LOCAL GOVERNMENT COMMISSION

Quarterly Legal Update

Issue 3, 2022

Greetings from the Director:

As Fall approaches and the current legislative session comes to a conclusion, we present you with a quite substantial collection of federal and state cases impacting local government from the last quarter, including significant SCOTUS cases on sign regulation and government speech. Until our next edition, best end-of-summer wishes from the Commission staff.

-David Greene, Executive Director of the Local Government Commission

Legislative Updates:

SB 675, PN 746: This bill, introduced by the Local Government Commission, amends the Third Class City Code, in Title 11 of the Pennsylvania Consolidated Statutes, to authorize a third class city to appoint a partnership, limited partnership, association or professional corporation as the city administrator/manager. This is consistent with language in the First Class Township Code, and proposed language to the Borough Code (*see* **HB 1350**).

HB 2237, PN 2592: This bill would authorize a special ad hoc postretirement adjustment for municipal police officers who retired prior to 2018, to reflect a COLA, similar to the adjustment passed in 2002.

These two bills were scheduled for a vote out of the House Local Government Committee, in a meeting which was cancelled, prior to the passage of the 2022-2023 FY Budget.

Keep up with the latest from the Local Government Commission:
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Civil Rights

City of Austin, Texas v. Reagan Nat'l Advert. of Austin, LLC, 2022 WL 1177494 (United States Supreme Court, April 21, 2022). Owners of billboards that advertise off-premises products or services filed a state court lawsuit for declaratory judgment that Austin's (City) sign ordinance, which distinguished between on-premises and off-premises signs, violated their First Amendment free speech rights, after the City denied their applications for permits to digitize grandfathered off-premises signs. After removal to federal court, federal district court held for the City, the court of appeals reversed. Certiorari was granted. On appeal, the United States Supreme Court held that regulation of signs is not automatically content-based, such that strict scrutiny of a violation of First Amendment free speech rights would be applicable. Rather, one must ask who is speaking and what the speaker is saying.

On appeal to the United States Supreme Court, Justice Sotomayor found that a regulation of signs is *not* automatically content based, noting that the Supreme Court's First Amendment precedents and doctrines have consistently recognized that restrictions on speech may require some evaluation of the speech and nonetheless remain content neutral. In contrast, the Fifth Circuit had found that if a reader must determine who the speaker is and what the speaker is saying to apply a sign regulation, then the restriction is inherently impermissibly content-based regulation. In reversing the appeals court, the Court rejected such a "read-the-sign" rule exaggerating the breadth of the holding in *Reed v. Town of Gilbert,* 576 U.S. 155 (2015). In rejecting the expansive circuit court application of *Reed*, the Court held that an "on premises/off premises" regulatory distinction is not, per se, content-based thus triggering strict scrutiny, but is rather "location-based and

content agnostic," without reference to the "topic discussed or idea or message expressed." For these reasons, the Supreme Court reversed the court of appeals and remanded the case for resolution of any claims surrounding this signage restriction.

Shurtleff v. City of Bos., Massachusetts, 2022 WL 1295700 (United States Supreme Court, May 2, 2022). Organization brought action against Boston (City) alleging that the City violated, among other things, the First Amendment's Free Speech Clause by refusing to allow the Organization to raise its self-described "Christian flag" under the City's program allowing private groups to use one of the three flag poles in front of city hall to fly the flag of their choosing for the duration of events sponsored by the Organization. The United States District Court granted summary judgment to the City, holding that flying a private group's flag from City Hall amounted to government speech, so the City could refuse Organization's request without running afoul of the First Amendment. Organization appealed. The United States Court of Appeals affirmed. Certiorari was granted.

On appeal, the United States Supreme Court held that the City's flag-raising program does not express government speech. The Supreme Court held that the Free Speech Clause of the First Amendment does not prevent the government from declining to express a view. "The government must be able to decide what to say and what not to say when it states an opinion, speaks for the community, formulates policies or implements programs." The Supreme Court found that the boundary between government speech and private expression can blur when the government invites the people to participate in a program, such as flag-raising. In a situation such as this, the Court conducts a holistic inquiry to determine whether the government intends to speak for itself or, rather, to regulate private expression.

