

**Legal Updates:  
Recent Legislation and  
Court Decisions**

**APA-PA  
2016 Annual Conference**

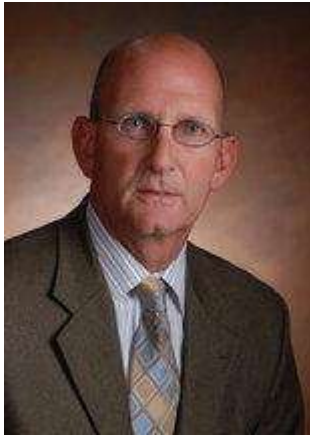
**Allen R. Shollenberger, Esquire  
The Law Firm of Leisawitz Heller  
Wyomissing, PA**

**Joan E. London, Esquire  
Kozloff Stoudt, P.C.  
Wyomissing, PA**

**Michelle R. Mayfield, Esquire  
Hartman, Valeriano, Magovern &  
Lutz, P.C.  
Wyomissing, PA**

## **Session Presenter Biographies**

## Allen R. Shollenberger



**The Law Firm of Leisawitz Heller  
2755 Century Blvd, Wyomissing, PA 19610**

**Phone: (610) 372-3500**

**Email: [ashollenberger@leisawitzheller.com](mailto:ashollenberger@leisawitzheller.com)**

*"My role is to convey information in understandable form so that my client can make an informed decision."*

Allen Shollenberger maintains a general practice of law with emphasis in the following areas: municipal representation, zoning, land development, real estate, corporate law, bankruptcy, estate planning, and estate administration.

A member of the Berks County Bar and Pennsylvania Bar Associations, Allen has been admitted to practice before the Pennsylvania Supreme Court and United States District Court for the Middle and Eastern Districts of Pennsylvania. Allen is the solicitor for the Recorder of Deeds of Berks County.

He graduated from East Stroudsburg College and received his Juris Doctor degree from Delaware Law School of Widener University. Allen is an avid outdoor enthusiast and enjoys running, biking, whitewater rafting adventures and golf. Allen serves on the Northern Berks Recreation Commission and is a liaison to the Schuylkill River Greenway Association.

"Every day is a new learning experience. Working with people each day is different. There are new problems, challenges and situations in the law. I look forward to my continuing evolution as an attorney and as a person who can contribute in a meaningful way to my community."

## **Joan E. London**



**Kozloff Stoudt, Professional Corporation**  
**2640 Westview Drive**  
**Wyomissing, PA 19610**  
**(610) 670-2552**  
**E-Mail: [jlondon@kozloffstoudt.com](mailto:jlondon@kozloffstoudt.com)**

Joan London concentrates her practice in municipal law, land use, appellate practice and employment law. She has planned and taught seminars given by the Pennsylvania Bar Institute, the Berks County Bar Association, the Society for Human Resources Management, the Albright College Center for Excellence in Local Government, and the Pennsylvania Housing Alliance. These seminars have addressed topics including validity challenges to land use ordinances, zoning for agricultural preservation, the Sunshine Act, the Open Records Act/Right to Know Law, wage and hour law, employment discrimination, and blighted property remediation. Joan co-authored a chapter titled “Meetings and Records” of the Solicitor’s Handbook published by the Governor’s Center for Local Government Services of the Pennsylvania Department of Community and Economic Development, and co-authored a cover article for the May-June 2013 issue of Pennsylvania Lawyer magazine titled “Emerging from the Red: What to do About Municipalities In Financial Trouble.” She regularly appears on Berks Community Television’s “Ask A Lawyer” program on local government and employment-related issues.

Born in Philadelphia, Pennsylvania, Joan is graduate of Villanova University (B.A. and M.A. in Political Science) and The Dickinson School of Law of the Pennsylvania State University. She is a member of the Berks County and Pennsylvania Bar Associations. Joan is the immediate past Chair of the Municipal Law Section of the Pennsylvania Bar Association (PBA), and currently serves on the PBA House of Delegates on behalf of the Municipal Law Section. Joan currently serves as President-Elect of the Berks County Bar Association, and served as its Treasurer from 2003 to 2006, and has served as Chair of its Municipal/Education/Environmental/Real Estate Section. Since beginning her legal career in 1993, Joan has served as Solicitor and as Special Counsel for many townships, boroughs, municipal authorities, zoning hearing boards, and agencies in Berks County.

