# LOCAL GOVERNMENT COMMISSION
## Quarterly Legal Update

*Issue 1, 2023*


***Greetings from the Director:***

**This first Legal Update edition of 2023 contains not only some legislation of note from last session, but a collection of appellate cases governing pension forfeiture, the First Amendment and tax sales. We hope you find the discussion informative and are "thinking Spring" as we prepare our next edition.**

-David Greene, Executive Director of the Local Government Commission

## Legislative Updates:

**Act 154 of 2022**, sponsored by the Local Government Commission, amends Title 57 (Notaries Public) of the PA Consolidated Statutes to: (1) eliminate the 50-cent fee for the registration of an official signature of a notary public; (2) authorize the "Notary Register" to be located in either the prothonotary's office or the office of the recorder of deeds; and (3) authorize the electronic transfer of the official signature to the prothonotary's office.

**Act 126 of 2022** amends the Abandoned and Blighted Property Conservatorship Act to include a land bank as a "party in interest" authorized to petition or intervene in proceedings for a conservatorship of a residential, commercial or industrial building.

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## Civil Rights

*Kennedy v. Bremerton Sch. Dist.*, 213 L. Ed. 2d 755, 142 S. Ct. 2407 (June 27, 2022). School employee, who lost his job as a high school football coach after he knelt at midfield after game to offer a quiet personal prayer, brought an action under 42 U.S.C. §1983 against the school district, alleging violations of his rights under the First Amendment's Free Speech and Free Exercise Clauses. The district court granted summary judgment in favor of the District; the court of appeals affirmed. Certiorari was granted.

The United States Supreme Court reversed, holding that the School District burdened Employee's rights under Free Exercise Clause of the First Amendment by suspending him for his decision to persist in praying quietly at midfield during the postgame period when coaches were free to attend briefly to personal matters and students were engaged in other activities; Employee engaged in private speech, not government speech attributable to school district, when he uttered prayers quietly at midfield without his players; the School District's burdening of Employee's rights under Free Exercise and Free Speech Clauses could not be justified on that ground that his suspension was essential to avoid an Establishment Clause violation; and Employee's private religious exercise was not an impermissible government coercion of students to pray.

In forbidding Employee's brief prayer, the School District's challenged policies were neither neutral nor generally applicable. The Supreme Court noted that the School District, by its own admission, sought to restrict Employee's actions at least in part because of their religious character; prohibiting a religious practice was thus the School District's unquestioned "object."

A second step remained under which courts attempted to engage in a balancing of the competing interests surrounding the speech and its consequences -- where the District may seek to prove that its interests as employer outweigh Employee's private speech on a matter of public concern. The Court concluded that the School District cannot sustain its burden under any standard.

*Noonan v. Kane*, 2022 WL 2702153 (3d. Cir., July 12, 2022). This appeal arises out of claims by former employees (Appellants) of the Office of the Attorney General of Pennsylvania (OAG) that the former Attorney General, and an investigator in the OAG, (Appellees) retaliated against them for exercising their First Amendment rights to criticize the Attorney General in the press and testify before a grand jury.

The District Court dismissed all the First Amendment retaliation claims for failure to state a claim. The Court of Appeals reversed and remanded to the District Court to consider whether qualified immunity shielded Appellees from liability. On remand, the District Court dismissed counts on qualified immunity grounds and granted Appellees' motions for summary judgment on the remaining claims.

On appeal, the 3rd Circuit affirmed. In doing so, the court held that because the objectionable conduct took the form of statements to the media, liability will attach only if the public officials, who are defendants in this case, *imposed or threatened official action.* The court determined that Appellants either failed to allege such actions or failed to adduce evidence to satisfy this burden. "Crucially, without the threat of official action, a public official's speech does not adversely affect a citizen's First Amendment rights, even if defamatory." Here, the court found that the former Attorney General did not exercise or threaten official action against them. Moreover, the court found no evidence that the former Attorney General directed her subordinates to threaten Appellants, such that liability did not attach.

