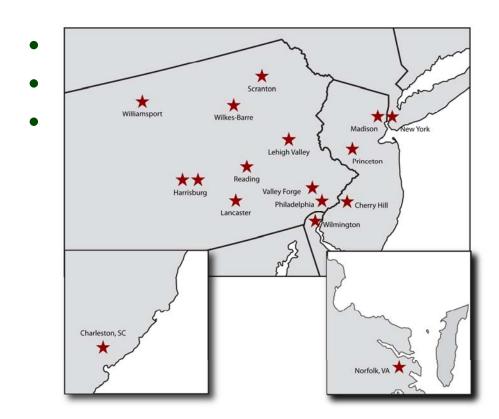
Significant Pennsylvania Appellate Land Use Decisions 2009 – 2011

STEVENS & LEE LAWYERS & CONSULTANTS

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About Stevens & Lee



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Today's Speakers



• Ronald M. Lucas, Esq.



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Procedure

- In re: Appeal of Board Mountain
 Development Company, LLC, ___ A.3d ___, (Pa. Cmwlth. 3/7/2011) (Brobson)
 - Improper zoning permit for 27 wind turbines
 - Objectors had standing to appeal based on living within ½ mile
 - Appeal timely when permit first disclosed at planning commission meeting and construction of meteorological tower in 1,100 acres insufficient notice
 - No vested rights

- Hatfield Township v. Lexon Insurance Co.,
 __ A.3d __ (Pa. Cmwlth. 2/23/2011)
 (Brobson)
 - Developer defaults on residential development public improvements
 - Township seeks payment from bond company to complete/repair improvements
 - Injunction proper for payment to restore status quo – limited to amount of work completed (including defective construction) when developer abandoned work

- Takacs v. Indian Lake Borough Zoning
 Hearing Board, ___ A.3d ___ (Pa. Cmwlth.
 1/5/2011) (Friedman)
 - Challenge to building permit issued for permitted use, multi-family dwelling
 - Objector required to post \$380,000 appeal bond after dismissal of the appeal by trial court
 - Amount based on value of one unit under contract
 - Objector's appeal dismissed for failure to post bond

- Miravich v. Township of Exeter, 6 A.3d 1076 (Pa. Cmwlth. 10/28/2010) (Leadbetter)
 - Objectors to 26 lot subdivision plan did not need to appear before governing body to appeal written decision.
 - Appeal from ZHB requires substantive and procedural standing
 - Substantive direct, immediate and substantial interest – aggrieved person
 - Procedural party at the ZHB hearing
 - Subdivision approval typically not part of a hearing with notice or transcript (MPC 508(5))

- <u>Laughman v. Zoning Hearing Board of</u>
 <u>Newberry Tp.</u>, 964 A.2d 19 (Pa. Cmwlth. 1/5/09) (Pellegrini) (publication of case decided 10/9/08)
 - Substantive validity challenge to zoning ordinance and map
 - Appeal dismissed for lack of standing
 - Objector not an aggrieved person since his closest property was 8/10 mile to disputed district
 - No substantial, direct and immediate interest

- Keebler v. ZBA of Pittsburgh, 998 A.2d
 670 (Pa. Cmwlth. 6/29/10) (Flaherty)
 - ZHB hearing on special exception
 - Board granted a variance, which was never specifically requested
 - A change in the theory of relief is ok at the hearing, but Objectors must be given an opportunity to be heard and present evidence on that theory

- Weston v. Zoning Hearing Board of Bethlehem, 994 A.2d 1185 (Pa. Cmwlth., 4/27/2010) (Friedman)
 - Appeal of determination that renting rooms to college students was a boarding house
 - ZHB approval of use appealed by neighbor within 400 ft area required by ordinance for specific notice
 - Objector failed to appear before ZHB
 - Appeal dismissed because objector lacked standing as a party at ZHB hearing
 - Objector had burden to prove notice of hearing deficient

- Falkler v. Lower Windsor Tp. Zoning
 Hearing Board, 988 A.2d 764 (Pa. Cmwlth.
 2010) (Kelley)
 - Certificate of nonconformance issued to salvage yard operator on June 21, 2007
 - Neighbor became aware of certificate on Dec. 13, 2007 and attended BOS meeting on Dec. 13, 2007 where certificate was discussed
 - ZHB appeal filed on January 16, 2008
 - Appeal untimely as filed over 30 days from neighbor becoming aware of permit