## **Michelle R. Mayfield**



**Hartman, Valeriano Magovern & Lutz, P.C.**

**1100 Berkshire Blvd., Suite 301  
P.O. Box 5823  
Wyomissing, PA 19610**

**Email: [mmayfield@hvmlaw.com](mailto:mmayfield@hvmlaw.com)  
Phone: 610-779-0772**

Michelle R. Mayfield's practice concentrates in municipal law, zoning and land use. Additional experience includes code enforcement, insurance defense litigation with focus on defense of municipalities, workers compensation and labor and employment. She received her Bachelor of Science in Business Administration from West Virginia University. She earned her Juris Doctorate from Villanova University School of Law in 1997. Michelle previously served as an Assistant City Solicitor for the City of Reading.

Michelle is admitted to practice in the Commonwealth of Pennsylvania. She is also admitted to practice before the United States Supreme Court and Eastern District of Pennsylvania District Court. Additionally, she is admitted to the State Bar of West Virginia and Southern District Court of West Virginia. She is a member of the Pennsylvania and Berks County Bar Associations.

Michelle is a frequent presenter on code enforcement. She has been a presenter on the legal aspects of code enforcement at the Pennsylvania State Association of Townships (PSATS) annual conference, the statewide Pennsylvania Building Officials Conference (PennBOC), regional PennBOC meetings, the conference for the Pennsylvania Building Code Officials (PABCO), meetings of the Pennsylvania Fire Code Officials (PAFCO), and the Virginia Fire Prevention Association. Michelle resides in Chester County with her husband Jamie and their daughter McKinley.

# **Recent Cases of Interest from Appellate Courts**

*Reed, et al. v. Town of Gilbert, Arizona*, 135 S.Ct. 2218 (June 18, 2015)

The Town adopted a Sign Code prohibiting most outdoor signs without permits. The Code contained 23 categories of signs not requiring permits, but regulated to differing degrees. In particular, 3 sign types were at issue: 1) “Ideological signs”; 2) “Political Signs”; and, 3) “Temporary Directional Signs.” Reed, pastor of a church holding services at different locations, placed 15-20 “Temporary Directional” signs in public rights-of-way, and was cited under the Sign Code for violating regulations on time limits for such signs. Reed challenged the restrictions in federal court, alleging violation of 1<sup>st</sup> and 14<sup>th</sup> Amendment free speech guarantees by content-based restriction. Both the district court and the Ninth Circuit rejected this argument, finding the restrictions to be content-neutral, because they did not differentiate based on message. Reed sought certiorari to the U.S. Supreme Court, which was granted.

The Court held that under the 1<sup>st</sup> and 14<sup>th</sup> Amendments, local government may not restrict speech by content. Laws targeting speech due to “communicative content” are presumptively unconstitutional and must be narrowly tailored to serve compelling state interests. A regulation may be content based by either restricting a message or subject matter. The Court found the Sign Code content-based, as the level of restriction was related to the communicative content, and favored certain signs. Regulation, by more or less restriction, based on subject matter, renders a regulation content-based, and subject to strict scrutiny. The Court found that the Sign Code afforded more favorable treatment to some signs over others, namely, the Temporary Directional Signs under which Reed was cited. Accordingly, the Sign Code was held to be subject to a strict scrutiny test. Under that test, the Town was required to demonstrate that the Code’s differentiation of Temporary Directional Signs from other types of signs, such as Political Signs and Ideological Signs, furthers a compelling governmental interest, and, if so, whether the restrictions are narrowly tailored to further that interest. The Town cited two governmental justifications for the Sign Code’s restrictions: aesthetics and traffic safety, but the Court rejected the restrictions as necessary to further these (legitimate) goals, stating that there were content-neutral means of achieving the same objectives, and found the Sign Code to be unconstitutional.

*Crivellaro v. Williams Township ZHB*, No. 1047 C.D. 2015 (PA Commonwealth Court, January 7, 2016), Petition for Allowance of Appeal denied, August 16, 2016.

The Crivellaros owned a property along I-78, and applied for and received a permit for a 30’ high billboard, which was the Township’s height restriction for billboards in that zoning district. Upon receipt of a complaint, the Township engineer measured and found it 44’ above grade, and the Township issued a NOV, which the owners appealed unsuccessfully to the ZHB. The Court of Common Pleas reversed the decision of the ZHB, after a hearing at which new evidence was taken, not heard by the ZHB, including expert testimony with respect to the methods of measuring sign height. Williams Township appealed the decision to the Commonwealth Court. Commonwealth Court reversed, finding that while Section 1005-A of the MPC allows the court to hold a hearing to take additional evidence, its discretion is not unlimited or absolute. The record was complete, and the Commonwealth Court found that the trial court impermissibly allowed a new theory of recovery to be raised at that level. Issues must be preserved before the ZHB to be raised on appeal, and the issues in the testimony before the Court

were not. Likewise, the expert witness could have been called to testify before the ZHB, but was not. Failure to present testimony available at the time of a board hearing is not grounds to allow additional testimony. As a result, Commonwealth Court, remanded the case to the lower court for a new decision to be rendered without the additional evidence, finding that the additional evidence was improperly taken and considered.

