



MODERNIZING THE CODE

By PSAB Staff

An overview of House Bill 1702, the Borough Code recodification project

In 2003, Helen Jackson from New Beaver Borough, Lawrence County, who then served as president for the Pennsylvania State Association of Boroughs (PSAB), called for the revision and recodification of the 1968 Borough Code. The Borough Code (Code) currently contains antiquated language (e.g., court of quarter sessions instead of court of common pleas), sections that violated state law and court cases and confusing legal jargon.

As president, Ms. Jackson, and successive presidents, appointed council members, mayors and managers to the committee in addition to PSAB staff from the research and government affairs departments to assist the committee. From her experiences with the Code, Ms. Jackson said, "I found interpreting some sections to be difficult, and a lot of information was scattered throughout the Code, so it was time to do something about it."

In late summer 2003, the first meeting was called to order at the PSAB office in Harrisburg. Tony Defilippi from Leechburg Borough, Armstrong County served as the first chairman of the Borough Code Revision Committee (Committee). Mr. Defilippi echoed similar sentiments as President Jackson by saying, "The Code was archaic, outdated and confusing. It could no longer meet the needs of boroughs anymore, so it needed revised and recodified. Now that it's been introduced in the House, I look forward to when it's passed." The initial meeting, in addition to all future meetings, included staff attorneys who were representatives of the Local Government Commission (Commission) as well as the Commission's executive director. The Commission has worked on other municipal codes and gave the Committee support and advice on ensuring



THE COMMITTEE PROCESS Over time, the Commission, PSAB staff members and a number of borough officials, ranging from council members and mayors to managers, participated in committee meetings

smooth passage of the proposed changes. Committee members were guided to understand that neither fundamental changes in borough government structure nor controversial issues would be acceptable to the state legislature.

When Mr. Defilippi's chair term expired, Scott Sistik from New Stanton Borough, Westmoreland County was appointed chairman. The Committee averaged three meetings per year, and suggestions were solicited from members a month prior to each meeting. Other stakeholder groups were also provided the opportunity to give the Committee their views. The most common member suggestions included raising the bid limit thresholds, allowing mayors to keep wedding fees, exempting the purchase of electricity from bidding requirements, and authorizing solicitors to prosecute serious ordinance violations under the Rules of Criminal Procedure.

At each meeting the committee reviewed current language, section by section, to determine whether

amendments or even repeals were warranted and the participating attorneys reviewed suggestions for legality. On occasion, the issues were more complex, and the Commission had to meet and discuss the proposed language with a state agency to ensure that PSAB was not usurping the state's authority (e.g., mine inspections). The Commission was an asset to the process as they acted as a liaison between the Committee and state agencies in addition to providing advice.

The Committee's dynamics created a cooperative atmosphere in which each member's suggestions were treated respectfully and ideas built upon one another, and the members each learned about issues in each other's boroughs. While every official brought his own ideas and perspectives to the table, they were always open to suggestions for the greater good.

The last meeting was held in fall 2010, and the Committee was discharged of its duties as it was time for the Commission to draft the



NECESSARY CHANGE Due to a 2003 Pennsylvania Supreme Court Case involving South Newton Township, Section 904 of the Borough Code must be removed

Borough Code bill for introduction into the General Assembly.

Why Recodify the Borough Code?

Black's Law Dictionary defines codification as the "process of collecting and arranging the laws of a country or state into a code, (i.e., into a complete system of positive law, scientifically ordered, and promulgated by legislative authority)." And Webster's Dictionary defines prefix "re" as "again; for a second time; anew; in a new or different form."

The recodification of the Code means that PSAB's committee added legislative acts not previously incorporated within the main text (from the various supplements) and rearranged current material to create consistency. The Code was first enacted in the early 19th century and then recodified numerous times; however, the last codification completed was in 1966.

Recodification is necessary and beneficial due to a number of changes that occurred during

the past four and a half decades because after the Constitutional convention in 1968, portions of the Code were invalidated. For instance, Article IV (Change of Boundary Limits) was in conflict with Article IX (Local Government) of the Pennsylvania Constitution. This complete article will be repealed.

Also, new court decisions since 1966 require some provisions of the Code to be repealed, such as Section 904 which allows council to remove a council member for missing two successive regular meetings.¹ Currently, the only lawful remedy is for the courts to remove an official for conviction of certain crimes under the Pennsylvania Constitution "embezzlement of public moneys, a felony, perjury or an infamous crime."²

In addition, there are several provisions addressing the same topic found in other sections of the

¹The Pennsylvania Supreme Court in *South Newton Township Electors v. South Newton Township Supervisors*, Bouch, 838 A.2d 643 (Pa. 2003), held that Section 503 of the Second Class Township Code relating to removal of township officers for failure to perform duties was unconstitutional as violating Article VI, Section 7 of the Pennsylvania Constitution.

