxes *on the 1262 Property*. Additionally,…[owner went to the office] in August of 2020, after receiving notice that the 1262 Property was delinquent on taxes. Instead of being directed to pay her delinquent taxes of $809.26 on the 1262 Property, [owner] instead paid $1,000[.00] for taxes on [the 1260 Property], which she falsely believed was in jeopardy of being sold at a tax sale. Had she [paid] the 1262 Property's delinquent [2018] taxes, neither [P]roperty would have been at risk of being sold at the 2020 [Tax Sale]. Because the [Bureau] failed to

> help [Owner protect] her 1262 Property from being sold at the 2020 [Tax Sale] when she showed up [she]…was effectively deprived of notice. As such, [Owner] was…deprived of due process prior to her [1262] Property being sold."

Purchaser appealed and the Commonwealth Court affirmed, albeit on different grounds. The court held that the trial court "lacked authority to apply equity" to correct Owner's misunderstanding, noting that the Real Estate Tax Sale Law and precedent have established that strict notice requirements and adherence to the law is sufficient to justify the sale. The court, nevertheless, held that the bureau carried the burden to prove compliance with notice provisions, and failed to produce copies of the notice letter or the post-sale letter at the trial court hearing, and, furthermore, the posted notice contained the wrong date. Consequently, the sale was appropriately set aside.

Municipal Governance

Siger v. City of Chester, 309 A.3d 698 (Pa., Jan. 29, 2024). The City of Chester is a financially distressed City for which a receiver has been appointed by the Department of Community and Economic Development (DCED) under the Municipalities Financial Recovery Act (Act 47). Receiver sought modification of the recovery plan, including a restructure of administrative duties then being performed by members of the city council who had been appointed heads of departments by City Mayor. City contested the administrative restructuring among its objections to the recovery plan by citing language in Act 47 prohibiting a receiver from unilaterally changing the distressed municipality's form of government, or the receiver's authority to interfere with the powers of elected officials. The Pennsylvania Supreme Court assumed King's Bench jurisdiction and directed briefing these and several other questions. In finding for the receiver, the court noted that the legislature's intent in adopting Act 47 was not simply to provide for technical assistance to struggling municipalities, but rather that the act is an extension of the Commonwealth's prerogative to establish, provide for and abolish local governments. In fact, related to the city's objections that the modifications were an impermissible change of the city's form of government, the court found that the act "…unambiguously commands us not to construe such modifications as changes to the City's form of government." Instead Act 47 provides for different potential levels of intervention related to the severity of distress in the covered community, and here, where the financial condition and persistent operational issues are so significant, receivership is a response to a fiscal emergency, and the General Assembly has empowered the receiver to prevent elected and appointed officials from taking actions that interfere with the objectives of the receiver's plan.

> ***"The General Assembly predicted that circumstances may arise in which "local officials are unwilling or unable to accept a solvency plan developed for the benefit of the municipality." It decided that such situations may require "the exercise of the Commonwealth's sovereign and plenary police power in emergency fiscal conditions to protect the health, safety and welfare of a municipality's citizens." The City of Chester's local officials must accept the exercise of that power, whether they like it or not."***
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> ***- Siger v. City of Chester***

Public Employment

Townsend v. Northampton Township, 313 A.3d 473 (Pa. Cmwlth., Jan. 11, 2024).** Appellant former township manager pled guilty to crimes involving township funds. Following the guilty plea, all of his retirement benefits, including funds provided by township in a 457 plan, were forfeited in accordance with the Public Employee Pension Forfeiture Act. Appellant had participated in the plan since 1980 when he obtained the position. Appellant filed suit against Township and an additional defendant later dismissed from the

case. The trial court ultimately found in favor of the township, holding that the plan was authorized by Section 8.1 of the Fiscal Code, and constituted an "other retirement benefit" as referenced in Section 3(a) of the Forfeiture Act. Commonwealth Court affirmed. Appellant's argument that the plan should be distinguished from pensions was rejected by the court: "by its plain language, Section 3(a) of the Forfeiture Act is applicable not only to pensions, but to any 'retirement' or 'other benefits' or 'payments of any kind' that inure to a public employee as a consequence of his public employment." Appellant also argued that the plan proceeds were "already received" given that they were earned during a period prior to the convictions. The court rejected this argument as well, citing precedent holding that deferred compensation "is not without conditions, the relevant one being that the employee not commit any of the enumerated crimes [in the Forfeiture Act]." Finally, Appellant argued that Section 8.2 of the Fiscal Code, which prohibits the "involuntary transfer" of any assets held in trust in 457 plans created under that section, applied to his benefit. The court observed that Section 8.1 of the Fiscal Code authorizing 457 plans was added in 1978, two years before Appellant was employed, and 13 years before Section 8.2 was added; consequently, Appellant's plan was governed by Section 8.1, not Section 8.2, and the prohibition on transfers is restricted to plans under that section.