*Hunterdon Ruritan Club v. Straban Tp. ZHB*, No. 1204 C.D. 2015, (PA Commonwealth Court, July 14, 2016).

A property was purchased by a local affiliate of a national civic organization in 1955, and a portion used for go-kart racing beginning in 1966, with occasional Sunday racing by 1972. A Zoning Ordinance was adopted in 1992, and racing became a pre-existing non-conforming use. In 2011, after the use had expanded over time, the Township issued a NOV, and the Club applied for a “certificate of non-conformance.” The Certificate issued allowed only Saturday racing, and expansion to be approved by the Township. The Club did not appeal the Certificate and asked for a special exception hearing with request for expansion. The ZHB denied the special exception, and Common Pleas Court affirmed, due to failure to appeal the certificate, and failure to meet special exception standards. The Club appealed to the Commonwealth Court.

Commonwealth Court reversed, finding that Saturday and Sunday racing had been established as a legal, non-conforming use, pre-existing zoning by 20-25 years, and was a right entitled to constitutional protections. The use runs with the land, and the certificate of non-conforming use is personal to the owner and only documents the non-conforming use for the protection of the owner. The fact that the certificate was not appealed was irrelevant to whether there was a protected nonconforming use, and there was no abandonment of the Sunday racing use by not appealing. The court further found that increase in the intensity of a prior use, including variations in vehicles or hours was not a change in use, and that natural expansion based on maintaining viability or increased demand, subject to reasonable restriction, was permitted.

*DiMattio, et al. v. Millcreek Township Zoning Hearing Board and Millcreek Township*, No. 1051 CD 2015 (PA Commonwealth Court, September 21, 2016)

The Millcreek Township Board of Supervisors adopted an ordinance which “down-zoned” a 24 acre parcel from a mix of Rural Residential and Single-Family Residential to Low Density Residential. The down-zoning had the effect of allowing two-family dwellings, such as duplexes or townhouses on the Low Density Residential portion of the property, and eliminating agriculture as a permissible use on the property, as had been permitted on the portion of the property zoned as Rural Residential. The appellants were owners of property sharing only a point of access with the disputed property, but were not adjoining. The appellants had instituted a substantive validity challenge to the ordinance alleging spot zoning, which was denied by the ZHB, and the denial was affirmed by the trial court. The appellants appealed to the Commonwealth Court.

The Commonwealth Court affirmed the denial of the validity challenge. The focus of the challenge had been on “health, safety, and welfare,” and designation of the property as



recreational under the Comprehensive Plan. The appellants failed, however, to submit evidence of geographic and physical characteristics of the property showing it to be similar to surrounding properties. In order to successfully challenge a re-zoning as “spot zoning,” an owner must present evidence of similarity so as to show not rational basis or justification for the change in zoning.

*Hartman v. Zoning Hearing Board of Cumru Township*, No. 650 C.D. 2015, 2016 Pa.Comm. LEXIS 77 (Pa. Commonwealth Court, February 12, 2016)

Decision of the Township Zoning Hearing Board approving a permit to construct a residential dwelling, in a residential zoning district, for care of terminally ill individuals was affirmed where the ordinance allowed up to four unrelated individuals to reside in a residence, and where the Court found sufficient permanence and non-transiency among residents to constitute the functional equivalent of a family.

*Marchenko v. Zoning hearing Board of Pocono Twp*, 2016 Pa. Commw. Lexis 401 (Pa. Commonwealth Court, September 19, 2016)

Property owner’s rental of her residence to a single family on weekends at a time when she works and stays with a friend was use of the property as a single family dwelling in accordance with the definition thereof in the Zoning Ordinance.

*Kretschmann Farms, LLC v. Township of New Sewickley*, No. 360 C.D. 2015, 2016 Pa.Comm. LEXIS 33 (Pa. Commonwealth Court, January 7, 2016)

A conditional use approval to build a gas compressor station was upheld where the applicant was found to have met its burden of demonstrating compliance with conditional use criteria, and residents opposing the application were found not to have met their burden of demonstrating that the use would adversely affect the welfare of the community in a way not normally expected from that type of use. The residents’ presented only speculative concerns about adverse health and safety impacts, without expert testimony or other evidence of harm.