²Article VI, Section 7

Code. For instance, Article I Section 1006 (4) of the Code describes how to advertise and enact an ordinance; however, the fines for violating ordinances are found in Article XXXIII (Enforcement of Ordinances). With the recodification project, all provisions addressing ordinances will be "ordered" and relocated to the same article. The same is true of the provisions on the auditors; there will be a new subdivision that includes every provision relevant to auditors.

The recodification will not only update the Code, but will also make it flow more logically.

The Role of Council in Public Policy

What is public policy? Who makes it, how is it made, where does it occur and why is it created? The borough council, which is the community's governing body, determines public policy. Whether planned or unplanned, public policy is the product of those who govern, and the individuals as well as the body are often held accountable

for it. Public policy is the product of council when it uses its legal powers to manage the affairs of the borough. It is the result of the decisions that council makes, and these decisions reflect the desires council has for the well being of the community.

It is important for all borough officials to understand this dynamic because public policy, through ordinances and resolutions, is a role of local governance. It is useful to be familiar with the Code and other laws in order to develop appropriate, just and legitimate public policy.

Public policy, or for the sake of brevity, policy is not crafted in a vacuum; it is crafted by governing officials using powers granted to them by law and under public scrutiny. Powers granted to borough officials are mainly found in the Borough Code. If not enumerated in the Borough Code, officials must research the Pennsylvania Code and/or other volumes of law to secure their authority to act on a specific issue. As officials identify laws or statutes granting the power to regulate an area of the law, they secure what is called “police powers.” These enabling powers are used to develop ordinances or resolutions addressing the subject matter at issue. Borough council enacts ordinances and resolutions to regulate areas of law impacting the public, and when viewed holistically, including a broad range of issues, initiatives, ordinances and resolutions, the governing body’s perspective on public policy emerges.

Public Policy Issues & Recodification

The Code is the law for borough governance, and the statutory guidance it establishes provides the legal tools to borough council to manage and govern. While the Code is a legally binding volume of law, the choices of those who govern, the borough council, are reflected in ordinances enacted. When the

Code is revised and recodified to remove archaic language, new language will be inserted in the Code addressing issues important to governance. As a result, borough councils, through an updated Code, will obtain a clearer understanding of the statutory authority or powers needed to address public policy issues important to their borough and its residents.

It is important to maintain the caution offered early in the revision process by the Commission and select lawmakers that a recodification of any municipal code should be absent of controversial or “unsettled” issues. This does not mean PSAB is unwilling or unable to address those particular issues, but rather, to paraphrase some “unsettled issues in the bill will gum-up and delay the entire process.” Moreover, borough officials should know these issues are being pursued; PSAB is currently addressing these issues in separate bills that provide those parties with divergent views the opportunity to negotiate, develop agreed-to language and eventually eliminate issues of contention. This approach gains bi-partisan support for solutions to once controversial issues without delaying the entire Code bill.

The Committee’s work included the removal of out-dated language, reorganization of sections, raising or removing dollar amounts for appropriation limits, deleting sections overturned by case law and incorporating relevant case law. In addition, updating sections with new language and incorporating common provisions from other recently recodified municipal codes are other changes to benefitting the Code. Some of those changes with limited detail are following.

Code changes within Articles I through VI, which deal primarily with borough creation, incorporation and alteration, are limited to

incorporating language from settled court cases defining boundary and residence status. These changes add significant guidance and clarity to future establishment of borough communities. Article VII, which originally authorized the creation of and outlined the purposes for the PSAB, is amended to authorize compensation for attendance at not only the Annual Conference, but educational training and association committee meetings as well, provided the expenses are approved by the borough. Article IX (Vacancies in Office) has two key changes: (1) Section 901 stipulates that a person who has failed to file an affidavit of residency is not qualified to hold borough office; and (2) Section 904, which enables council to declare a council seat vacant due to failure to attend borough council meetings, is repealed as a similar clause in the Second Class Township Code was declared unconstitutional by the Pennsylvania Supreme Court in 2003.³

Several substantial changes under Article X, which defines powers and duties of elected borough officials, benefit boroughs. Section 1001 is amended to allow council members to participate in meetings by telecommunication device provided a physical quorum has been established; this language incorporates the 1992 *Babac* decision.⁴ The constraint on mid-term council salary changes as a result of the 2009 Pennsylvania Supreme Court decision in *Buckwalter v. Borough of Phoenixville*⁵ is also addressed in this section. Lastly, provisions regulating the passage, approval and veto of ordinances along with their

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⁴*Babac v. Pennsylvania Milk Marketing Board*, 531 Pa. 391, 613 A.2d 551 (Pa. 1992), holding that official action can take place at a public meeting if a quorum is established by members who are not physically present but participate in the meeting by speakerphone.