*Hartman v. Borough,* 2022 WL 2513043 (M.D. Pa., July 6, 2022). Plaintiff filed a three-count complaint against multiple defendants, including the borough, a borough employee, and businesses of that employee to recover damages for an allegedly ongoing riparian trespass that continued upon his land by improvements made to upstream property owned by defendants, for injunctive and mandamus relief, and for civil rights violations under 42 U.S.C. § 1983 stemming from the same underlying conduct. Defendants had the action removed to federal court and moved to dismiss the complaint. The motion to dismiss was granted in part and denied in part.

Federal District Court dismissed Hartman's trespass claim against the Borough but refused to dismiss the claim against the employee. The court held that the borough was immune from liability under the Political Subdivision Tort Claims Act because Plaintiff alleged that the conduct of defendants was intentional rather than negligent, as is required to find liability under the act. With regard to the employee defendant, plaintiff alleged that "[employee] improperly used her influence as a member of Borough Counsel (sic)" to cause the Borough to complete the 'water drainage project' that led to the increased trespass . . ." Applying Pennsylvania law, the court concluded that a person who "authorizes or directs" an owner to commit the trespass can be liable for the tort, and that plaintiff had sufficiently alleged conduct to sustain the claim against the employee.

Plaintiffs claim for mandamus and injunctive relief were dismissed as being improperly plead separate claims, although the court noted that such relief may be available if plaintiff succeeds on the merits. Finally, the court dismissed the §1983 claims against both the borough and the employee, but without prejudice as to the claim against employee. Noting that municipalities may only be liable for constitutional violations resulting from a "policy or custom" consistent with the doctrine set forth in *Monell v. Department of Social Services of City of New York*, the court held that plaintiff's complaint did not alleged any facts consistent with the *Monell* elements and dismissed the claim against borough with prejudice, finding an opportunity for an amended complaint

*Respect for religious expressions is indispensable to life in a free and diverse Republic. Here, a government entity sought to punish an individual for engaging in a personal religious observance, based on a mistaken view that it has a duty to suppress religious observances even as it allows comparable secular speech. The Constitution neither mandates nor tolerates that kind of discrimination.*

*- Kennedy v. Bremerton Sch. Dist.*

futile. With regard to the §1983 against employee, the court observed "[the] court cannot ascertain which constitutional right(s) [plaintiff] believes have been violated, nor can the court infer from the facts alleged how this violation (of unspecified variety) occurred." Consequently, the §1983 against employee was dismissed without prejudice, with leave to file an amended complaint.

## Government Accountability

*Real Alternatives v. Dep't of Hum. Servs.*, 279 A.3d 96 (Pa. Cmwlth., July 19, 2022). This appeal concerns the extent to which the records of an independent non-profit corporation's ("Real Alternatives") records are subject to the Right-to-Know-Law (RTKL) when Real Alternatives provides services on behalf of a state agency pursuant to a grant agreement. Following considerable prior procedural history, the Office of Open Records (OOR) held, in part, that section 506(d)(1) of the RTKL does not make accessible records held by Real Alternatives concerning the services it provides to other parties simply because those services are similar to the governmental function Real Alternatives performs on behalf of the agency. However, other records, including the service provider monthly invoices related to the services that are a part of the grant agreement are accessible, limited only by redaction to obscure identifying personal information explicitly protected from disclosure. In doing so, the OOR rejected Real Alternative's argument that other information, including information regarding patient services rendered, in the invoice should be redacted under the health information exception that is not relevant to the performance of its duties on behalf of the agency.

*Section 1983 does not, by its own terms, create substantive rights; it provides only remedies for deprivations of rights established elsewhere in the Constitution or federal laws.... [A] plaintiff 'must demonstrate a violation of a right secured by the Constitution and the laws of the United States [and] that the alleged deprivation was committed by a person acting under color of state law.' (quoting Kneipp V. Tedder)*

*- Noonan v. Kane*

On appeal, Commonwealth Court affirmed the reasoning and conclusions of the OOR in full, finding that consistent with its prior precedent, once identifying information has been redacted records concerning the services provided, the health information exception no longer applies.

*Brunermer v. Apollo Borough*, 2022 WL 2976345 (Pa. Cmwlth., July 28, 2022).** The Brunermers submitted a Right-to-Know Law (RTKL) request to Apollo Borough (Borough) asking for Borough-related e-mails to and from the Borough zoning officer. The Borough produced documentation responsive to the Brunermers' request (pertaining to a dispute between the Brunermers and the Borough as to permissible uses of a property owned by the Brunermers.) The Brunermers appealed the response to the Office of Open Records (OOR), which invited the parties to supplement the record and accepted additional submissions from both sides.