The Supreme Court said that the key issue is whether the City shaped or controlled the flags' content and meaning; such evidence would tend to show that the City intended to convey the flags' messages as its own. "[O]n that issue, [the City's] record is thin."

Here, the City sought "to accommodate all applicants" who wished to hold events at the City's public forums, including City Hall Plaza. The City's application form asked only for contact information and a brief description of the event, with proposed dates and times. The City employee who handled applications testified that he did not request to see flags before events. Rather, the City's practice was to approve flag raisings without exception, until the Organization's request. At the time, the City had no written policies or clear internal guidance about what flags groups could fly and what those flags would communicate. The Supreme Court said: "[a]ll told, [the City's] lack of meaningful involvement in the selection of flags or the crafting of their messages leads the Court to classify the third-party flag raisings as private, not government, speech."

The Supreme Court further held that because the flag-raising program did not express government speech, the City's refusal to let the Organization fly its flag violated the Free Speech Clause of the First Amendment.

Amalgamated Transit Union Loc. 85 v. Port Auth. of Allegheny Cnty., 39 F.4th 95 (3d Cir., June 29, 2022). The Port Authority of Allegheny County (Port Authority) narrowed its policy requiring employees to wear face masks in response to employee's wearing masks bearing political or social protest messages by imposing additional restrictions, confining employees to a narrow range of masks. Employees sued, alleging that Port Authority had violated their First Amendment rights. The District Court entered a preliminary injunction rescinding discipline imposed under the July

policy and preventing Port Authority from enforcing its policy against Black Lives Matter masks. (summarized in the LOCAL GOVERNMENT COMMISSION QUARTERLY LEGAL UPDATE, Issue 1, 2021, p. 1)

On Appeal, the Third Circuit first found that Port Authority's policy was more restrictive than existing rules governing employee personal speech and contradicted lax enforcement of other speech limitations revealing that the mask rule was focused on prevailing political debates, not the mode of speech, and, so, fails to satisfy the narrow tailoring requirement. Consequently, the court found that Port Authority made no showing that preventing mask-related disputes will redress the disruption it fears.

Next, focusing on whether irreparable harm would result if the relief sought is not granted, the court here found that when a government employer's restrictions on employee speech tread on First Amendment interests, those restrictions work irreparable injury. Port Authority's mask rules prevented employees from expressing their views on a range of issues, from race relations to mask mandates. The First Amendment protects that speech, as such, the court found that curtailing it inflicted an irreparable injury.

As for the third factor, the court found that the injunction does not harm Port Authority more than the enjoined policy would harm Port Authority's employees. The Employees' masks are unlikely to cause the feared disruption, and Port Authority suffers no legitimate harm from not enforcing an unconstitutional policy. Finally, the court found that the injunction is also in the public interest.

> There is a strong public interest in upholding the requirements of the First Amendment … if a plaintiff demonstrates both a likelihood of success on the merits and irreparable injury, it almost always will be the case that the public interest will favor the plaintiff.

Because Employees met both showings and considering the strong public interest in upholding the First Amendment, the court held that the public interest favored granting an injunction.

Firearm Owners Against Crime v. City of Pittsburgh, 276 A.3d 878 (Pa. Cmwlth., May 27, 2022). Pittsburgh (City) enacted ordinances that, among other things, prohibited the use of assault weapons and large capacity magazines within certain public places of the City. On the same date, the legislative body of the City and the mayor signed an ordinance prohibiting specific individuals from possessing or using a firearm because they are deemed to have dangerous propensities and pose an imminent risk of harm to others (collectively, Ordinances).

In passing these Ordinances, the City was aware of Section 6120(a) of the Uniform Firearms Act (UFA), which prohibits a county, municipality, and/or township from passing laws that "in any manner regulate the lawful ownership, possession, transfer or transportation of firearms, ammunition or ammunition components when carried or transported for purposes not prohibited by the laws of this Commonwealth."

In response, organizations, and individuals (Plaintiffs) filed suit seeking a declaration that provisions of the Ordinances were preempted by Section 6120 of the UFA and filed an injunction enjoining their enforcement. Both sides filed motions for summary judgment. The trial court denied the City's motion and granted Plaintiff's motion concluding that "under the doctrine of field preemption, the UFA preempts any local regulation pertaining to the regulation of firearms. The City appealed.