⁵*Buckwalter v. Borough of Phoenixville*, 985 A.2d 728 (Pa. 2009) which held that Article III, Section 27, of the Pennsylvania Constitution, which provides that no law shall increase or decrease the salary of a public officer after election or appointment, applies to ordinances.

recording, advertising, certification and appeals have been moved to a newly created Article XXXIII (Ordinances), and the provisions relating to the mayor have been relocated to a new article as well, Article X-A (Mayor).

Article X-A consolidates the provisions for the office of mayor. New in the article is the ability for the mayor to accept an honorarium for the solemnization of a marriage. The new article, by consolidating the provisions regulating the powers and duties of a borough mayor, now places all pertinent information impacting the mayor's office into one, central location in the Code. Article XI, regulating the powers duties and rights of appointed borough officers and employees, contains clarifying language in Section 1104(c) stipulating that no mayor or council member may serve as a borough police officer. Section 1121 delineates council powers over the police department, and Sections 1141 and 1142 enable council to establish an employment contract with its borough manager.⁶ Finally, of note in Article XI are the changes to civil service concerning promotions of officers currently under the employ of the borough.⁷

Under Article XII (Corporate Powers), boroughs find the powers they maintain to manage their community. The article itself has been divided into three sections, General Powers (§ 1201), Specific Powers (§ 1202) and Residual Powers (§ 1203). One notable General Power change under Section 1201 is the permission to use electronic auction services that comply with the Public Notices Law for the sale of borough personal property.⁸ This change is patterned after Section 1504(d) of the Second Class Township Code thereby giving boroughs like

The most notable changes that occur under Section 1202 (Specific Powers) are as follows:

- The ability to prescribe fees for EMS, fire, or traffic control expenses incurred by the borough in response to traffic accidents⁹
- The power to create an operating reserve not exceeding five percent of the boroughs general fund¹⁰
- Expanding intergovernmental cooperative agreements to include regional police services¹¹
- The power to provide municipally operated cable television services provided they comply with current federal and state law¹²
- Boroughs may file suit to recover claims from the time period when an account becomes delinquent instead of waiting to file a lien on the account

Concluding Article XII is the creation of a new Section 1203 (Residual Powers). This new section breaks out the old Section 1202 (74), general powers clause, that gave authority to boroughs to enact ordinances protecting the health, safety and welfare of its community and its residents, but were not enumerated under specific powers. In other words, the newly entitled section highlights the power reserved for the borough to enact ordinances that are not expressly stated or denied by the current language of the Code. Specifically, the new section states "council may make and adopt all ordinances, bylaws, rules and regulations not inconsistent with or restrained by the Constitution of Pennsylvania and the laws of this Commonwealth." While this is a newly titled section, it is not

new language; it is simply given a new section to provide a clearer understanding of borough powers.

Taxation and Finance Powers under Article XIII remain relatively unchanged except for limited changes to a narrow segment of our boroughs. Under Section 1308, proposed annual budgets under \$50,000 will no longer need advertised; however, it must remain available for inspection at the borough secretary's office. Research tells us that 41 boroughs will benefit from this cost saving provision. A technical note of interest in the article is Section 1310, which allows for the adoption of the budget by motion of council.

Article XVI, formerly entitled Land Subdivision, will be removed from the Code as Act 247, the Municipalities Planning Code (MPC), repealed it in 1968. The provisions of Articles XVII (Streets) through XXII (Storm Sewers and Water Courses), dealing primarily with infrastructure, were reorganized to dictate the legal steps necessary for the opening, dedicating and vacating of streets and roadway infrastructure. Especially true of Article XVII, the redraft harmonizes procedures and timing for opening, laying out and vacating streets with the MPC. Similar editorial changes are reflected in Articles XVIII through XXII. Article XXIII, regulating underground conduits, is repealed, and its sections are relocated to Article XXII Section 1202 (64).

Article XXIV is renamed from Public Service to Water System as it will only apply to water supply and systems. Sections relating to gas works and gas wells have been moved to Section 1202 (60). Airports, moved from the former Public Service article, are incorporated under a newly created Article XXV-A. Also a new article, Article XXIV-A is created to provide for

⁶Act 54 of 2011.

⁷Act 91 of 2010.

⁸Act 12 of 2011.

⁹Article XII Section 1202(1)

¹⁰Article XII Section 1202 (23)

¹¹Article XII Section 1202 (24)

¹²Article XII Section 1202 (63)

the current language in former subdivision (b) of Article XXIV. It regulates the manufacturing and supply of electricity and provides for new, expanded language on electric deregulation and purchase as a result of powers obtained from Act 87 of 2010. Article XXV, Public Buildings and Works, is repealed and its contents moved to Article XII Section 1202.