- BPG Real Estate Investors-Straw Party II, LP. v. Board of Supervisors of Newtown Tp., 990 A.2d 140 (Pa. Cmwlth. 3/5/2010) (Simpson)
 - Conditions of conditional use approval appealed
 - Settlement agreement approved by court could depart from existing zoning
 - Reversed on appeal since settlement involved land beyond 51 acres in conditional use appeal

- In re: Edward H. Arnold, 984 A.2d 1 (Pa. Cmwlth. 11/5/09) (Leadbetter) (publication of case decided 8/13/09)
 - Walmart conditional use approved by 2-1 vote after 16 hearings on Dec. 28th
 - New supervisor takes office Jan 1st replacing one of the 2 favorable voting members
 - Written decision issued Jan 19th
 - 12/18 vote was final decision of BOS and valid
 - Written decision explains final decision of board

- Philomeno & Salamone v. Board of Supervisors of Upper Merion Tp., 600 Pa. 407, 966 A.2d 1109 (Pa. 3/18/09) (Eakin) (Saylor concurring)
 - Residential subdivision of 18 lots granted time extensions
 - Conditional use application for 28 townhouses denied
 - Deemed approval of subdivision
 - Separate inconsistent applications
 - Conditional use zoning issues
 - Subdivision land use

- Thompson v. Zoning Hearing Board of Horsham Tp., 963 A.2d 622 (Pa. Cmwlth. 1/12/09) (Friedman)
 - Use variance for office building in Airport Overlay District
 - Objector appears before ZHB and granted party status w/o objection by applicant
 - Objector has standing to appeal as appeared before ZHB w/o objection to party status
 - Objector presumed aggrieved by decision

Variances

- Lench v. Zoning Board of Adjustment of City of Pittsburgh, 3 A.3d 576 (Pa. Cmwlth. 1/20/2011) (Leavitt)
 - De minimis dimensional variance
 - Building height increase of 2" from 42' existing and 40' limit
 - Do not apply normal variance standards
 - Discretionary with ZHB
 - No set criteria
 - Applies to conforming and nonconforming structures

Variances (cont'd)

- Schomaker v. Zoning Hearing Board of the Borough of Franklin Park, 994 A.2d 1196 (Pa. Cmwlth. 5/21/2010) (Brobson)
 - Dimensional variance for 150 ft cell tower
 60 ft from property line in lieu of required
 200 ft setback
 - ZHB grants variance as location is the only spot where tower can be located based on current uses
 - Up hill neighbor objected and appealed
 - Hertzberg requires substantial burden must attend all dimensionally complaint uses
 - Variance reversed as hardship not showed

Variances (cont'd)

- Boyer v. Zoning Hearing Board of Franklin <u>Tp.</u>, 987 A.2d 219 (Pa. Cmwlth. 1/7/10) (Freidman)
 - Variance to build house on 8 acre plateau surrounded by steep slopes
 - Overlay applies to slopes over 15% and plateaus surrounded by steep slopes
 - Failure to prove hardship and unique physical circumstances of property

Variances (cont'd)

- Township of Northampton v. Zoning
 Hearing Board of Northampton Tp., 969
 A.2d 24 (Pa. Cmwlth. 3/26/09)
 (Smith-Ribner)
 - New Rite Aid on 5.2 acre tract seeks parking variance for 67 spaces in lieu of required 112 spaces
 - Testimony was that only 67 spaces were needed. No economic testimony
 - ZHB grants variance and Twp. Appeals
 - Court reverses as spaces could be located and building made smaller. Did not meet <u>Hertzberg</u> standards

Conditional Uses

- Joseph v. North Whitehall Township Board of Supervisors, ____ A.2d ____ (Pa. Cmwlth. 3/11/2011) (Leadbetter)
 - Conditional use for planned commercial development
 - Conditional use only use of land
 - Applicant specific, objective criteria
 - Objectors detrimental effect on public health, safety and welfare
 - Wal-Mart not required to identify specific use, until land development
 - To deny traffic must be abnormal and pose a substantial threat
 - Board could reject objector's expert testimony

Conditional Uses (cont'd)

- Marquise Investment, Inc. v. City of Pittsburgh, 11 A.2d 607 (Pa. Cmwlth. 12/30/2010) (Butler)
 - Conditional use approved by trial court for adult cabaret located w/in 80 ft from social club for recovering alcoholics and drug addicts.
 - Cabaret would not serve alcohol
 - City failed to rebut presumption that use had impact beyond that normally expected
 - Applicant met burden for specific req's.
 - Objectors have burden as to all general policy and general detrimental effects