The court rejected the City's arguments that the UFA's preemption is confined to ownership, possession, transfer, and transportation of firearms, and that the City is authorized by its home rule charter

and enabling statute to regulate in other areas, including use. However, the court held that it was bound by clear pronouncements in precedents compel the conclusion that, in enacting Section 6120(a) of the UFA, the General Assembly expressed its unambiguous intention to preempt the entire field of firearm regulation.

Police Power

Commonwealth v. Litman, 2022 WL 1437684 (Pa. Cmwlth., May 6, 2022).** Landowners own a single-family residence in Towamencin Township (Township), Montgomery County. In 2019, Landowners built a new driveway on which they placed a trailer, attached utilities to the trailer and constructed a plywood deck to facilitate access to the trailer from the house. As a result of Landowners' action, the Township concluded that the trailer was "an accessory structure" for which Landowners had not obtained a permit. The Township sent a violation notice to Landowners.

After receipt of the zoning violation notice, Landowners did not remove the trailer, did not obtain a permit for the accessory structure, and did not appeal the violation notice to the Zoning Board. Thereafter, the Township zoning officer initiated an enforcement proceeding seeking the imposition of fines upon Landowners for their violation of the Township's zoning ordinance.

After a hearing, the Magisterial District Court found that Landowners violated the permit requirement of the Township's zoning ordinance and held them liable for not obtaining a permit for the accessory structure on their residential property. Landowners appealed to the trial court.

At trial court, Landowners testified that they were confused by the Township's violation notice because the trailer was not "constructed" as stated in the violation notice but, rather, was a vehicle registered with the Pennsylvania Department of Transportation. As such, they contended the enforcement notice did not conform to Section 616.1 of the Pennsylvania Municipalities Planning Code (MPC), relating to sufficiency of the notice.

> *The court noted that faithful adherence to clear pronouncements in precedents compel the conclusion that, in enacting Section 6120(a) [limitation on the regulation of firearms], the General Assembly expressed its unambiguous intention to preempt the entire field of firearm regulation.*
>
> *-- Firearm Owners Against Crime v. City of Pittsburgh*

The trial court concluded that the violation notice satisfied the requirements of Section 616.1 of the MPC. The language "accessory structure" was broad enough to encompass the trailer, which was "man-made" and had an "ascertainable stationary location." As such, the court found that the trailer met the definition of "structure," and "accessory" is a word commonly understood. Indeed, the Zoning Ordinance describes a residential "accessory structure" as a structure "detached from, but located on the same lot as the principal structure, the use of which is incidental and accessory" to the principal structure. Zoning Ordinance, §153-152 (H)(8)(c).

On appeal to Commonwealth Court, Landowners raised three issues: 1. the violation notice was invalid because it did not include the information required by the MPC relating to the enforcement of zoning ordinances; 2. the Township improperly ini-

tiated a criminal proceeding; and 3. the trailer, licensed as a vehicle, is not an accessory structure because it is not permanent.

First, the court held that the term "accessory structure" was sufficient to put Landowners on notice that they needed a permit for their trailer. Commonwealth Court noted that had they appealed to the Zoning Board, they may have been successful in arguing that the trailer was a temporary structure and, thus, no permit was required. However, Landowners did not appeal to the Zoning Board.

In their second issue, Landowners argued that due process required that the criminal citation apprise them of "the statute or ordinance allegedly violated, together with a summary of the facts sufficient to advise [them] of the nature of the offense charged[.]" Pa. R.Crim. P. 403(A)(6). The Township responded that the Pennsylvania Rules of Criminal Procedure do not apply to enforcement proceedings initiated under the MPC for a zoning ordinance violation.

> The court held that the Pennsylvania Rules of Criminal Procedure do not apply to enforcement proceedings brought under Section 617.2 of the MPC and Section 153-211 of the Zoning Ordinance.