OOR concluded that the Borough did not conduct a sufficient search for records when it received the Brunermers' initial request and since then had not shown that there were no further responsive records in its possession or the possession of any possible third parties. OOR ordered the Borough to search for and provide any additional records within 30 days. Thereafter, the Brunermers filed a mandamus action in the trial court alleging that the Borough failed to conduct a good faith search for responsive documentation, which warranted imposition of attorneys' fees, costs, and civil penalties.

The trial court found the Borough had a duty to comply with the OOR's final determination and ordered the Borough to conduct a reasonable and good faith search for any additional records. However, the trial court declined to find that the Borough had acted in bad faith. The court noted that the Borough *had not refused or failed to conduct* a search for records, did not object or claim exemptions to the Brunermers' request, and had continued to search throughout the litigation in an effort to comply. Given these facts, the court denied

the Brunermers' requests to assess attorneys' fees and civil penalties against the Borough:

"[T]he Borough acted slowly and without adequate staff or open records training, but not in bad faith." Commonwealth Court noted that the record contained no evidence no evidence of obstruction and affirmed the trial court.

## Land Use

*Horizon House, Inc. v. E. Norriton Twp.*, 2022 WL 2916680 (E.D. Pa., July 25, 2022), *reconsideration denied*, 2022 WL 4119778 (E.D. Pa. Sept. 8, 2022). Plaintiff sued Township under the Fair Housing Amendments Act ("FHAA"), the Americans with Disabilities Act (ADA), and Section 504 of the Rehabilitation Act. Horizon House asserted that the Township violated these statutes when it required Horizon House to obtain a special exception under its zoning ordinance for its proposal to house and provide supportive services for individuals with disabilities in a single-family dwelling. During state litigation which ultimately favorably was decided in favor of plaintiff, this action in federal court was filed. The district court found that Township had violated the FHAA and other statutes. During discovery in the federal suit, Township found plaintiff emails discussing how proposed residents of the facility suffered from "sexual behavior disorders." Township filed the instant motion for reconsideration, alleging that Plaintiff always "intended" on housing sex offenders and that sexual behavior disorders do not constitute disabilities under the ADA. Consequently, a genuine issue of material fact exists as to whether plaintiff intends to house only disabled individuals.

The court initially noted that reconsideration may only be granted in three situations: (1) an intervening change in controlling law, (2) new evidence, or (3) a need to correct a clear error of law or prevent manifest injustice. Township contended that an error of law had occurred in the determination. The court denied the motion, citing undisputed evidence in the record that the proposed residents had intellectual disabilities, and noting "[the] ADA does not exclude from its protection all individuals who have a 'sexual behavior disorder.' It simply states that such a disorder, on its own, is not a disability. . . An individual with both a sexual behavior disorder which is not considered a disability and a non-sexually-related condition which is considered a disability is entitled to the ADA's protection. The Township has not cited any authority for the proposition that such individuals lose protection under disability discrimination statutes."

*Yaw v. Delaware River Basin Comm'n.*, 49 F.4th 302 (3d Cir., Sept. 16, 2022). Pennsylvania state senators, state party caucus, and several municipalities (Plaintiffs) brought action against river commission challenging commission's ban on high-volume hydraulic fracturing within Delaware River Basin. The United States District Court for the Eastern District of Pennsylvania dismissed, finding that Plaintiffs lacked standing.

On appeal to the 3rd Circuit, Plaintiffs also argued that the ban on fracking harms the public trust (Trust) created by the Environmental Rights Amendment (ERA) by decreasing fracking revenues in Pennsylvania. The idea is that the corpus of the Trust includes not only the state's public natural resources, including its oil and gas reserves, but also "any funds derived from the sale or lease of those resources." Plaintiffs thus alleged that by reducing fracking revenues, the ban "directly and substantially" injured the Trust's corpus.

The 3rd Circuit affirmed stating that it agreed that all Plaintiffs lacked standing to sue, because none of the injuries alleged were especially direct or personal and relied too much on speculative future financial injury. Although the legislators may have had a good argument for standing of the entire General Assembly, individual legislators do not generally have standing to assert injury to the body as a whole.