Conditional Uses (cont'd)

- HHI Trucking & Supply, Inc. v. Borough
 Council of the Borough of Oakmont, 990
 A.2d 152 (Pa. Cmwlth. 3/5/2010) (Leavitt)
 - Conditional use for ready-mix concrete plant in industrial district
 - Ability of governing body to impose conditions on approval
 - Board can not "devise conditions out of thin air" – arbitrary and capricious
 - Conditions must be reasonable, based on evidence of a harm in the record, and relate to an ordinance standard or authorization in the MPC

Conditional Uses (cont'd)

- In re: McGlynn, 974 A.2d 525 (Pa. Cmwlth. 5/21/09) (Simpson)
 - Conditional use for MHP
 - Notice of first hearing 4 days apart
 - Objectors had actual notice, participated in all 3 hearings and remand hearings, did not raise issue before Board, not denied procedural due process
 - Failure to raise ownership issue a waiver by Objectors
 - Ordinance only required new conditional use for a change in use, not a change to site plan

Special Exceptions

- Blancett-Maddock v. City of Pittsburgh
 Zoning Board of Adjustment, 6 A.3d 595
 (Pa. Cmwlth. 9/15/2010) (Leavitt)
 - 150 ft Cellular tower s/e approved on 40x20 ft section of cemetery despite "minor" deficiencies in application – distance to residential properties and access road
 - Reversed applicant has burden to demonstrate compliance with specific requirements at hearing
 - Conditions (ie moving tower) can not be imposed to make application compliant.

Special Exceptions (cont'd)

- Hamilton Hills Group, LLC v. Hamilton
 Township Zoning Hearing Board, 4 A.3d

 788 (Pa. Cmwlth. 9/1/2010) (Jubelirer)
 - Special exception to construct townhomes on property split between three municipalities
 - ZHB could limit itself to consideration of only the land located within its borders in determining whether proposal met open space requirements
 - Reasonable ordinance interpretation even without explicit language
 - Township did not have jurisdiction over use of property outside Township boundary 25

Special Exceptions (cont'd)

- Good v. Zoning Hearing Board of Heidelberg Tp., 967 A.2d 421 (Pa. Cmwlth. 1/9/09) (Simpson) allocatur denied, 973 A.2d 1008 (Pa. 6/23/09)
 - Special exception for dog kennel
 - Approved with numerous conditions relating to operation and disposal of carcasses
 - Conditions properly imposed as based either on applicant's testimony (cage size), consistent with health/safety (disposal), or to protect neighbors (noise/hours of outdoor operation)

Bad Municipal Action

- MFS, Inc. v. DiLazaro, __ F. Supp ____
 (E.D. Pa. 2/16/2011) (Slomsky)
 - Civil Rights action against DEP employees (air permit)
 - Action survived summary judgment as action could – if proven – "shock the conscience" for substantive due process claim.
 - Jury verdict for millions.
 - Trial Court judge reverses jury verdict as allegations not proven

Bad Municipal Action (cont'd)

- Highway Materials v. Board of Supervisors of Whitemarsh Tp., 974 A.2d 539 (Pa. Cmwlth. 5/21/09) (Butler)
 - Land development in industrial district
 - Property rezoned at request of objectors to residential estate lots
 - Failure to interpret ordinances or provide direction was bad faith
 - Denial reversed where applicant denied opportunity to cure deficiencies

Substantive Validity of Ordinances

- Main Street Development Group, Inc. v.
 Tinicum Twp. Board of Supervisors, ____
 A.2d. ____ (Pa. Cmwlth. 3/21/11)
 (Pellegrini)
 - Prime Agricultural Lands Overlay District invalid when it results in 95-97% of township limited to Agricultural
 - Curative amendment to remove overlay from residential and commercial districts
 - Improper balance of agriculture & development

- Briar Meadows Development, Inc. v. South Centre Township Board of Supervisors, 2
 A.3d 1303 (Pa. Cmwlth. 8/18/2010)
 (Flaherty)
 - Denial of Curative amendment to rezone agricultural land to commercial/industrial
 - Failed to demonstrate ordinance invalid on constitutional grounds
 - Insufficient to show proposed development is consistent with comprehensive plan and causes no harm and naturally extends existing commercial district
 - No evidence of spot zoning

