
MEMORANDUM

To: Borough of Chambersburg
Re: Statutory authority to lay out, establish, and compel construction of
sidewalks
Date: August 4, 2017

INTRODUCTION:

During the July 20, 2017, Curb and Sidewalk Policy Compliance Committee meeting, Councilman Leedy made a presentation regarding requests for sidewalk waivers. Included in that presentation was a letter from the "Property and Business Owners of Industrial Drive," as well as various supporting materials. The Borough Manager asked our office to prepare a legal memorandum regarding the legal considerations presented by Councilman Leedy with respect to the Borough of Chambersburg's statutory authority to compel the construction of sidewalks.

BACKGROUND:

Pursuant to Title 8 (the Borough Code), the Borough of Chambersburg has express statutory authority to lay out, establish and compel construction of sidewalks within the Borough.¹ That same section also permits the Borough to require property owners to construct gutters and surface water drains along a street.² The burden of compliance falls on the property owner; if the property owner fails to comply with Section 1801, the

¹ 8 Pa.C.S. § 1801(a).

² *Id.*

Borough may, after notice, perform the necessary work at the property owner's expense.³ In addition, by ordinance, the Borough of Chambersburg enacted legislation detailing its authority to compel existing sidewalks and curbs to be repaired.⁴ Specifically, § 254-29 of the Borough's Code of Ordinances provides that:

- A. Property owners on whose property there exists public curbs and sidewalks and/or public easements shall be responsible for paving curbs and sidewalks and for maintaining curbs, sidewalks, and public easements in good repair, in safe condition and free of vegetation or other obstruction.
- B. The operation and maintenance of stormwater facilities related to public walkways within public easements shall be the responsibility of those property owners upon whose private property the walkway is located.⁵

Furthermore, the Borough of Chambersburg has enacted a Policy Statement regarding sidewalks and curbs in the Borough.⁶ This policy statement serves numerous purposes, including espousing the procedures by which the Borough will monitor and enforce compliance with the sidewalk and curb standards set forth in the Borough's Code of Ordinances.

We were asked to address numerous questions that arose following the presentation of information by Councilman Leedy. These questions are:

I. Is the Borough's authority to compel the construction of sidewalks limited to situations where safety concerns exist?

The provision granting the Borough statutory authority to compel the construction of sidewalks is quite broad. Neither the statute, nor any case law, limit the Borough's authority to compel sidewalk construction to only situations where safety issues have been raised or documented. While safety is obviously a factor the Borough

³ 8 Pa.C.S. § 1805(a).

⁴ See Borough of Chambersburg Code of Ordinances, Chapter 254, Article V.

⁵ Borough of Chambersburg Codes of Ordinances at § 254-29.

⁶ The initial policy statement was enacted in 2003 and has been revised and supplemented numerous times thereafter.

is free to consider in making sidewalk location determinations, safety concerns are not a prerequisite to the Borough exercising its authority in this area.

II. Is the Borough’s authority to compel the construction of sidewalks limited to situations where public perception indicates pedestrian walking areas are needed?

Similar to the discussion above, neither the relevant statute nor case law impose on the Borough an obligation to limit sidewalk construction to situations where the public has indicated a need for pedestrian walking areas. Clearly, the need for pedestrian walking areas, or a lack thereof, are factors that a Borough is free to consider in making a determination regarding compulsory sidewalk construction, however, it is not a prerequisite to the Borough exercising its authority in this area.

III. Is the Borough’s authority to compel the construction of sidewalks impacted in any way by zoning ordinances or a property’s land use?

Zoning ordinances have no impact on the Borough’s authority to compel sidewalk construction. In addition, the use attributed to the land has no impact on the Borough’s authority in this area.

IV. Is the Borough’s authority to compel the construction of sidewalks limited by stormwater management considerations?

While stormwater management is an issue the Borough can consider hand-in-hand with sidewalk and curb construction determinations, the Borough is afforded a separate and distinct authority to require property owners whose property abuts a street to construct a gutter or surface water drain.⁷ Therefore, the Borough’s authority to compel sidewalk construction is not limited by stormwater management concerns.

⁷ 8 Pa.C.S. § 1801(a)

V. Is the Borough's authority to compel the construction of sidewalks limited to situations where it would not disturb the aesthetic appearance of a neighborhood? Also, is it limited by consideration of whether utility poles and mailboxes are in the right of way?