Similarly, it was not enough for the municipal plaintiffs to allege future harm based on a comparison to nearby drilling activity in communities outside the ban. Failing to demonstrate that recent projects proposed within their borders would have proceeded but for the ban, the municipalities simply relied on general suitability for drilling as a demonstration of harm.

In rejecting the trust argument, the court characterized the trust relationship in the nature of "protector" rather than "proprietor" and that the ban on fracking *promoted* the purposes of the Trust:

> First, "the Commonwealth has a duty to prohibit the degradation, diminution, and depletion of [Pennsylvania's] public natural resources, whether these harms might result from direct state action or from the actions of private parties." Second, "the Commonwealth must act affirmatively via legislative action to protect the environment."

In concluding, the Third Circuit held:

> the fact that the ERA requires certain fracking proceeds to remain in the [T]rust does not mean that trustees somehow have a duty to keep fracking. To the contrary, the duty of loyalty requires trustees to "manage the corpus of the [T]rust *so as to accomplish the [T]rust's purposes*," which here is the conservation and maintenance of Pennsylvania's public natural resources. And although it is possible to conceive of a situation where the sale of [T]rust assets might be necessary to advance the purposes of a conservation [T]rust or save it from insolvency, Plaintiffs[] have not alleged that anything like that is happening here. (Emphasis in original.)

The 3rd Circuit offered an interesting articulation of the nature of the ERA "trust" in the context of "interference" and "injury".

*In re Twp. of Jackson*, 280 A.3d 1074 (Pa. Cmwlth., Aug. 1, 2022). The Township of Jackson (Township) appeals an order of the Court of Common Pleas of Lebanon County (trial court), which denied the Township's petition to sell Township land that a developer donated to the Township for a dedicated recreational use (Lot 107). The trial court held that the Township's proposed sale of Lot 107 violated the Donated or Dedicated Property Act (Donated Property Act). Specifically, the Township contended that the trial court erred and abused its discretion by not deferring to the Township's judgment that the recreational use to which Lot 107 was dedicated was no longer practicable and ceased to serve the public interest.

On appeal before the Commonwealth Court, the Township asserted that no one objected to their initial petition to sell, and it did not make a promise to property owners upon which they relied to their detriment. The court rejected the Township's argument that the Rules of Civil Procedure precluded the trial court from considering equitable estoppel

*The public trust doctrine, which is incorporated into the Donated Property Act, requires the political subdivision to hold the property in favor of the community and not divert it from a public use or convey it to a private party…. The Township can keep the land as open space in its unimproved state…*

*- In re Township of Jackson*

*sua sponte* and held that the rule was not integrated in in proceedings under the Donated Property Act. Moreover, the court held that the Donated Property Act made the objecting property owner a party-in-interest in the instant matter, and the Township did not object to their appearance before the court.

The court reasoned that the principles of equitable estoppel are implicitly part of the standards to be applied by the courts when presented with an application to sell public land under the Donated Property Act. The court found that the Township "actively facilitated" the Wheatland Manor residents' belief that Lot 107 would remain as open space when the Township accepted the donated land and dedicated the land to public park use, never advising the public that it "might" use the land for any other purpose.

The court also held that the public trust doctrine, incorporated into the Donated Property Act, requires the political subdivision to hold the property in favor of the community and not divert it from a public use or convey it to a private party. In addition, the Township did not establish that retaining recreational use for which land was dedicated was no longer physically or financially practicable, as a requirement for grant of judicial relief under the Act.

*In re Charlestown Outdoor, LLC*, 280 A.3d 948 (Pa., Aug. 16, 2022). The construction of an interstate highway interchange created a conflict whereby Pennsylvania Department of Transportation (PennDOT) regulations barred the placement of billboards within 500 feet of an interchange

and the Township's zoning ordinance provided for outdoor, off-premises advertising signs in only one district. At issue is whether the construction of the interchange now caused the zoning ordinance to become impermissibly exclusionary.

The zoning hearing board held that the ordinance is not exclusionary; nor did construction of the Turnpike ramp somehow create a *de facto* exclusion under the zoning ordinance, as the prohibition of billboards was not a condition imposed by the Township. The Court of Common Pleas and Commonwealth Courts each affirmed and Outdoor appealed to the Pennsylvania Supreme Court.