- The Piper Group, Inc. v. Bedminster Twp. Board of Supervisors, 992 A.2d 224 (Pa. Cmwlth. 3/12/2010) (Friedman) appeal granted, ___ A.2d ___ , 2010)
 - Ag preservation provisions declared invalid by PA Supreme Ct. in 2002 in C&M challenge. Six days after decision, curative amendment filed by another landowner
 - 1 week later, twp files municipal cure and amends ordinance to fix C&M problems
 - Second curative amendment properly denied as ordinance was cured
 - Substantive validity reviewed based on cured ordinance
 - C&M invalidity put landowners on constructive notice that twp would enact amendment

- Plaxton v. Lycoming County Zoning
 Hearing Board, 986 A.2d 199 (Pa. Cmwlth.
 12/4/09) (Simpson)
 - Zoning amendment to permit wind energy facilities by right in certain districts
 - After issuance of a zoning permit objectors filed a substantive validity challenge, but did not meet hearing burden of arbitrary and unreasonable
 - Prior denial of SE for public service use not collateral estoppel
 - Not spot zoning or special legislation

- Township of Exeter v. Zoning Hearing Board of Exeter Township, 962 A.2d 653 (Pa. 1/22/09) (Castille)
 - Twp limited billboards to 25 sf.
 - Permits denied for billboards 300-672 sf
 - ZHB determines billboards de facto excluded and based on industry standards, 300 sf was reasonable. Twp. Appeals
 - Twp can regulate billboards but not exclude them. 25 sf limit was exclusionary
 - Industry standards relevant but not controlling

Condominiums

- Shaffer Family Limited Partnership v.
 Zoning Hearing Board of Chanceford Tp, 5
 A.3d 989 (Pa. 2010) (Per Curiam),
 affirming 964 A.2d 23 (Pa. Cmwlth.
 1/15/09)
 - House constructed on 25 acres
 - UPCA Declaration filed two units
 - Unit 1 (house) conveyed
 - No subdivision of LD approval
 - Township NOV illegal subdivision

Private Roads

- In re: Opening a Private Road for the Benefit of Timothy O'Reilly, 5 A.3d 246 (Pa. 9/30/10) (Saylor)
 - Landlocked tract due to I-79 construction
 - Petition for private road through adjacent development
 - POs filed as to constitutionality private taking
 - CC all lands within PA have 6% burden for creation of roads, thus constitutional
 - SC rejects historical analysis and calls constitutionality of act into question

Ordinance Interpretation

- Borough of Moosic v. Zoning Hearing
 Board of the Borough of Moosic, ___ A.2d
 ___ (Pa. Cmwlth. 12/1/10) (Cohn Jubelirer)
 - Construction of a roof over an approved patio for a restaurant is not land development
 - Original renovation permit for restaurant improvements did not require land development
 - Any improvement to a lot is not necessarily land development

Nonconformities

- 200 W. Montgomery Ave. Ardmore, LLC v. ZHB of Lower Merion Twp, 985 A.2d 996 (Pa. Cmwlth. 12/14/09) (Butler)
 - Nonconforming gas station sought s/e to install car wash and convenience store
 - ZHB change of use, not expansion of nonconforming use
 - Car wash not "sufficiently similar" to prior non conforming use
 - Physical layout different; more vehicals on site longer times; specialized equipment required; change in revenue %s

Nonconformities (cont'd)

- Harrisburg Gardens, Inc. v. Susquehanna Tp. Zoning Hearing Board, 981 A.2d 405 (Pa. Cmwlth. 9/23/09) (Kelley)
 - Nursery and garden center a nonconforming use in residential district
 - Change from primarily plants, flowers and trees to primarily stone created a new and distinct use
 - Doctrine of natural expansion as a matter of right requires evidence of need to accommodate increased trade

Nonconformities (cont'd)

- Pietropaolo v. ZHB of Lower Merion Twp, 979 A.2d 969, (Pa. Cmwlth. 8/19/09) (Simpson)
 - R zoned property used for garage for minor service and storage since 1930s
 - Landscape business established in 1969 and no prob until Twp issues NOV in 2007
 - No expansion of NC use; improper change of use
 - No variance by estoppel as unnecessary hardship not shown i.e., unique to property and zoning regulation sought to be overcome renders the property practically valueless

Nonconformities (cont'd)