Ursinus College v. Prevailing Wage Appeals Board, 310 A.3d 154 (Pa., Feb. 21, 2024). The Board of Trustees of a private, non-profit college authorized the college to undertake certain construction projects and to acquire a loan, financed by funds derived from the issuance of tax-exempt bonds, from the Montgomery County Health and Higher Education Authority to finance the project. The International Brotherhood of Electrical Workers, Local No. 98 (IBEW) sought an opinion from the Department of Labor and Industry's Bureau of Labor Law Compliance regarding whether the Prevailing Wage Act (PWA) covered the project. The bureau determined the project was not subject to the PWA, and the IBEW filed a grievance with the Prevailing Wage Appeals Board challenging the decision. The board held that the PWA did apply to the project, as the authority was a public body serving a public purpose in financing the project and therefore the project was a "public work" under the PWA. Commonwealth Court reversed the board's decision on appeal by the college, holding that "the Project was not paid for 'out of the funds' of the Authority as a public body [and]…because Ursinus, and not the Authority, bore the risk for repaying the bonds…the Project is not public work subject to the PWA." On appeal by the IBEW, the Pennsylvania Supreme Court affirmed the Commonwealth Court's decision, finding that the "economic reality" of the transaction revealed the project was paid by Private funds: "We hold that the Project falls outside of the PWA's purview, as it was not "paid for in whole or in part out of the funds of a public body" by virtue of the Authority's role in providing conduit financing…nor did the Authority bear any risk or liability with respect to repayment of the bonds."

Nathaniel Hite v. City of McKeesport and City of McKeesport Firefighters Pension Plan Board, 312 A.3d 420 (Pa. Cmwlth., Mar. 11, 2024). Appellant firefighter appealed trial court's ruling upholding the denial of Appellant's application for a disability pension by the McKeesport Firefighters Pension Plan Board. Appellant requested a disability pension after being placed on permanent work restrictions after undergoing multiple surgeries to repair injuries sustained in the course of his employment. Appellant's required medical evaluation resulted in only two of the three physicians determining the disability was total and permanent, and the Board denied Appellant's disability pension request, as the pension plan required unanimous determination of a total and permanent disability. Appellant requested review of the denial, and the city council upheld the decision, which was further upheld by the trial court on appeal. Here, Appellant argued that Council violated his due process rights in disallowing him a continuance to depose the dissenting doctor. The city asserts that it did not prevent Appellant from presenting and cross-examining witnesses, but that Appellant did not subpoena any witnesses to the hearing. Commonwealth Court determined that the council abused its discretion when refusing to grant Appellant's request for a continuance in order to cross-examine the doctor, and therefore vacated trial court's decision and remanded for further proceedings at which Appellant may subpoena the doctor.

School District of Philadelphia v. Board of Revision of Taxes, 303 A.3d 1150 (Pa. Cmwlth., Oct. 6, 2023), *reargument denied* (Nov. 30, 2023). School District appealed a trial court finding that a series of 138 appeals of commercial property assessments violated the Uniformity Clause of the Pennsylvania Constitution. Trial court evidence revealed that the school district had sought to target for assessment appeal properties that would yield an increase of at least $7,500 more tax revenue for the school district, or stated another way, properties that were under assessed by about $1 million or more. Contractor retained to identify and initiate appeals quickly selected the appealed properties by primarily consulting commercial value tools, and a combination of random selection and guesswork resulted in appeals of commercial properties only. Trial court rejected all property appeals. In its review, Commonwealth Court upheld the trial court finding that the methodology employed by the school district and its contractor was flawed. Citing the Pennsylvania Supreme Court, it noted that even though prior dicta could have been interpreted as supporting a monetary threshold for targeting appeals, such a monetary threshold could not be based on the type of property or residency status of the owner. Thus, it found that the contractor's methodology yielded a systematic disparate enforcement of the tax laws in violation of the Uniformity Clause.

> "Taxing authority appeals yield more revenue for the taxing authority. However, the purpose of a countywide reassessment is to correct all mistakes, including those that fall upon overassessed properties. When the taxing authority attempts an ersatz countywide correction of underassessments, it is the sole beneficiary. Under the Uniformity Clause, however, some of that correction should inure to the benefit of the overassessed taxpayer."