On appeal to the Pennsylvania Supreme Court, Outdoor asserted that the relevant question is whether "in application" the use is excluded. The Supreme Court held that it is not the zoning ordinance, but rather the statewide regulation, that precludes the proposed use, and that no duty exists to revise the ordinance when a third party has made a property owner's use impossible.

> Were Outdoor's position to prevail, it would impose a constitutional obligation on municipalities continuously to review and update their zoning ordinances to account for governmental regulations and the impact of development by third parties, and to ensure that various uses are permitted and possible in the municipality. … Municipalities have no duty to review and revise their zoning ordinances or to rezone for a particular use where a property owner's use is limited by third parties, including through governmental regulations beyond the municipality's control.

Accordingly, the Supreme Court affirmed Commonwealth Court's rejection of Outdoor's validity challenge and held that the challenged zoning ordinance is not *de facto* exclusionary.

*Levy v. Zoning Bd. of Adjustment of City of Philadelphia*, 2022 WL 2763714 (Pa. Cmwlth., July 15, 2022). Dale Levy (Levy) appeals from the trial court order affirming the City of Philadelphia (City) Zoning Board of Adjustment's (ZBA) decision that granted use and dimensional variances to Fitler Square Equities, LLC (Applicant) to create two lots from one existing lot Property, and for the erection of a single-family home on one of the newly created lots.

On appeal, Levy argued that Applicant failed to establish the requisite hardship, pursuant to the Philadelphia Zoning Code (Zoning Code) to provide a legal basis for the ZBA to issue the use variance.

In affirming the trial court, Commonwealth Court reiterated that the Pennsylvania Supreme Court "explicitly rejected the requirement that an applicant for a variance … eliminate every possible permitted use." (Citation omitted.) Moreover, the court noted that the change sought by this variance is a "more desirable" use than the use by-right and "will not adversely affect, but better the neighborhood."

Because Levy did not present any evidence that there is "a high degree of probability that the proposed use will substantially affect the health, safety[,] and welfare of the community greater than what is normally expected from that type of use," Levy did not meet her "heavy" burden. Accordingly, the ZBA did not abuse its discretion.

## Police Power

*Erastov v. City of Philadelphia*, 2022 WL 2898806 (Pa. Cmwlth., July 22, 2022), reargument denied (Sept. 14, 2022).** Appellant purchased a property in Philadelphia via sheriff's sale. The sheriff's office acknowledged the deed, and the deed was recorded. However, during a delay between the date of purchase and before the deed was recorded, which included a waiting period in the Municipal Claims Tax Lien Law (MCTLL), the City of Philadelphia (City) inspected the structure, deemed the structure in danger of collapse and posed notice that it would demolish the structure if the situation were not addressed. The City ultimately demolished the structure.

Appellant sued the City, alleging that he was unable to obtain a permit to perform work on the property in advance of the demolition because of the sheriff's office delay in transferring the deed. The City argued that it was immune from suit pursuant to the governmental immunity provisions of the Judicial Code. The trial court agreed and ruled that the City was entitled to judgment as a matter of law.

At issue on appeal was the Appellant's challenge to the city's immunity defense because City was in "possession" of the property until the sheriff's office completed its duty and transferred the deed to Appellant, and thus the "real property" exception to immunity should apply. Appellant argued that the sheriff's office did not timely transfer the deed to him

after the sale, which impaired his ability to repair the property before the City began demolition.

Commonwealth Court affirmed, holding that the case did not involve the sort of alleged negligence relating to real property that the Code encompasses (i.e., an injury *caused* by the real property), and that the City did not exert enough control over the property to "possess" it; particularly as MCTLL allows possession by the prior owner to continue until the expiration of the statutory redemption period. The court determined that while the City arguably exercised some control over the Property, in that the sheriff's office oversaw the sheriff sale, this was limited control, at most. As such, the court held that "the [p]roperty was never 'in the possession of' the City."

## Public Employment

*Quinn v. Police Pension Comm'n of City of Sunbury*, 2022 WL 2674215, (Pa. Cmwlth., July 12, 2022). Appellant challenges the trial court's order that affirmed the decision of Pension Commission that Appellant forfeited the pension benefits she had accrued after working as a police officer for 22 years, because of her conviction of conspiracy to tamper with or fabricate physical evidence.