The aesthetic appearance of a neighborhood has no bearing on whether the Borough has the legal authority to compel sidewalk construction. Aesthetic appearance is a factor the Borough may consider if it so desires, however, making these determinations based on differing levels of neighborhood aesthetics could subject the Borough to challenges based on disparate treatment. As previously communicated by Memorandum dated October 18, 2016, enforcing the Sidewalk and Curb Policy arbitrarily, or based on subjective standards, could open the policy to challenges. Applying sidewalk construction determinations in a uniform manner, without any consideration of aesthetics, is the fairest and most prudent course of action. Similarly, the Borough is under no obligation to consider whether utility poles and mailboxes are limited within the right-of-way.

VI. Does a decision by a prior Council to waive compulsory sidewalk construction in certain situations bind a later Council from compelling sidewalk construction in the future?

It is a well-settled principle of law that a legislature does not have the power to bind future legislatures from enacting general legislation. Specifically, the United States Supreme Court has stated, "No legislature can curtail the power of its successors to make such laws as they may deem proper in matters of police power."⁸ The Court has reasoned that:

"Every succeeding Legislature possesses the same jurisdiction and power...as its predecessors. The latter must have the same power of repeal and modification which the former had of enactment, neither more nor less. All occupy, in this respect, a footing of perfect equality."⁹

⁸ *Stone v. Mississippi*, 101 U.S. 814 (1880).

⁹ *Newton v. Commissioners*, 100 U.S. 548, 559 (1879).

Furthermore, Chief Justice Roger Taney, writing for the Court in *Ohio Life Insurance & Trust Co. v. Debolt*, concluded that:

“The powers of sovereignty confided to the legislative body are undoubtedly a trust committed to them, to be executed to the best of their judgment for the public good; and no one Legislature can, by its own act, disarm their successors of any of the powers or rights of sovereignty confided by the people to the legislative body...”

Therefore, a prior Council’s determination regarding the necessity of sidewalk construction in a certain area has no legal impact on the power of current or future iterations of Borough Council to exercise its statutory authority regarding sidewalk construction.

VII. Does a property owner’s ability to pay for the costs of constructing the sidewalk have any impact on the Borough’s authority to compel construction?

No, whether or not a property owner can afford the costs of constructing a sidewalk is irrelevant to the question of whether the Borough has the authority to compel the construction of the sidewalk. The Borough can, and has, chosen to make low interest loans available to residents who may not be able to front all of the costs of the sidewalk construction. Obviously, cost is something that Council has considered and often encourages residents to cooperate in bids for construction to lessen the financial impact.

VIII. Does the potential liability of a property owner that may accrue from constructing sidewalks on his/her property have any impact on the Borough’s authority to compel the construction of sidewalks?

No, neither the statute or relevant case law, nor the Borough’s Sidewalk ordinance, indicate that the Borough must consider potential liability issues on behalf of the property owner. The law regarding liability is well-settled. If you have a sidewalk

you must maintain it; if the Borough compels construction it must ensure compliance with sidewalk standards and specifications.¹⁰

IX. Is the Borough's authority to compel the construction of sidewalks limited to situations where the property owner supports the decision?

No, neither the statute or relevant case law, nor the Borough's Sidewalk ordinance, indicate that the Borough must consider public support for or opposition to the sidewalk construction project.

X. Do any previous subdivision plans, land development plans, land use permits, annexation plans, indentures, or annexation ordinances which appear to "waive" the Borough's authority to compel sidewalk construction bind future Town Councils?

None of the subdivision plans, land development plans, land use permits, annexation plans or annexation ordinances limit in any way the current Town Council's authority to compel sidewalk construction. In addition to these documents, references have been made to the Indenture agreements between the Borough and various property owners in 1967 related to the annexation of parts of Guilford Township, which require significant analysis.¹¹

Each of these Indenture agreements contains the following language:

"In the event of sub-division by first parties (the property owner), all water and sewer facilities and all streets, curbs and sidewalks are to be constructed and paved entirely at the cost of the sub-divider."

¹⁰ *Koerth v. Borough of Turtle Creek*, 49 A.2d 398, 398 (Pa. 1946).

¹¹ The following are the specific Indenture agreements referred to throughout this Memorandum:

1. March 7, 1967 Indenture between Theodore K. Nitterhouse and Nellie E. Nitterhouse, and the Borough of Chambersburg;
2. March 6, 1967 Indenture between Elmer W. Martin and Lucy Blance Martin, and the Borough of Chambersburg;
3. March 23, 1967 Indenture between Clarence A. Rotz and Mary B. Rotz, and the Borough of Chambersburg;
4. March 29, 1967 Indenture between Ray C. Zeger and Virginia M. Zeger, and the Borough of Chambersburg.