Finally, regarding Landowners argument that the trailer is not an accessory structure that required a permit, but rather a "non-stationary, registered vehicle" that is allowed on the property without a permit, Commonwealth Court held that Landowners were able to contest the violation only by way of appeal to the Board. The court found that their failure to appeal to the Board rendered the Township's violation notice "immune from attack, even on constitutional grounds." In concluding, the court said:

> The notice could have, and probably should have, stated that the trailer parked next to the house was an "accessory structure" that needed a permit. Plain language is always preferred. Landowners also make a good point that a landowner should not have to pay a fee of $2,250 to appeal a violation notice that a landowner believes was issued in error. However, the level of the Zoning Board fee is a political question to raise with the Township's legislative body.

Land Use

Charlestown Township, Pennsylvania v. CMI Hartman, LLC, 2022 WL 982533 (Pa. Cmwlth., April 1, 2022).** Sometime prior to 1950, four structures were constructed on 2.55-acre property (Property) located in the Township and used as residential rental units, although they remained on a single lot, under single ownership.

In 2009, then-owner Harman submitted a plan to convert the Property to condominium ownership. The plan was rejected by the Township. In 2011, CMI acquired the Property and submitted a proposal to convert the Property to condominium ownership, which was also rejected.

In 2016, CMI filed with the County a declaration of condominium (Declaration) converting the existing single-family residences on the Property to condominium units. The Declaration created four condominium units, each with a separate tax parcel number, which CMI sold in fee simple to four separate unit owners (Unit Owners). In 2018 the Township sent violation letters (First Letter) to the Unit Owners stating that, because no subdivision and land development plan was approved, the Property was in violation of the Municipalities Planning Code (MPC); Section 202 of the Township's Subdivision and Land Development Ordinance (SALDO); and the Uniform Condominium Act (UCA). The First Letter gave the Unit Owners 30 days during which they

could remedy the violation by filing appropriate applications with the Township. None of the Unit Owners filed an application. Consequently, the Township sent second violation letters (Second Letter) that the Township would seek to enforce its zoning ordinance and SALDO. Thereafter, the Township filed a complaint against CMI and the Unit Owners alleging that the Property was illegally converted to condominium ownership without Township approval.

The trial court determined that the Property was a lawful, nonconforming use and that the conversion of the Property to condominium ownership without a redivision of boundary lines or changes to any existing structures did not constitute a subdivision subject to the requirements of the MPC or Township's SALDO and was not otherwise affected by the UCA.

On appeal, Commonwealth Court affirmed. This Court has long held that, "if a use is permitted, a municipality may not regulate the manner of ownership of the legal estate." (Internal citation omitted.) The Court further determined that a condominium, as a method of ownership, is not a property use subject to zoning regulation. No dispute existed that, prior to the Declaration, the existing four homes on the Property used as rental residential units represented a lawful, nonconforming use. In fact, the Township confirmed that it viewed the use of the Property's dwellings as complying with Township's zoning requirements as a lawful, nonconforming use.

Aside from the identification of the individual units by new tax parcel numbers, nothing changed on the Property upon the filing of the Declaration. No lot lines were drawn or changed; no structures were added or altered; no change in use of the Property's structures as single-family dwellings occurred.

The filing of the Declaration effected only a change in the Property's ownership structure, nothing more. As such, the Declaration did not create a subdivision of the Property.

Appeal of Towamencin Sumneytown Pike, LLC, 273 A.3d 95 (Pa. Cmwlth., April 1, 2022). Developer filed an Application to Towamencin Township for Preliminary/Final Land Development Approval (Application) seeking to consolidate two parcels, demolish all existing structures thereon, and construct a Wawa convenience store. The Application did not require zoning relief and the Developer had all necessary property interests, including easement interests, necessary to develop the Property.

Upon review of the Application and multiple revisions thereto, Township's Planning Commission (Planning Commission) identified Section 153-619 of the Towamencin Township Zoning Ordinance (Zoning Ordinance), which requires the written consent of a private easement owner before anything can be placed within a private easement, as a "zoning issue" that must be satisfied. The Planning Commission recommended preliminary/final approval of the Application, subject to the resolution of the alleged deficiency presented by the easement written consent issue.

Developer filed a substantive validity challenge to Zoning Ordinance Section 153-619 with the Board. Developer alleged that municipalities may not consider private property rights, including easement rights, in determining land development approval applications. Instead, Developer alleged that private civil lawsuits represent the proper vehicle to adjudicate claims of private easement rights infringement. In addition to the substantive validity challenge, Developer proposed a curative amendment to Section 153-619 of the Zoning Ordinance (Curative

Amendment) that removed reference to private easements. The Board denied Developer's application.