Appellant loaned her son (Son) her department-issued cell phone to ensure that she would be able to stay in touch with him. Son received an unrequested photo of a topless teenage girl on the cell phone. Appellant instructed Son to delete the photo, and never admit that the photo was ever on the Department-issued phone. Thereafter, the Pennsylvania State Police initiated an investigation into the situation and sent a state trooper to a local high school to speak with the revenge porn victim and other juveniles, including Son. After securing and searching the phone, the state police found the text sent by Appellant.

As a result of her actions, Appellant was charged with multiple crimes, including conspiracy to tamper with or fabricate physical evidence and was fired due to the criminal charges. A jury convicted Appellant of the conspiracy charge. After her criminal conviction and dismissal as a police officer, Appellant filed a claim for her vested pension benefits. The Pension Commission denied her claim because her conviction rendered her ineligible for benefits under to the Pension Forfeiture Act. Appellant appealed to the trial court, arguing that the Act did not enumerate conspiracy to commit the offenses listed, and that an insufficient nexus existed between the crime and her official duties. The trial court affirmed the forfeiture decision. Commonwealth Court reversed.

> *…[T]he purpose of the Tax Sale Law is to ensure the payment of taxes and not to punish taxpayers for their nonpayment of taxes due to oversight or error.*
>
> *- Iron & Steel Realty Invs., LLC v. Westmoreland Cnty. Tax Claim Bureau*

On appeal, Commonwealth Court found that a conviction for conspiracy to commit a crime enumerated in Section 2 of the Pension Forfeiture Act remains a legally valid basis for stripping a public employee of their pension benefits. However, the court was persuaded by Appellant's contention that trial court improperly found a sufficient nexus between her criminal activity and her employment as a police officer that would warrant this extreme penalty.

Considering the requirement that pension forfeiture provisions be construed narrowly, the court concluded that, in this specific instance, the trial court's application of the Pension Forfeiture Act was not supported by substantial evidence. Although the cell phone was Department property, Appellant did not use it to conspire to tamper with or fabricate physical evidence as part of her responsibilities as a public employee, but rather in her private capacity as a mother.

The court held that "Under the Pension Forfeiture Act, a public employee or official does not automatically forfeit their pension simply because their government-issued property was involved in a forfeiture-eligible crime." The use of the property is material to pension forfeiture "only where the record reflects that the employee or official also committed the crime through their public position, or that the property

they accessed by virtue of their position had more than an incidental connection to the crime's commission."

*Schaszberger v. Am. Fed'n of State Cnty. & Mun. Emps. Council 13*, 2022 WL 2826438 (3d Cir., July 20, 2022) Appellants were state employees whose jobs fell within a classification covered by the American Federation of State, County, and Municipal Employees (AFSCME) but who were not dues-paying members of the union. As non-dues-paying members, Congress allowed unions to require all employees who do not join the union to nonetheless contribute to the costs of representation, bargaining, and administration of bargaining agreements. These mandated contributions are known as "fair-share" fees. The United States Supreme Court consistently upheld the constitutionality of fair-share fees. However, in 2018, the Supreme Court *reversed* its views with respect to fair-share fees in *Janus v. American Federation of State, County, and Municipal Employees Council 31*, 138 S. Ct. 2448 (2018).

Prior to *Janus*, AFSCME collected fair-share fees from Appellants. Appellants filed suit on behalf of themselves and a class of similarly situated employees, contending they should be able to recover the fair-share fees AFSCME collected from them prior to *Janus*. AFSCME filed a motion to dismiss, which the district court granted. In doing so, the court found that AFSCME was shielded from liability by virtue of its good faith reliance on then-controlling Supreme Court precedent and state law. Appellants appealed and the Third Circuit affirmed.

In its decision, the Third Circuit noted that it had examined a substantially similar claim in *Diamond v. Pennsylvania State Education Association*, 972 F.3d 262 (3d Cir. 2020). The court in *Diamond* found for the union, however the panel making that decision was divided. Consequently, *Diamond* was not an established and clear entitlement to a good-faith defense on this issue and was not binding precedent.