Articles XXVI through XXVIII remained relatively unchanged with exception of removing the limitation on appropriations for cemeteries (XXVIII). Articles XXXII through XXXIII are reasonably yet substantially, amended. While the former Articles XVII (Land Subdivision) and XXXII (Zoning) are repealed due to the MPC, a new, comprehensive Article XXXII-A, entitled Uniform Construction Code, Property Maintenance Code and Reserved Powers, is provided in their place. This language recognizes and stipulates the primacy of the Uniform Construction Code and permits boroughs to adopt property maintenance ordinances. In addition, the article incorporates recent authorizations for blight, revitalization and conservatorships.

Article XXXIII, entitled *Ordinances unites all provisions related to ordinances including:* publication, enactment, approval, mayoral veto, recording, advertising and proof of ordinances, and codification and appeals. Article XXXIII is probably the most consequential alteration made to the Code as of this time because it will require council to formally enact an ordinance for every legislative action. These include, but are not limited to, tax ordinances, general appropriations to authorized expenditures, capital expenditures not payable out of current funds, actions exercising police powers, land use regulations, and enactment of standard



HONORARIUM ACCEPTANCE Article X-A consolidates the provisions for the mayor's office and provides the ability for a mayor to accept an honorarium for performing a marriage ceremony

codes. Resolutions will consist of ceremonial and congratulatory expressions of council's good will, statements of policy, and approval of formal agreements (other than purchasing). In addition, the approval of administrative rules, regulations and bylaws arising out of state statutes or borough ordinances and the appointment of certain positions will also require a resolution. However, council's approval of acquisition, disposition and leasing of real or personal property may continue to be accomplished by resolution.

Important policy issues are in the forefront with this recodification of the Code. These changes will become the statutory authorization for borough officials in developing new, amended or revised ordinances, and they serve as a tool for council to implement the regulatory public policy. Mr. Sistik succinctly stated, "Local government officials across the Commonwealth are guiding their communities by the Code, so modernizing it will be

beneficial to those who dedicate their time to effective governance and bettering their communities."

The Process

Just as with any piece of legislation, the Code must go through the legislative process and be signed by the governor. The legislative process with any bill can be a tricky mine field to navigate, let alone a 480 page bill. This process will be greatly enhanced with the assistance of the bi-partisan Commission. The Commission approved the sponsoring of the project on June 8, 2011. Therefore, the legislation will become an official bill sponsored by members of the Commission, otherwise known as a, "Commission bill." When a piece of legislation comes before the General Assembly as a Commission bill, it comes with enhanced credibility. With 75 years of service to the General Assembly on local government matters, the Commission has built an impeccable reputation. Members of the General Assembly



PROVIDING ASSISTANCE The Borough Code bill, or House Bill 1702, is currently in the House of Representatives, so borough officials are encouraged to contact their House member and ask for support

and their staffs know these bills are thoroughly researched and do not contain any controversial elements.

With the approval of the Commission to sponsor the bill, the project was introduced in the Pennsylvania House of Representatives by Representative Mauree Gingrich (R-Lebanon) as House Bill 1702. Representative Gingrich has experience in borough government having served 12 years on the Palmyra Borough Council, including 9 years as council president, so she was very willing to serve as the bill's lead sponsor. Also cosponsoring the bill are all of the remaining members of the Commission from the House of Representatives including Representative Chris Ross (R-Chester), Representative Tom Creighton (R-Lancaster), Representative Robert Freeman (D-Northampton) and Representative Steve Santarsiero (D-Bucks).

Now that the bill is in legislative format and formally introduced, it has been referred to the House Local Government Committee. The committee chairman Representative Creighton already expressed an interest in holding an informational meeting with committee members on the bill. An informational meeting will help the committee become acquainted with the bill and different nuances of the new code. Once the members have a level of comfort with the bill, and can thoroughly review the changes the committee could consider it along with any changes they deem necessary. After this the bill, will be considered by the full House. If approved by a majority of the House, the bill will be sent to the Senate for their concurrence.

So, how long will this process take? The legislative process has the potential to be rather long and drawn out. Most recodification

projects take at least two sessions (four years) to enact into law. We hope to beat the average with swift consideration this fall in the House and possibly the Senate next year. That will take some assistance from borough officials across the state. Please visit PSAB's Government Affairs page for more information on House Bill 1702. We encourage you to contact your House member and urge them to support this worthwhile project. If you would like to discuss House Bill 1702 or have assistance preparing and drafting letters of support, please contact Ed Troxell at 800-232-7722 ext. 21 or etroxell@boroughs.org or Ron Grutza at ext. 44 or rgrutza@boroughs.org. More detail on the bill can be found on the Commission's website at www.lgc.state.pa.us/whats_new_borough_code.shtml. **(B)**