

CONFIDENTIAL/ATTORNEY CLIENT PRIVILEGE

Solicitor's Report
April 2022
Dated May 12, 2022

Legislative

HB 139 PN 104, formerly reported last session as HB 509, entitled the "Permit Administration Act", would require DEP to handle the administration of permits including renewals and modifications for applicants including a municipal authority in a more timely and transparent manner. The act would require a tracking system of applications. It would require notice of incomplete applications within 10 days of receipt and notice of technically deficient applications within 20 days of completeness. It would require notice to permit holders of changes to permit regulatory requirements, expiration and changes to fees. It would require third party reviewers to review applications that DEP cannot get to. The proposal passed the former House, and was pending before the Senate Intergovernmental Operations Committee when the last session closed. See SB 28

HB 457 PN 1016 would amend the Authorities Act and the Ethics Act to provide investigatory and enforcement under the Ethics Act of a violation of conflict of interest provisions relating to contracts in the Authorities Act. The most recent version includes a prohibition from using proceeds from a borrowing for a purpose other than the project for which the debt was incurred, or placed in an account used by the authority for an unrelated purpose.

HB 584 PN 554 would amend the Prevailing Wage Act to increase work covered by the Act from \$25,000 to \$150,000, and exempt local highway and bridge projects.

HB 587 PN 557 would amend the Prevailing Wage Act to increase work covered by the Act from \$25,000 to \$207,000, with annual adjustments based upon the CPI.

HB 590 PN 559 would increase the recycling fee for municipal waste landfills and incinerators from \$2 to \$5 per ton.

HB 710 PN 680 would amend the Separations Act to increase the work covered by the Act from \$4,000 to \$250,000, with annual adjustments based upon the CPI.

HB 1936 PN 2211 would amend the Public Utility Code to only allow the sale of municipal or authority owned water or wastewater systems to private companies using the fair market valuation procedures if the system is under financial and /or operational distress. The sponsors cite to testimony by the consumer advocate that sales always drive up rates for customers, and to protect ratepayers, those sales should be limited to systems truly in distress.

SB 28 PN 10 would provide for the administration of permits by State agencies by providing for a permit tracking system. Final passage in Senate on May 26, 2021.

SB 276 PN 258 would allow a school or municipality to opt out of paying prevailing wages. As proposed, while the opt-out provision would apply to a borough it would not apply to a municipal authority.

Act 18 of 2022 formerly SB 478 PN 503 signed by Governor Wolf on April 19, 2022, effective in 60 days. Act 18 amends the Public Contract Bid Nonreceipt Act to authorize municipal authorities to enter into negotiated service contracts where no bids for such services are received after advertising twice. The bill adds a new definition for “services” to include (1) the routine operation or maintenance of existing structures; (2) the repair or rehabilitation of existing infrastructure and utility services; and (3) those services formerly provided by public utilities such as electrical, telephone, water and sewage service. (Copy attached.)

SB 632 PN 758 would amend the Crimes Code to require persons entering a municipal building to check their firearms if the governing body of the municipality had adopted an ordinance. A municipal building is defined as the meeting place of the governing body.

Courts

Upper Pottsgrove Township v. Pottstown Borough Authority and Pottstown Borough, CCP Montgomery County No. 2021-06705, Complaint in Equity for Final Injunction to compel assignment of STSA to PAWC. We entered our appearance and filed an Answer, New Matter and Counterclaims on behalf of the Authority and the Borough. Upper Pottsgrove has filed a request for preliminary injunction and a hearing on the request has been scheduled before the Court for September 27, 2021. The hearing before Senior Judge Smyth was held as scheduled. As requested by Judge Smyth, Findings of Fact, Conclusions of Law and a Brief in support of the Authority and Borough’s position were filed today. Reply briefs will be due next week. A decision by the Judge is expected by the end of October. On October 21, 2021, Judge Smyth denied Upper Pottsgrove’s Petition for Preliminary and Permanent Injunction. Thereafter, settlement discussions ensued among counsel for the parties, and at the December meeting a Settlement Agreement and Release will be presented to the Board for approval wherein the Authority and the Borough agree to consent to the assignment of the STSA to PAWC and Upper Pottsgrove agrees to pay \$470,184.22 at closing of the sale of its sewer system to the Authority. In December and January, respectively, the Authority and Borough approved the Settlement Agreement and Release. On February 4, 2022, Judge Smyth entered an Order adopting the Settlement Agreement and Release as an Order of the Court. **Nothing further to report.**