The trial court reversed Board's denial of Developer's substantive validity challenge but denied Developer's request to strike certain conditions to Board's conditional approval of Developer's application. Commonwealth Court affirmed in part by holding that ordinance requiring written consent of private easement owners before land development applications could be approved was invalid.

At the heart of the matter is the Township's zoning ordinance section 153-619(A), which provides in pertinent part:

> Nothing shall be permitted to be placed, planted, set or put within the area of any public or private right-of-way or easement including, but not necessarily limited to, a utility easement, a sanitary sewer easement, a stormwater management easement, a snow storage or a pedestrian easement *without written consent from the owner of the easement*. (Emphasis in original.)

As the court has explained, zoning, as an exercise of police power, "is permitted when exercised for the promotion of the health, safety, morals or general welfare of the community. Regulations adopted pursuant to that power must not be unreasonable, arbitrary or confiscatory." (Citation omitted.) Zoning legislation must benefit the public welfare and may not be used to accomplish purely private preferences. Moreover, under the MPC, the power to legislate zoning is reserved to a municipality's governing body. The MPC does not contain any provision authorizing municipalities to delegate their zoning powers.

Commonwealth Court agreed with the trial court that the impact of the consent provision contained in Zoning Ordinance is to ultimately place zoning determinations into the hands of third-party easement owners. Section 153-619 delegates zoning authority to those nongovernmental actors. In other words, Pennsylvania law does not allow such a delegation of zoning authority to a nongovernmental entity. As affirmed by Commonwealth Court, the trial court held that the Board erred in determining otherwise.

City of Philadelphia Law Department v. Macrillo, 2022 WL 1073037 (Pa. Cmwlth., April 11, 2022).** Appellant appeals from the order of the Court of Common Pleas of Philadelphia County that imposed a fine and an ongoing fine for violations of the Philadelphia (City) Code of General Ordinances (Code) and prior trial court orders.

Appellant owns property (Property) in the City and received notice by the City for several violations pertaining to the Property, including adding an addition without a permit. The notice informed Appellant that fines are imposed and will continue to be imposed "per violation each day and every day the violation remains uncorrected." Appellant was given time to correct the violations and was told that he had a 30 day right to appeal.

Thirty days later the Property was reinspected, but the violations were not corrected. Consequently, the City filed a complaint seeking injunctive relief and fines. Because service on the Appellant was not successful, the City served the Appellant by posting on the Property. Appellant did not appear at any of the hearings but continued to complete the addition on the Property and reconnect disconnected electricity. Moreover, Appellant did not obtain permits and did not request a zoning change (to multi-family use). The court also ordered Appellant to provide a safe pedestrian walkway and provide an engineer's report to certify that the structure on the Property was safe.

The order also stated that fines would continue until the requirements were met. In all, the court granted the City's request for $248,075.00 in fines, noting that

since Appellant was served, there were 13 hearings in this matter and little to no compliance.

Commonwealth Court, affirmed noting that the United States and Pennsylvania Constitutions prohibit excessive fines and that "[a] fine is excessive if it is grossly disproportional to the gravity of a defendant's offense."

In this case, however, the court stated that the fines issued against Appellant were similarly imposed per day based upon repeated daily violations of numerous Code provisions. The violations pertained to potentially hazardous conditions on the Property which remained for approximately eight months, despite City demands to remediate. "Thus, the significant fine was an accumulation of penalties arising solely from [Appellant's] repeated and ongoing failure to correct the violations."

> *"The government must be able to decide what to say and what not to say when it states an opinion, speaks for the community, formulates policies or implements programs."*
>
> *-- Shurtleff v. Bos., Massachusetts*

In Re Garcia, 276 A.3d 340 (Pa. Cmwlth., May 10, 2022). The dispute concerned a project proposed by Applicant to develop property (Property), which had been abandoned for decades, that would include a multi-family residential use. Because the Property's zoning classification allowed only for single-family residential uses, this proposal required a variance. Appellants opposed the development, noting traffic, parking, and congestion, among the concerns. The Philadelphia Zoning Board of Adjustment (ZBA) granted the variance and Appellants appealed to the trial court. The trial court agreed with the ZBA that the physical shape, size, and character of the Property qualified as a unique hardship under the zoning code to allow for a variance.