Here, after an analysis of existing precedent related to good faith and qualified immunity in other circuits, the Third Circuit affirmed district court holding. The court found that private parties sued for monetary damages "are entitled to a subjective good faith defense if the court finds no malice and no evidence the party knew or should have known of the statute's constitutional infirmity." (Internal quotation omitted.) In affirming, the Third Circuit found that case law relied upon by the district court, including *Diamond,* established that this good faith defense put forth by AFSCME "is open to private-party defendants as a categorical rule."

## Taxation and Finance

*Iron & Steel Realty Invs., LLC v. Westmoreland Cnty. Tax Claim Bureau*, 2022 WL 2336050 (Pa. Cmwlth., June 29, 2022). Purchaser appealed from a trial court order granting an amended Petition to Set Aside an upset tax sale conducted by the Westmoreland County Tax Claim Bureau (Bureau) of a residential property (Property), filed by the Property's owner, a Nevada LLC not registered to do business in Pennsylvania, and its principals. The trial court ordered the sale set aside because the Bureau acknowledged that it failed to abide by the statutory notice requirements in Section 602 of the Real Estate Tax Sale Law (1947, P.L. 1368, No. 542). Purchaser appealed, arguing that the trial court should have, prior to determining that the sale was invalid, first made specific findings regarding the owner's capacity to sue given that Section 411(b) of the Associations Code (15 Pa.C.S. 411(b)) prohibiting an unregistered LLC "doing business" in the Commonwealth from "maintaining an action or proceeding." Thereafter, the trial court issued an amended order directing owner to pay Purchaser and record the order setting aside the sale. Purchaser did not seek a stay or supersedeas of the trial court orders.

Owner filed a motion to quash the appeal, arguing that the appeal was moot given the trial court orders and that Purchaser did not address its capacity to sue except within an amended answer. Commonwealth Court denied the motion to quash holding that because there was no valid sale of the Property and the transfer of the Property was based on the order being challenged on appeal, and because this was not a situation where the Purchaser's appeal was an attempt to assert an invalid petition to set aside, such an order would "have force, or practical effect, as to the ownership of the Property." The court also held that Purchaser did not waive the issue of capacity to sue, noting that The Pennsylvania Rules of Civil Procedure, specifically, Rule 1028 regarding the filing of preliminary objections, "do not apply to statutory proceedings brought under the ... Tax Sale Law," and "a defendant

timely objects to a plaintiff's lack of capacity to sue if the defendant raises this issue in preliminary objections **or in its answer to the complaint."** Finally, after an analysis of the facts and purpose of the Associations Code, the court held that "[p]assive ownership of real property does not constitute doing business, and [Owner's] ownership and rehabilitation of one property is, under these facts, an isolated transaction. [Owner, by contesting the sale] was protecting its ownership of real property, which according to the credited evidence here, does not constitute "doing business." Consequently, although the trial court "should have technically addressed the issue of capacity to sue as a threshold matter," the court affirmed the trial court's granting the Petition to Set Aside.

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

## Legislative Updates: *(Continued from page 1)*

**Act 125 of 2022** amends Title 68 (Real and Personal Property) to: (1) permit a land bank to establish a quorum when a meeting is conducted virtually; (2) add a legislative finding and authorize prioritization of the use of land banks in combating homelessness and permit a land bank to enter into collaborative relationships with other entities for the conversion of properties for housing of the homeless; and (3) exempt the transfer of real property to or from a land bank from state and local realty transfer taxes.

**Act 149 of 2022** amends the Recorder of Deeds Fee Law to remove the 10-year sunset provision from the county demolition fund.

**Act 155 of 2022** amends the Child Labor Act to allow for minor members of volunteer emergency service organizations who are 17 years of age or older, with permission from a fire chief and a parent or guardian, and under the supervision or a credentialed Pennsylvania State Fire Academy instructor, to enter a burning structure when engaged in a training session for an interior firefighting module with live burn.


This newsletter has been produced by the staff of the Pennsylvania Local Government Commission, a bicameral, bipartisan agency of the Pennsylvania General Assembly. The information presented herein should be construed as an effort to provide a neutral summary of current legal issues facing municipal governments in the Commonwealth of Pennsylvania, and not as a substitute for any form of legal advice.