Financial – Drafted a Credit Enhancement Agreement between the Borough and the Authority providing for a commitment by the Borough to continue to guarantee water obligations under the Management Agreement between the Borough and the Authority for calendar year 2022 for a fee of \$85,000 in order to continue the funds available to the Borough under the Management Agreement for 2022 consistent with the 2021 amount. The Credit Enhancement Agreement will be presented to the Board at the December meeting. At its December meeting, the Authority

approved the Credit Enhancement Agreement. At its January regular meeting, the Borough approved the Agreement. Nothing to report.

PennVest funding offer for the 2021 Lead Service Replacement Project - The Board declined the offer at its April meeting.

Lower, Upper and West Pottsgrove Townships

Sale of System to PAWC - Upper Pottsgrove Township accepted the proposal of Pennsylvania American Water Company to purchase its sanitary sewer system. The sale is contingent on the Township and PAWC negotiating an asset purchase agreement, and the approval of the sale by the Pennsylvania Public Utility Commission. At the request by Upper Pottsgrove, we held an initial Zoom meeting with representatives of the Township, PAWC and the Authority, and raised initial concerns on behalf of the Authority and Borough including Service Agreement issues, municipally-oriented issues and the outstanding Siphon Project costs. Additional information has been shared among the parties on these issues. Subsequent to the meeting, the Township and PAWC have agreed to initially escrow the amount of \$8,000 (\$4,000 from each) to cover Borough and Authority expenses to address issues involving the sale. At my request, a conference with PAWC and Upper Pottsgrove representatives was held on October 14th, which I reported at the October Authority meeting. We received correspondence from Township Solicitor Chuck Garner dated November 20, 2020 (copy attached) enclosing a check in the amount of \$25,350.05 representing amounts owed for reimbursement of Siphon Project costs for sewer connections since 2017. The letter stated that prior reimbursements were incorrect as the Authority was entitled to only a 68.2% portion of the reimbursement since the developer had also contributed to the Siphon Project and the Township was giving itself a credit for the alleged overpayment of prior reimbursements. In response, on January 6, 2021, I sent the attached email to the Solicitor requesting additional information regarding the Township's position that the reimbursement is to be shared with the developer. On December 11, 2020, we received correspondence from the Solicitor responding to concerns raised as to how municipal obligations under the Service Agreement were to be handled by PAWC following closing. On January 11, 2021, we held a Go To Meeting with various legal counsel for PAWC and the Township. During that conference, Solicitor Garner indicated that he was assembling information in response to my email of January 6, 2021. He also made clear that the Township did not intend to reimburse the Authority for the costs incurred for the Siphon Project following Closing since they would no longer be capable of charging a tapping. In response, I made clear that the Authority expected payment in full. Counsel for the PAWC and outside transaction counsel for the Township requested a statement of the total amount owed. Following the call, I emailed the statement prepared by the Authority Bookkeeper of amounts owed to all counsel. Counsel for PAWC proposed that a second agreement involving the Township to be called a Support Agreement would be proposed to deal with the issues under the Service Agreement that only a municipality can do, post-closing. The Authority received two letters from Upper Pottsgrove both dated February 22, 2021, one from the Board of Commissioners addressed to the Authority Board, and the second from the Township Solicitor addressed to the Authority Solicitor. The letters asserted