- In re: Moyer, 978 A.2d 405 (Pa. Cmwlth. 7/2/09) (Leavitt)
 - Subdivided lots held in single ownership at time of first zoning ordinance in 1963
 - Zoning ordinance contained a merger provision – permitting erection of a single family house on a lot held in single and separate ownership
 - Landowner had burden to prove lots used, maintained or treated as separate and distinct properties

Accessory Uses

- Sky's the Limit, Inc. v. ZHB of Smithfield
 Twp., ___ A.3d ___ (Pa. Cmwlth. 3/31/11)
 (Pellegrini)
 - Tent and RV camping is not accessory use to private airport
 - Despite testimony of use since 1984, applicant failed to prove camping was necessary or customarily incidental to airport use
 - 20% of PA airports allow camping

Accessory Uses (cont'd)

- Tink-Wig Mountain Lake Forest Property
 Owners Assoc. v. Lackawaxen Twp ZHB,
 986 A.2d 935 (Pa. Cmwlth. 12/15/09)
 (McCloskey)
 - Zoning permit issued for 55 ft wind turbine to generate electricity on lot within residential development
 - While not a specifically listed accessory use, it qualified as "essential services" as provided electricity to home, not for sale
 - Customarily incidental and accessory like a satellite dish, solar panel and propane tank

Accessory Uses (cont'd)

- Hess v. Warwick Township Zoning Hearing Board, 977 A.2d 1216 (Pa. Cmwlth. 7/15/09) (Leadbetter)
 - Housing 21 Siberian Huskies on a 3 acre residential lot was not an accessory use
 - Customarily incidental question of fact and law
 - Objective reasonable person standard

Right-to-Know Law Update

Pennsylvania's Right-to-Know Law Act 3 of 2008 65 P.S. § 67.101, et. seq.

Significant Changes from Old Law

- Presumption of access to records
- Burden of proof for denial for exceptions on agency
- Definition of record and public record very broad
- Legislative and Judicial records
- Office of Open Records
- 5 day initial response time
- Email requests
- Contractors performing "governmental functions"
- State-related institutions
- Financial records, aggregated data

Definition of "Record"

- Information, regardless of physical form of characteristics, that documents a transaction or activity of an agency <u>and</u> that is created, received or retained pursuant to law <u>or</u> in connection with a transaction, business or activity of agency
- Term includes document, paper, letter, map, book, tap, photograph, film or sound recording, information stored or maintained electronically and a dataprocessed or image-processed document

Definition of "Public Record"

- A record, including a financial record, of a Commonwealth or local agency that
 - Is not exempt under section 708
 - Is not exempt from being disclosed under another law, regulation, or court order
 - Is not protected by a privilege

Concerns with RTKL

- Minutes and notes of meetings or working sessions with municipal staff probably available to public through RTKL
 - Information documenting activity of agency, created in connection with transaction, business or activity of agency
 - Possibly subject to the pre-decisional deliberation exception § 708(10), but not definitive at this point
- Any documents, email or correspondence provided to Township officials may be available to the public, even if sent privately

- In re: Silberstein Appeal from Grant of Open Record Request, 11 A.3d 629 (Pa. Cmwlth. 1/6/2011) (S.J. Quigley)
 - OOR directed York Township to obtain records that York Township Commissioner Silberstein stored on his personal computer in response to a right to know request
 - The request asked for electronic communications or correspondence between a developer and individual commissioners as well as the constituents and commissioners
 - Court held that the emails and documents on Commissioner's personal computer were not "public records" because they were merely correspondence with constituents and the developer by a single Commissioner, and did not document transactions or activity of the Township as a whole
 - Decision is fact specific and the Court cautions that if personal computers are used to store agency documents they would be subject to release

- Documentation of settlement discussions in land use appeal may be available to public
 - May be subject to the pre-decisional deliberation exception
 - May seek Court order preventing disclosure

- Studies and reports provided to other agencies (PennDOT, DEP, County Conservation) subject to disclosure
 - Department of Transportation v. Office of Open Records, 7 A.3d 329 (Pa. Cmwlth. 11/1/2010) (Jubelirer)
 - Request to PennDOT for accident reports, traffic and engineering studies, and sight distances were denied
 - Traffic studies and sight distance measurements are exempt from disclosure under privilege provided by Section 3754 of the Vehicle Code if used in the preparation of "safety studies"
 - PennDOT filed to meet its burden of showing the requested studies and sight distance were used in a safety study