Lincoln Learning Solutions, Inc. v. County of Beaver, 312 A.3d 970 (Pa. Cmwlth., Mar. 20, 2024). County and the Pennsylvania Finance Authority (PFA) entered into a Lease and Sublease of the Property (PFA Lease). PFA agreed to prepay rent to the county from funds derived through a bond issue (2005 Bonds), and County agreed to pay rent to PFA in an amount equal to the debt service due on the 2005 Bonds. The purpose of the 2005 Bonds was to finance the county's leasing and renovation of the Property. Through a separate agreement, the county leased the Property to Appellee's predecessor in interest. The lease provided rent would be paid until "October 1, 2029, or, *such earlier date on which the Bonds are no longer outstanding.* …" (Emphasis in original.) The lease identified the term "Bonds" as the 2005 Bonds, and provided that, at the end of the lease term, tenant had the option to acquire title by deed of special warranty for "no additional consideration." In 2016, the county issued new bonds (2016 Bonds), which caused the 2005 PFA Bonds to be redeemed on May 13, 2016. Appellee was not notified of the redemption. Between 2017 and 2018, Appellee and the county exchanged correspondence regarding the status of the 2005 Bonds and the option. In 2021, Appellee requested the county to convey the Property for no additional consideration and to refund $406,666.26 in rent, which the county declined. As of March 15, 2021, the county maintained the position that the 2005 PFA Bond obligation remained outstanding on the Property. Appellee then filed suit against the county based on the terms of the lease, asserting claims for breach of contract, specific performance, declaratory judgment, and unjust enrichment, claiming that the county never notified Appellee that the 2005 Bonds were redeemed upon the issuance of the 2016 Bonds. As a result, it continued to remit rent pursuant to the lease. Appellee sought title to the Property and rent reimbursement for rent paid from 2016 through and including February 28, 2021, a period of 58 months, as well as prejudgment interest, costs, and post-judgment interest. After a stipulation that the 2005 bonds were redeemed, the trial court determined that upon the redemption of the bonds, the bonds were "no longer outstanding," per the terms of the lease, and Appellee was entitled to acquire title to the Property as of May 2016.

During a non-jury trial on damages including rent reimbursement, County asserted that as early as 2017 Appellee knew the 2005 Bonds were redeemed and failed to exercise their option. The trial court reviewed correspondence between the parties in 2017 and 2018 and determined "the County's responses 'skirted' the issue and failed to provide adequate notice that the…Lease had expired." The trial court awarded Appellee reimbursement of rent totaling $393,333.53. After

post-trial motions and further proceedings, Appellee was awarded a total $516,533.53. Commonwealth Court affirmed, finding adequate cause for the trial court's determination that County's correspondence regarding the status of the 2005 Bonds was "evasive and not forthright," and that County kept collecting rent, never informing Appellee that the lease had terminated. The court also rejected County's argument that the rent reimbursement was inflated because Appellee constituted a hold-over tenant. The court held that no such tenancy existed because the record showed that Appellee had inquired about the option to take title and thus demonstrated a "contrary intent" to a hold over tenancy.

Mixell v. Cumberland County Board of Assessment Appeals, 313 A.3d 330 (Pa. Cmwlth., Mar. 20, 2024). Owner of property which received preferential tax status under the Pennsylvania Farmland and Forest Land Assessment Act of 1974 (Clean and Green Act), divided and sold part of the property in 2021. The Cumberland County Tax Assessment Office terminated the Clean and Green status of both parcels, which triggered roll-back taxes on the entire Property in the amount of $38,072.50. Owner filed an assessment appeal with the Board of Assessment Appeals seeking the restoration of the Property's Clean and Green status. The board scheduled a hearing which Owner did not attend. The next day, the board issued a decision notice denying Owner's appeal on the basis that she abandoned her appeal by failing to attend the hearing pursuant to Section 8844(e)(1) of the Consolidated County Assessment Law. Owner appealed to the trial court, asserting that she "was unable to attend the scheduled hearing." In response, the board filed a Preliminary Objection (PO) in the nature of demurrer, which it amended, on the basis that Owner had abandoned her right of appeal by failing to attend the hearing, warranting dismissal of the trial court appeal. The board attached to its PO the hearing notices and decision notice. Owner asserted that her failure to appear for the board hearing only had the effect of preventing her from proceeding further with an appeal to the board and did not preclude an appeal with the trial court. She also alleged that she never received a copy of the board's hearing scheduling notices. The trial court sustained the Board's demurrer, issuing a Pa.R.A.P. 1925(a) Opinion in support of its order, wherein the court, in relevant part, determined that Owner received notice of the board hearing based on the mailbox rule, which provides that notice is deemed effective upon posting. The court concluded that because Owner failed to attend the board's hearing, Owner abandoned her assessment appeal before the board. The trial court further concluded that Owner had the right to appeal the board's determination, which she fully exercised. Therefore, her right to an appeal was not violated. Commonwealth Court vacated and remanded.

Commonwealth Court found that the trial court did not conduct any form of evidentiary hearing or factfinding proceeding and instead dismissed Owner's appeal on a PO upon determining that the mailbox rule applied even though she disputed that the notices were mailed and received. While the record contained the notices themselves, there was no indication or testimony that they were mailed. Even assuming that the hearing notices themselves could constitute proof of mailing under local rule, the trial court did not afford Owner an opportunity to rebut the presumption of receipt.

Legislative Updates: *(Continued from page 1)*

In addition to the movement of the bills discussed on page 1, several other bills related to local government have been signed into law since the last Update:

- **SB 149**, authorizing all counties to establish a County Demolition and Rehabilitation Fund, is now Act 48 of 2024.
- **SB 464**, permitting a municipal policy department to allow full-time police officers to purchase up to 5 years of pension service credit, is now Act 49 of 2024.
- **SB 645**, providing for community gardens in cities of the first class, is now Act 50 of 2024.
- **SB 219**, authorizing a city of the second class to establish a Longtime Owner-Occupant Program, is now Act 53 of 2024.

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