On appeal to Commonwealth Court, Appellants contended that no substantial hardship existed; the proposed variance was not the minimum necessary to afford relief; and the variance should not have been granted because of back taxes. Here, Commonwealth Court found that Applicant presented substantial evidence that strict compliance with the Property's zoning designation presented an unnecessary hardship for purposes of the City's zoning code.

The court also determined that the evidence produced before the ZBA thoroughly addressed the inability to develop the Property in strict conformance with the zoning ordinance, and Applicant provided evidence demonstrating both that its proposal reflected the least possible departure from the zoning ordinance and that the development would be in conformity with the surrounding neighborhood. Uncontradicted evidence established that the use of adjacent and surrounding properties included commercial, industrial, single-family residential, and multi-family residential uses. The court noted that the fact that Applicant already had significantly reduced the size and scope of the project lent support to the ZBA's determination that the variance sought was the minimum necessary, since Appellant specifically testified that additional reduction in the project and the number of units sought to be built would make the project economically unviable.

Philadelphia's zoning code states in pertinent part that no special exception or variance shall be granted unless documentation is provided that all taxes due on the property are current, excepting the following: the ZBA may provide conditional approval of the application if it otherwise meets approval criteria, with

final approval given after documentation verifies all taxes due on the property are paid in full.

Appellants argued that, if property taxes are unpaid, the ZBA's approval must be conditioned upon payment of the taxes. Applicant argued that the word "may" means that the application of the exception is discretionary, and the ZBA is authorized to choose whether to provide a conditional or a final approval. The court vacated the trial court's order to the extent that Applicant failed to establish that it was entitled to a variance absent payment of the taxes due on the Property and remanded to address the issue relating to unpaid taxes.

Government Accountability

City of Pittsburgh v. Murray, 2022 WL 1087006 (Pa. Cmwlth., April 12, 2022).** The City of Pittsburgh (City) appealed the trial court's determination ordering the City to produce records pursuant to a Right-to-Know Law (RTKL) request. At issue are records of email communications between City officials concerning the planning of two significant summertime events in 2019: a Fourth of July fireworks show and the City's annual Three Rivers Regatta.

Throughout the proceedings, the City contended these records are subject to the "criminal investigations exemption" within the RTKL because they are allegedly inseparable from documents it claimed to have already produced to federal authorities in response to a grand jury subpoena (federal subpoena).

The court noted that exemptions are to be construed narrowly, and if the government seeks to resist disclosure by relying on an exemption, it is the government that bears the burden of proving the exemption's applicability "by a preponderance of the evidence." Section 708(a)(1) of the RTKL, 65 P.S. §67.708(a)(1).

One common method by which the government may carry its burden to establish an exemption under the RTKL is the preparation of "an item-by-item index ... which correlates to ... specific [RTKL] exemption[s]." (Internal citation omitted.) The court noted that the production of an index, may, in some instances, compromise "legitimately withheld material." As an alternative, the government may describe documents by category and state "with particularity" why the exemption applies to each category. To make this showing, an agency may submit an affidavit from a government official who is familiar with the responsive records and who can explain the grounds for an exemption. In this matter, the City did not produce an index and instead submitted the affidavit and testimony of the Director of Public Safety, who speculated, based on his experience with federal investigations, that the records produced in response to the subpoena would likely be the same as the documents responsive to the RTKL request. Notably, he testified that he did not review the contents of the requested documents.

Because the affidavit and testimony did not include personal knowledge of the contents of the requested documents, the City failed to make the threshold evidentiary showing required to properly invoke the exemption, and Commonwealth Court affirmed the order of the trial court ordering the City to produce the requested records.

Haverstick v. Pennsylvania Office of Attorney General, 273 A.3d 600 (Pa. Cmwlth., April 12, 2022). Commonwealth Court has repeatedly stated that "the OAG is one of the small number of agencies listed in the Right-to-Know Law (RTKL) for which appeals officers are *not* designated by the OOR, and which instead select their own appeals officers from *within* the agency. … [A]ppeals from final determinations of these agencies are not heard by the OOR."