- Records in possession of a government contractor or a private entity performing a governmental function subject to disclosure (65 P.S. § 67.506.(d))
 - Court has expressed an expansive view of what is governmental function
 - East Stroudsburg University Foundation v.
 Office of Open Records, 995 A.2d 496 (Pa. Cmwlth. 2010)
 - "[A]Il contracts entered into with private contractors necessarily carry out a 'governmental function'—because the government always acts as the government."
 - Records in contractor's possession that "directly" relate to carrying out the "government function"
 - Not clear whether this same reasoning would be applicable to Developer Improvement Agreements

- But see, Office of the Budget v. OOR, 11
 A.3d 618 (Pa. Cmwlth. 1/6/11)
 - Where contract between agency and third party contractor does not involve performance of government function, and the contractor is not obligated to submit certified payroll to agency, the agency need not obtain documents to fulfill RTK request
 - Ability of the agency to obtain records from a third party upon request does not mean that documents are within agency "control"

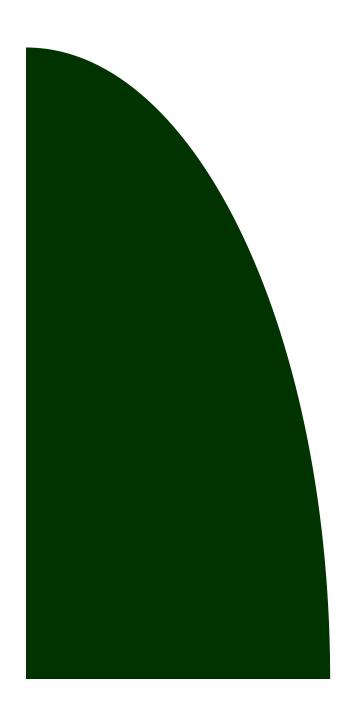
- Agency can release documents even if covered by an enumerated exception, unless doing so would violate State or federal law, a court order or an established privilege
 - Signature Information Solutions, LLC v. Aston Township, 995 A.2d 510 (Pa. Cmwlth. 2010)
 - An agency may not assert a basis on appeal to justify a denial of disclosure of records that it did not assert in its initial response for those records
 - Practice Tip: Any initial response refusing access should be reviewed by Solicitor to ensure that all valid reasons for denial are stated

- Board of Supervisors of Milford Township
 v. McGogney, 13 A.3d 569 (Pa. Cmwlth.
 1/6/2011) (McCullough)
 - Right to know request for invoices of Township Solicitor for services rendered in connection with a specific use
 - Solicitor informed the Right-to-Know Officer that invoices had to be redacted
 - Concerned about timeliness of response, Officer released records without redacting them
 - Court upheld injunction requiring return of the records, holding that legal service descriptions were properly subject to redaction and the disclosure of the records by the Officer did not waive the privilege exception on the Township's behalf

- County of York v. OOR, 13 A.3d 594 (Pa. Cmwlth. 2/16/11)
 - Court held that 911 "time response logs," including cross-street and address information are public records subject to disclosure
 - The Court refused to recognize a blanket exception protecting the address or crossstreet information noted in these records

Sunshine Act Open Meetings Law Update

Sunshine Act: Open Meetings Law – 1998 Oct. 15, P.L. 729, No. 93 § 1, 65 Pa.C.S. §§ 701-716



Key Provisions

Definitions – § 703

- "Meeting"
 - Any prearranged gathering of an agency which is attended or participated in by a quorum of the members of an agency held for the purpose of deliberating agency business or taking official action
- "Executive Session"
 - A meeting from which the public is excluded, although the agency may admit those persons necessary to carry out the purpose of the meeting

Definitions - § 703 (cont'd)

- "Agency Business"
 - The framing, preparation, making or enactment of laws, policy or regulations, the creation of liability by contract or otherwise or the adjudication of rights, duties and responsibilities, but not including administrative action

Definitions – § 703 (cont'd)

- Mazur v. Washington County
 Redevelopment Authority, 900 A.2d 1024,
 (Pa. Cmwlth., 2006)
 - Tax increment financing (TIF) Committee composed of members of local taxing authorities and the Redevelopment Authority was not an "agency" required to hold open meetings in discussing a proposed TIF district for a redevelopment project
 - Authority and each taxing body required to hold public meetings and public votes to act

Definitions - § 703 (cont'd)