Whether a governmental body may enter long-term contracts binding upon its successors depends on whether the contract serves a governmental or proprietary purpose. In making that determination, our courts look at the following three factors:

1. Whether the activity is one that government is not statutorily required to perform;
2. Whether the activity also may be carried on by private enterprise; and
3. Whether the activity is used as a means of raising revenue.¹²

If the answer to any of those questions is “yes”, then the governmental body has acted in a proprietary function, and the contract is binding on successive legislative bodies. If the answer to all three questions is “no”, then the governmental body has acted in a governmental function, and the contract cannot bind future governmental bodies.¹³

Here, the purpose of the 1967 indentures was to make agreements related to certain properties in Guilford Township annexed by the Borough. However, the Borough was not required, under the relevant (and now-repealed) statutes pertaining to annexation, to make these indenture agreements with the owners of annexed property. Thus, the indentures would seemingly run afoul of the first prong of the above-referenced test. As annexation cannot be carried on by a private entity, and as the Borough did not annex the properties for a means of raising revenue, the second and third prong are likely not implicated.

The Pennsylvania Supreme Court, in *Lobolito, Inc. v. North Pocono School District*, 755 A.2d 1287 (Pa. 2000), was tasked with determining whether an agreement between a school district and a developer whereby the school district promised to build a new school and the developer promised to construct and operate a sewage plant to service the new school constituted a “governmental” or “proprietary” function. The Court held that the “driving force” behind the agreement was the construction of the new school, an activity which clearly constituted a governmental function.¹⁴ In reaching this

¹² *Beaver Dam Outdoors Club v. Hazleton City Authority*, 944 A.2d 97 (Pa. Cmwlth. 2008); *Municipal Authority of Borough of Edgeworth v. Borough of Ambridge Water Authority*, 936 A.2d 538 (Pa. Cmwlth. 2007).

¹³ *Id.*

¹⁴ *Lobolito, Inc. v. North Pocono School District*, 755 A.2d 1287 (Pa. Cmwlth. 2000).

conclusion, the Court placed little importance on the above-cited three prong test, and instead reasoned that but for the school being built, the proprietary function of the provision requiring sewage treatment services would be devoid of any meaning.¹⁵

Applying this “driving force” analysis to the present issue appears to indicate that the Borough’s indenture agreements from 1967 constitute a governmental function rather than a proprietary function. The driving force, or crux, of the 1967 agreement was the Borough’s statutory authority to annex property in contiguous Townships. The specific provisions in the indenture regarding easements and utility services are completely incident and ancillary to the purpose of annexation. Much like the sewage treatment services that were irrelevant but for the construction of a new school in *Lobolito, Inc.*, the provision regarding sidewalk construction in the indentures is irrelevant but for the Borough’s statutory authority to annex property and regulate it pursuant to statutory authority. Therefore, the indentures do not restrict the current Town Council from exercising its statutory authority under Section 1801.

In addition, there is no significant concern with property owners attempting to bring a breach of contract claim against the Borough based on 1967 indentures. The current property owners likely are not intended third-party beneficiaries to the contract, and thus, would not have standing. Our courts have adopted the Restatement (Second) of Contracts, § 302 (1979), as a guide for analysis of third party beneficiary claims in Pennsylvania.¹⁶ Thus, a relevant two-part test is utilized to determine when a party has standing as a third party beneficiary in instances where the contract is silent as to third party beneficiaries, as follows:

1. The recognition of the beneficiary’s right must be “appropriate to effectuate the intention of the parties,” and
2. The performance must “satisfy an obligation of the promisee to pay money to the beneficiary” or “the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.”¹⁷

¹⁵ *Id.* at 1291.

¹⁶ *Guy v. Liederbach*, 459 A.2d 744 (Pa. 1983).

¹⁷ Restatement (Second) of Contracts, § 302 (1979).