Here, Requester filed a Right-to-Know Law (RTKL) request seeking records from the OAG. The request was granted in part and denied in part by the OAG Open Records Officer. One of the reasons given for denying certain records was that the records were exempt because they were pre-decisional deliberations under Section 708(b)(10)(i)(A). Requester appealed.

During the appeal, the open records officer submitted privilege logs to the appeals officer regarding the documents in issue that were denied. The privilege log stated that the denied documents contain correspondence between the appeals officer and either the attorney who submitted the OAG's verification in the underlying appeal or the open records officer. However, none of those communications included Requester or his counsel. As a result, Requester provided a supplemental submission to the appeals officer in which he raised an additional concern about apparent *ex parte* communications between the appeals officer and "members of the OAG."

The OAG appeals officer affirmed the decision of the OAG open records officer, concluding that the referenced communications were properly withheld under the pre-decisional deliberation exception and "contain communications between OAG staff regarding administrative logistics relating to the appeal of [the request]". Moreover, the appeals officer concluded that a concern over *ex parte* communications does not negate the application of the pre-decisional deliberation exemption. The appeals officer concluded, the fact that certain documents contain *ex parte* communications did not necessitate their production.

On appeal to Commonwealth Court, Requester argued that the key element is that the communications must be "internal." According to Requester, the agency's RTKL appeals officer is "external" and "neutral," and, therefore, cannot engage in internal, pre-decisional deliberations with members of the agency. Requester contended that any *ex parte* communication between a RTKL appeals officer and one party's counsel is inappropriate, and therefore, forbidden.

OAG summarized that the communications in issue were logistical in nature and did not contain any discussion regarding the merits or even general subject matter of the appeal. However, Requester argued that "this description is inconsistent with the conclusion that the communications were "deliberative" in nature." If the communications are purely "logistical" and do not even concern the "general subject matter" of the RTKL request, then it is difficult to see how those communications could relate to the "deliberation of a particular decision."

In reversing the appeals officer, the court said: "[e]ven though OAG appeals officers are selected from within the agency, the nature of their task in considering RTKL appeals remains quasi-judicial. Just as courts must refrain from *ex parte* communications with parties, the same concerns arise in this context. … Although OAG appeals officers are selected from within the agency, they are nonetheless required to perform their "quasi-judicial" duties in an impartial manner."

The Supreme Court found that the boundary between government speech and private expression can blur when the government invites the people to participate in a program, such as flag-raising.

--City of Austin, Texas v. Reagan Nat'l Advert. of Austin, LLC

The court held that the communications themselves were not deliberative in nature and do not fall within the definition of pre-decisional deliberations for purposes of Section 708(b)(10)(i) (A). Moreover, the court held that the *ex parte* communications in question between the OAG RTKL officer and the OAG appeals officer "appear" to be improper. The court cautioned to refrain from inappropriate *ex parte* communications when considering similar requests in the future.

Clark v. Schuylkill Canal Association, Inc., 2022 WL 2112023 (Pa. Cmwlth., June 13, 2022)** Appellants appeal from the order of the trial court , granting summary judgment in favor of Montgomery County (County) after concluding that the County is immune from suit pursuant to the Recreational Use of Land and Water Act (RULWA). The RULWA provides immunity from negligence liability for owners of undeveloped land who open that land without charge for recreational use by members of the public. The issue here is whether the RULWA provides the County immunity from suit for the death of deceased (Deceased) who was struck by a falling dead tree on county-owned recreational property (Lock 60).

Appellants argue that (1) RULWA does not shield the County from liability because substantial improvements had been made to Lock 60 from its natural state, including logs placed for seating, the formation of rock firepits, a staked-down trash can, and a well-worn pathway to get to the area where Deceased was killed; and (2) even if the County is immune from liability under RULWA, the County has a non-delegable duty to safely maintain its public property including, but not limited to, trees under section 8542(b)(4) of the Tort Claims Act. 42 Pa. C.S. §8542(b)(4).