*Honey Brook Estates, LLC v. Board of Supervisors of Honey Brook Township*, 2016 Pa. Commw. Lexis 52 (Pa. Commonwealth Court, January 13, 2016).

A municipality has a legal obligation to proceed in good faith in reviewing and processing development plans including discussing technical requirements or ordinance interpretations with an applicant and providing an applicant a reasonable opportunity to respond to objections or modify plans. A Board of Supervisors acts in bad faith in rejecting a Developer’s preliminary plans without affording Developer the opportunity to respond or modify the plans.

TWL Realty, LLC and Keystone Correctional Services, Inc. vs. West Hanover Township Zoning Hearing Board, et al., No. 17 CD 2015, Commonwealth Court

Facts:

- TWL owns a 3.8 acre parcel in a Commercial Highway District with a 44,000 sq. ft. building
- Keystone operates a privately owned community work release facility under a contract with PA Commonwealth Dept. of Corrections
- During 2008-2013 Keystone had discretion to reject certain offenders
- New contract 2013-2016 Keystone was required to accept all offenders
- Township Ordinance, definition of work-release facility was limited to “non-violent” criminals
- Separate Ordinance provision limits number of residents to 150
- 2 new residents convicted of Tier #3 sexual offenses leads to NOV

Issue: Do the Ordinance provisions conflict with the Prisons and Parole Code 61 Pa.C.S. Sections 101-6309 or the Sentencing Code 42 Pa.C.S. Sections 9701-9799.9?

- ZHB upheld the Ordinance Provisions.
- Court of Common Pleas reversed.
- Commonwealth Court affirmed the Court of Common Pleas. State law determinations on the placement of offenders preempts local zoning ordinance provisions.

Embreeville Redevelopment L.P. vs. Board of Supervisors of W. Bradford Township.  
134 A.3d 1122 Commonwealth Court 2016

Issue: Whether an ordinance purported to be a curative text amendment was to be treated as a zoning map amendment?

- Embreeville purchased land in an IM-Mixed Development use District for development primarily residential in character.
- Residential uses not allowed in IM District.

- Township prepared amendment to its zoning ordinance for residential uses in the I-Industrial District to meet fair-share obligations.
- Embreeville appealed to Common Pleas alleging Amendment was a zoning map change requiring different procedural requirements.
- CCP found for Township. Embreeville appealed to Commonwealth Court.
- Ordinance Amendment did not increase or decrease any zoning district size, did not revise any zoning boundary.
- Commonwealth Court reversed the Court of Common Pleas

The Court held:

“If an ordinance contains changes that are so comprehensive in nature as to result in a substantial change to the manner in which the tract of land is zoned in comparison to the surrounding tracts of land that were similarly zoned, then the Ordinance will constitute a map change.”

and

“It is the effect of the proposed changes and not just the number of changes which determines whether the amendment is a text amendment or a map amendment.”

# **Recently Enacted Legislation**

“Pennsylvania Development Permit Extension Act,” (Act 46 of 2010, Act 87 of 2012, and Act 54 of 2013) - Suspends the expiration date for most building and land development approvals to July 2, 2016.

“Medical Marijuana Act” (Act 16 of 2016). Allows physician-prescribed medical use of cannabis for treatment of certain chronic conditions and for terminal illnesses. The PA Department of Health will issue 25 combined grower and processor permits for medical marijuana. There will be a Board established by the Department, which will issue up to 50 dispensary permits, and each dispensary may have up to 3 locations in PA. Zoning for both a “grower/processor” and a “dispensary” is specifically addressed in Section 2107 of the Act:

A “grower/processor” shall meet the same municipal zoning and land use requirements as other manufacturing, processing and production facilities that are located in the same zoning district.

A “dispensary” shall meet the same municipal zoning and land use requirements as other commercial facilities that are located in the same zoning district.

“Amendment to MPC on the Appointment, Term, and Vacancy of Planning Commission Members” (Act 42 of 2015). Section 203 of the MPC by adding Section (e), which allows up to 3 residents to serve as alternates on the Planning Commission, for a term of 4 years. An alternate may participate in any proceeding or discussion, but may not vote or be reimbursed unless designated as a voting alternate under Section 207. Act 42 amends Section 207 of the MPC by adding Section (b). This new section authorizes the chair of the planning commission to designate alternate members as substitutes for any absent member or member who has recused or has been disqualified by the governing body, and, if, by that reason a quorum is not reached, the chair shall designate as many alternates to sit on the commission as needed to reach a quorum. An alternate will continue to serve on the in the matter or case for which he or she was appointed until there is a final decision. Designation of an alternate pursuant to this section shall be made on a case-by-case basis in rotation by seniority.