If a party satisfies both parts of the test, a claim may be asserted under the contract.¹⁸

Here, in regards to the 1967 indenture agreements, it does not appear that the recognition of the beneficiary's right to rely on the contract is "appropriate to effectuate the intention of the parties." The agreements, especially the provisions detailing sidewalk construction, mention no third parties, either expressly or impliedly, and the intention of the parties – namely memorializing certain easements and rights-of-way and other understandings and agreements related to land development – can be effectuated without granting third party beneficiary rights to the current property owners. In addition, the 1967 indentures contain no obligation for the promisees to pay money to the beneficiary, nor do the circumstances indicate that the promisees – the property owners – intended to give the benefit of the promised performance to third parties who would own the property in the future. Rather, any benefit the third parties have received, or could have received from the indenture agreements, were purely incidental to the agreement between the Borough of Chambersburg and the property owners at the time. For these reasons, there is little likelihood that a court could find that the current property owners would have third party beneficiary status under the 1967 indentures to bring a breach of contract claim against the Borough.

Thus, based on the above principals, it appears the Borough acted in a governmental function when it entered into these indenture agreements, the current property owners are not third party beneficiaries to the contract, and the Borough is not limited by the 1967 indentures in regards to its statutory authority to compel sidewalk construction.

¹⁸ *Guy*, 459 A.2d at 751.

XI. Is a current property owner able to shift responsibility to comply with the Borough's compulsory sidewalk construction order to a previous owner or developer?

Section 1801 speaks in the present tense when imposing the responsibility to construct sidewalks on the owner, as follows:

"The borough may also require owners of property abutting any street or State highway to grade, construct, drain, pave, and repave the sidewalk, curb or gutter..."

In addition, Section 1805 states that the Borough may conduct the work itself "at the cost of the owner."

Therefore, because the relevant statutes clearly only implicate current owners of property, and make no mention of previous owners of property, it is the responsibility of the owner of the property at the time the Borough orders sidewalk construction to comply with the order.

XII. Is each Council free to make its own determinations as to where and when sidewalk construction is necessary?

The statutory provision affording the Borough the authority to compel sidewalk construction is not a "use it or lose it" power. One Town Council deciding not to compel sidewalk construction on a certain street or area does not preclude a future Town Council from making a different determination where it deems it necessary. The current Town Council, and any future iterations thereof, are not restricted in their exercise of statutory authority to determine whether sidewalks are necessary in a certain area by a prior Council's determination, subject to the uniformity requirements previously discussed.

XIII. Is Council required to raise taxes and make all citizens pay for sidewalk construction throughout the Borough?

The statutory authority afforded to the Borough pursuant to Chapter 18 (relating to sidewalks) of the Borough Code allows the Borough to ensure that necessary sidewalk construction is effectuated without raising taxes. Sections 1801 places the costs of constructing the sidewalk on the property owner. Even if the property owner fails to comply with the Borough's order, Section 1805(b) permits the Borough to conduct the work itself and collect the cost from the property owner.

In fact, the Borough Code contemplates throughout that the property owners who benefit from an improvement can be required to pay for it. The Borough Code allows the Borough to assess the cost of streets, sidewalks, sewers, water lines, and stormwater systems to the adjacent properties. Pursuant to 8 Pa.C.S. § 1761, the Borough has the statutory authority to improve streets within the Borough and assess and collect the entire costs of improvement, in accordance with Chapter 21A of the Borough Code, from the owners of real estate abutting the improved street. Chapter 21A of the Borough Code provides the Borough with the authority to pay the costs of any public street improvement work from:

1. General Borough funds;
2. Special Borough funds created for that purpose; or
3. By assessment of costs against the benefited properties either on the front foot or benefit conferred method of assessment.¹⁹

The Borough Code also specifically authorizes the Borough to assess property owners for the costs of the construction or improvement of sanitary sewers and treatment works,²⁰ stormwater sewers and watercourses,²¹ water mains,²² shade trees and sidewalks disturbed by shade trees,²³ and street lighting installations.²⁴

¹⁹ 8 Pa.C.S. § 21A01(a)(1-3).

²⁰ 8 Pa.C.S. § 2001(a).

²¹ 8 Pa.C.S. § 2203

²² 8 Pa.C.S. § 2408

²³ 8 Pa.C.S. § 2720.2(a-b).

²⁴ 8 Pa.C.S. § 21A01(a).

XIV. Does Council have the authority to direct the construction of a sidewalk itself when a property owner has failed to comply with the Borough's order requiring sidewalk construction?

Yes, Section 1805 provides the Borough with the authority to do the work itself and collects any and all costs for the sidewalk construction, plus an additional 10% of the cost, from the property owner, together with all charges and expenses, when the owner has failed to comply with the thirty (30) day notice, required by Section 1805(b).

Should you require any further research on these matters, please feel free to contact me.