The court examined this matter using the four-point test set forth in *Pagnotti v. Lancaster Township*, 751 A.2d 1226 (Pa. Cmwlth., May 16, 2000). In *Pagnotti*, a township purchased an old mill site and converted it to seven-acre park. Some portions of the land were improved, some were not. The township removed old structures, regraded land, converted an old pool house to community building, constructed an open-air pavilion, and installed a pedestrian/bike path. A drowning occurred at the park when a child slipped over a dam on a creek. In determining whether the RULWA was intended to apply to insulate a particular landowner from tort liability, a court will consider: 1. the nature of the area (indoor/outdoor, urban/rural, large/small); 2. the type of recreation offered; 3. extent of the area's development (significantly altered from its natural state) and 4. character of the area's development (adapted for new recreational purposes or usable with listed purposes in RULWA). Thus, analysis under *Pagnotti* is a highly fact-specific determination, undertaken on a case-by-case basis.

The court found that the site of the incident was not largely developed or improved in any significant way, nor was it significantly altered from its natural state or adapted for a new recreational purpose. The area consisted of a muddy riverbank, rocks and trees left open for those who enjoy the outdoors. Its dangers "are comparable to those of a natural forest." Deceased's cause of death was an old tree – a natural element of the park and not an installed improvement. The court also rejected that the cut logs for seating, makeshift fire pits and trash barrels constituted "improvements", thereby removing the site from the protection of RULWA. The court found that these improvements were "slight".

Finally, Section 6 of RULWA provided an exception to immunity for liability which exists for "willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity." 68 P.S. § 477-6. Appellants argue that Section 6 of RULA provides an exception to immunity for liability which exists for

"willful or malicious failure to guard or warn against a dangerous condition, use structure, or activity" because the County knew or reasonably should have known that the long-dead tree existed in an area frequented by people and created a foreseeable risk.

The court found that Appellants did not show evidence of County knowledge. The court held that even if the record revealed willful or malicious failure to conduct on the part of the County, it would still be protected by the immunity provided in the Tort Claims Act, as the Tort Claims Act and RULWA are construed together.

The court noted that whether a municipality or other governmental unit acts maliciously or negligently, it is immune, without exception, under either the Tort Claims Act or the RULWA for injuries occurring on the municipally owned land. If the municipality acts willfully or maliciously, it may be held liable under the RULWA, but will be immune under the Tort Claims Act, and if the municipality acts negligently, the governmental unit may be held liable under the Tort Claims Act but will be immune under the RULWA.

Taxation and Finance

Waterford Twp. v. Pennsylvania Pub. Util. Comm'n, 276 A.3d 301 (Pa. Cmwlth., April 21, 2022). Public telecommunications company brought petition for declaratory judgment stating that it did not have to pay township permitting fees for the installation of utility service facilities within public rights-of-way. The Public Utility Commission (PUC) rejected the fees on the ground that these fees were preempted by the Public Utility Code. The Commission relied upon Pennsylvania's Supreme Court decision in *PPL Electric Utilities Corporation v. City of Lancaster*, 214 A.3d 639 (2019) (*City of Lancaster*), which reaffirmed the General Assembly's intention wholly to occupy the field of utility regulation at the state level.

Waterford Township (Township) appealed. According to the Township, the Supreme Court considered only whether the Code preempted a local government from charging a public utility a recurring maintenance fee for its occupancy of a public right-of-way (ROW) and not whether a local government could impose one-time permitting fees for entry onto a ROW. Thus, the Township maintained that while *City of Lancaster* is instructive, the court cannot infer that the Code preempts the Township from collecting reasonable permitting fees.

The Township also contended that Section 1511(e) of Pennsylvania's Business Corporation Law (BCL), 15 Pa. C.S. §1511(e), and Section 2322 of the Second Class Township Code (SCTC), 53 P.S. §67322 specifically authorize the Township to collect reasonable permitting fees. The Township repudiated the Commission's assertion that its permitting fees are preempted by the Code. Rather, according to the Township, its fees are permissible because the BCL and the SCTC provide more specific and more recent authority that insulates local government from the Code's preemptive force.

On appeal, Commonwealth Court disagreed with the Commission's conclusion that *City of Lancaster* mandates preemption of the Township's fees as impermissible utility regulation. The court held that pursuant to the BCL and the SCTC, the Township may impose reasonable permitting fees for entry onto its public ROWs.

As such, the court found that the Commission lacked authority to prohibit these fees and reversed the Commission.

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