that any reimbursement to the Authority of Siphon Project costs would cease as of the sale of the system to PAWC, and that Upper Pottsgrove views the matter of the Siphon reimbursement as separate and apart from the sale of the system, and requested the Authority provide comments on the draft Assignment and Assumption Agreement assigning its interest in the Sewage Treatment Service Agreement (STSA) to the Township by March 31, 2021. Given the time frames in the correspondence, we drafted and sent a response to the Township Solicitor asserting the contrary view that resolution of the reimbursement is necessary prior to negotiating the terms of the assignment. Representatives of the Township appeared at the March meeting, disputing any obligation to the Authority. Additional correspondence dated March 22, 2021 from the Township Solicitor followed, which was responded to by our letter dated March 29, 2021. On April 20, 2021 we received correspondence from the Township Solicitor disputing the application of escrowed review funds to Authority expenses involving the Siphon Project dispute. Following the direction from the Board at its April meeting, on May 13, 2021 we filed on behalf of the Authority and the Borough a Protest to PAWC's Application to the Pennsylvania Public Utility Commission for acquisition of the Upper Pottsgrove system on the grounds of the unresolved reimbursement. Over the objection of the Township and PAWC, the PUC Administrative Law Judge (ALJ) allowed the Protest to stand. Testimony of the Authority Manager was submitted, along with a brief protesting the application. A recommended ALJ decision is expected later this month. A public hearing on the Application was held remotely in June, and following briefing, the ALJ issued his recommended decision to approve the Application. A decision by the PUC on the Application is expected in late September. On September 23, 2021, the PUC issued its Order approving the ALJ's recommended decision. As anticipated, the PUC Order conditions the closing of the sale on the consent by the Authority and the Borough to the assignment of the STSA. Subsequent to the October 21, 2021 decision of Judge Smyth denying Upper Pottsgrove's Petition for Preliminary and Permanent Injunction, counsel for the parties recommenced discussions regarding post-closing contractual arrangements with PAWC and the Township after the sale of the sewer system. At the December meeting an Assignment and Assumption with Support Agreement among the Authority, the Borough, the Township and PAWC will be presented to the Board for approval wherein Upper Pottsgrove assigns the STSA to PAWC with the Authority's and Borough's consent, certain terms of the STSA are amended to address revisions necessary as a result of the assignment and a Support Agreement is entered into with the Township regarding the Township's obligations under the STSA after closing. The agreements will be effective only after closing, the payment of the \$470,184.22 at closing and the necessary approval of the agreements by the PUC. In December and January, respectively, the Authority and Borough approved the Assignment and Assumption with Support Agreement. On January 26, 2022, PAWC filed the fully executed Agreements with the PUC pursuant to Section 507 of the Public Utility Code. On February 28, 2022, the PUC issued its certificate of filing. As such, the legal matters have now been concluded, and we are awaiting the scheduling of a settlement date for the sale by PAWC and Upper Pottsgrove Township. Nothing to report.

General Contracting – Nothing to report.

Sewer Treatment Plant –Nothing to report.

Sewer Collection System - Nothing to report.

Water Treatment Plant – Reviewed DEP letter of August 24, 2021 granting credit for LT2 Rule compliance under SDWA regulations, in view of pending Consent Order and Agreement. Reviewed draft Amendment to the Consent Order and Agreement to extend the compliance date to December 7, 2022. Consent Order and Agreement Amendment finalized on March 23, 2022. **DEP delivered the fully executed Amendment on March 29, 2022.**

Water Distribution System – Reviewed draft permanent Bulk Water Purchase Agreement presented by counsel for Aqua and participated in internal review and discussions and discussions with Aqua counsel. Bulk Water Purchase Agreement conditionally approved at March meeting. **Aqua delivered its signed Agreement and attachments earlier this week which are under review by the Solicitor and staff.**

Developments

Pottsgrove Hunt (formerly Kummerer) – Nothing to report.

Lankford Acquisition Company, LP renewable fuel plant – Nothing further to report.

Lower Pottsgrove Township Municipal Complex – Nothing to report.

Stormwater Fees – Cross motions for summary judgment were filed before Commonwealth Court in the West Chester Borough stormwater fee litigation, and the parties are awaiting a decision from Commonwealth Court. Argument on the cross motions was scheduled before the Court *en banc* for December 15, 2021, but the argument was continued to be relisted before the Court on the next available argument list. To date, a new argument date has not been listed. **Nothing further to report.**