- Society Hill Civic Assoc. v. Phila. Board of License and Inspection Review, 905 A.2d 579 (Pa. Cmwlth. 2006)
 - City Board of License and Inspection Review, which approved the historic commission decision to allow developer to replace marble cornices on historic townhouse with fiberglass cornices, was created as a quasi-judicial body, with decision making and fact-finding power, subject to Sunshine Act
 - Although deliberation may occur in private, evidence and official action must be in public

Definitions – § 703 (cont'd)

- In re: Appeal of Arnold, 984 A.2d 1 (Pa. Cmwlth. 2009)
 - Governing body's "action" on a conditional use application occurred when it voted at public meeting in accordance with the Sunshine Act, not when it issued the written decision in accordance with MPC requirements

Definitions - § 703 (cont'd)

- "Official Action"
 - Recommendations made by an agency pursuant to statute, ordinance or executive order
 - The establishment of policy by an agency
 - The decisions on agency business made by an agency
 - The vote taken by an agency on any motion, proposal, resolution, rule, regulation, ordinance, report or order

Open Meetings – § 704

- Official action and deliberations by a quorum of the members of an agency shall
 - take place at a meeting open to the public unless closed under sections
 - 707 (relating to exceptions to open meetings)
 - 708 (relating to executive sessions) or
 - 712 (relating to General Assembly meetings covered)

Exceptions – § 707

- Executive session
- Conference
 - So long as no agency business deliberated
- Certain working sessions
 - Applicable only to "Boards of auditors"

Executive Session – § 708

- Limited to specified purposes
- Must state reason for executive session at the open meeting prior or subsequent
- Members must receive notice 24 hours in advance
- Official action may not be taken during session

- Schenck v. Township of Center, Bucks
 County, 893 A.2d 849 (Pa. Cmwlth. 2006)
 - Description of billed legal services for pending or impending litigation are not subject to disclosure under RTKL
 - The Sunshine Act and Right to Know Law must be construed together and it would be nonsensical to allow the release of information in billed statements which referred to discussions on pending or impending litigation held during an executive session

- Riverwalk Casino LP v. Pa. Gaming
 Control Bd., 926 A.2d 926 (Pa 2007)
 - Private meetings of the Gaming Board for the purpose of evaluating applications were quasi-judicial deliberations that are exempt from the open meeting or public hearing requirements of the Sunshine Act
 - Confidential information on applicants
 - Fact-finding responsibility

- Trib Total Media, Inc. v. Highlands School
 Dist., 3 A.3d 695 (Pa. Cmwlth. 2010)
 - Inviting local shopping center owner to discuss its tax assessment appeal in executive session with school board violated the Sunshine Act
 - Executive session exception is to consult with its attorney or other professional advisor regarding litigation or potential litigation
 - Opposing party participation in executive session undermines purpose
 - Quorum cannot participate in settlement conference

- King v. Perkasie Borough ZHB, 552 A.2d
 354 (Pa. Cmwlth. 1989)
 - Borough planning council met in executive session to recommend final approval of subdivision plan
 - Borough Council votes in public meeting to approve plan
 - Planning commission meeting in private "irrelevant" as planning commission role is advisory to borough council

- Moore v. Township of Raccoon, 625 A.2d
 737 (Pa. Cmwlth. 1993)
 - Planning Commission held public meetings to consider amendments to township junkyard ordinance
 - Chair of planning commission holds a closed meeting at his house
 - Next planning commission meeting, planning commission recommends amendments
 - Complaint to declare planning commissions recommendations void denied by Court
 - Planning Commission required to hold meeting in public, but cured defect by holding public meeting

Public Participation § 710.1

- Subject to rules and regulations necessary for the conduct of the meeting established under § 710, "reasonable opportunity" for comment "prior to taking official action"
- Can be limited to residents and taxpayers of the political subdivision
- May accept all public comment at beginning of meeting
- May defer comment to the next meeting or special meeting in advance of next meeting

Public Participation § 710.1 (cont'd)

- Alekseev v. City of Philadelphia City Council, 8 A.3d 311 (Pa. 2010)
 - City council could not delegate required public comment sessions to a committee to be held at a separate meeting
 - Agency is required to hear public comment during its meetings
 - 710.1(a) requires a board or council to allow public comment at its meeting
 - 710.1(d) grandfathers a practice of holding a special meeting for public comment before the board or council

Business at Unauthorized Meeting Void § 713

- Court has discretion of declaring any or all official action taken at a closed meeting to be invalid
- Agency can effectively cure the deficiency of any action taken at meeting in violation of the open meetings requirement by taking the same action at a subsequent, valid open meeting
 - Lawrence County v. Brenner, 582 A.2d 79
 (Pa. Cmwlth. 1990)

Business at Unauthorized Meeting Void § 713 (cont'd)

- Day v. Civil Service Commission of Borough of Carlisle, 931 A.2d 646 (Pa 2007)
 - Challenge to the closed nature of hearings as a violation of the Sunshine Act must be brought within 30 days of the decision to hold the closed hearings, not after the action has been taken at the hearing
 - However, the action itself can still be challenged as void

Business at Unauthorized Meeting Void § 713 (cont'd)

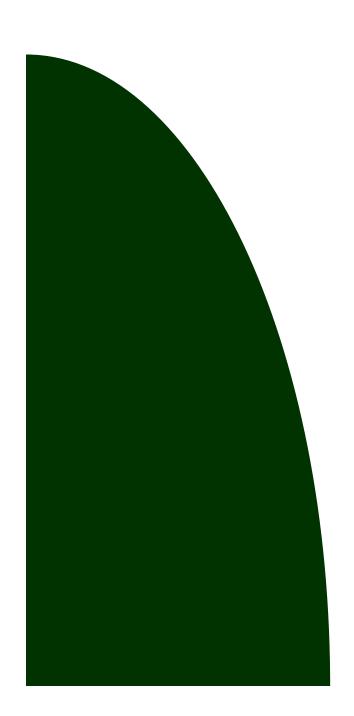
- Borough of East McKeesport v. Civil Service Commission, 942 A.2d 274 (Pa. Cmwlth. 2008)
 - The decision to in validate the action of agency due to a violation of Sunshine Act is discretionary for the reviewing court, not obligatory
 - Where a Sunshine Act violation is curable, it is appropriate for a trial court not to invalidate the action
 - Lack of notice or inadequate notice typically does not invalidate action if complainer was present at meeting

Penalty - § 714

 Intentional participation by agency member in a meeting purposefully designed to violate the Act is a summary offense, subject to a fine up to \$100

Attorneys Fees – § 714.1

- If agency acted willfully or with wanton disregard in violating the Act, the court shall award attorney fees and costs
- If a legal challenge was frivolous or with no substantial justification, the court shall award attorney fees and costs



Sprinkler Update

Sprinkler Update

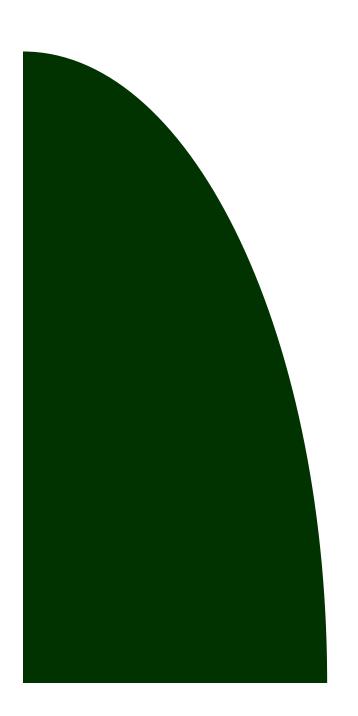
- Pennsylvania Builders Assoc. v. Dept. of Labor and Industry, 4 A.3d 215 (Pa. Cmwlth. 8/25/2010)
 - Allegation that the 2009 UCC codes & regulations as adopted were null & void due to improper delegation of legislative authority to L&I and the ICC.
 - Case dismissed on POs.
 - Review & Advisory Council set up in 2008 provided adequate oversight and ICC regulations were not adopted sight unseen

Sprinkler Update ...

- House Bill 377 of 2011 (PN 884)
- Passed House on 3/7/11 (154-39)
- Eliminates sprinkler requirements for:
 - Certain log homes
 - Single family residential
 - Two family residential
- Specifically provides that triennial revisions to uniform code with these regulations are excluded
- Builder is required to offer sprinklers as option to homeowner

Sprinkler Update ...

- Schuylkill Twp. v. Pennsylvania Builders
 Assoc., 7 A.3d 249 (Pa. 10/19/2010)
 (Eakin)
 - L&I invalidated 2005 township sprinkler ordinance as beyond minimum requirements of UCC
 - Township agreed that ordinance exceeded UCC (2005) which did not require sprinklers
 - Township failed to show local conditions were so different from statewide norm that uniform standards were not appropriate



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