

# **Court Strikes Down Home Rule Municipality's Right-of- Way Ordinance as Preempted by PUC**

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By **Krista-Ann M. Staley and Jenn L. Malik** | October 17, 2019 at 11:47 AM



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**‘PPL Electric Utilities v. City of Lancaster’**

On Aug. 20, the Pennsylvania Supreme Court invalidated a municipal ordinance that imposed additional controls on state-regulated public utilities for use of the municipality’s rights-of-way, in *PPL Electric Utilities v. City of Lancaster*, No. 55 MAP 2017 (Pa. 2019). By way of background, the city of Lancaster enacted a local ordinance in 2013 implementing a comprehensive right-of-way management program, including granting the city certain powers to regulate public utilities and charge an annual occupancy fee. The city relied upon its authority under the Home Rule Charter and Optional Plans Law, 53 Pa.C.S. Sections 2901-3717, and the Third Class City Code, 53 P.S. Sections 35101-39701 (TCCC), for its authority to adopt the ordinance.

PPL Electric Utilities Corp. challenged the ordinance, arguing that the Public Utility Code and the regulations promulgated by the Public Utility Commission

(PUC) preempted local authority. The ordinance provisions at issue were as follows:

- Section 263B-3 of the ordinance permitted the city to inspect public utilities and confirm their compliance with the code and the PUC regulations (inspection provision).
- Section 263-B4(6) of the ordinance permitted the city to remove, relocate or reposition utilities in the right-of-way (relocation provision).
- Section 263D-1 of the ordinance authorized the city to impose fees for violations not in the PUC's exclusive jurisdiction (penalties provision).
- Section 263B-5 of the ordinance permitted the city to impose a maintenance fee on public utilities for use of the city's rights-of-way (maintenance fee provision).

In February 2014, PPL filed a petition for review in the Commonwealth Court's original jurisdiction seeking declaratory and injunctive relief against the city. The PPL argued that: the regulatory authority of the PUC and the code preempted the city's ordinance, that the PUC was the only authority empowered to oversee the location, construction and maintenance of public utilities, and that the city had exceeded its authority under the Municipalities Planning Code, 53 P.S. Sections 10101-11202 (MPC) and the Business Corporation Law of 1988, 15 Pa.C.S. Sections 1101-4146 (BCL).

The Commonwealth Court entered summary judgment in PPL's favor with respect to all challenges, except that concerning the maintenance fee provision, on the basis that same were preempted by the code and the PUC regulations. Analyzing preemption principles, the Commonwealth Court recognized that "the courts of this commonwealth have long recognized the intent of our General Assembly that public utilities be regulated on a uniform basis by a statewide regulator and not be subject to the varied regulation of the many cities, townships and boroughs throughout the commonwealth." The Commonwealth Court held that the code and PUC regulation preempted the ordinance, with the exception of the maintenance fee provision. Regarding

that provision, the court held that “imposing fees to offset locally incurred maintenance expenses does not constitute impermissible regulation of public utilities.” Both parties appealed the commonwealth’s holding to the Pennsylvania Supreme Court.

The Pennsylvania Supreme Court began by giving an overview of preemption principles: “contemporary expressions of the three varieties of preemption are legion, and they distill reams of case law to the proposition that preemption may occur when the legislature has expressly stated its intention to displace local regulation (express preemption), or has occupied the regulatory field in question (field preemption), or, finally, where the local regulation would conflict with or confound rather than advance the operation of the state law in question (conflict preemption).” Next, the court addressed its prior decision concerning utilities regulation and preemption in *Borough of Lansdale v. Philadelphia Electric*, wherein the court, on the basis of preemption, struck down a county ordinance that prohibited the construction of a pipeline without submitting plans to the county. The court also discussed its decision in *Duquesne Light v. Upper St. Clair Township*, wherein it held that a township could not by ordinance prevent a public utility from exercising its eminent domain powers on the basis that such an action is preempted by the code.

Turning to the city’s appeal of the Commonwealth Court’s grant of summary judgment for PPL’s challenge to the inspection, relocation, and penalties provisions of the ordinance, the Pennsylvania Supreme Court invalidated the city’s ordinance on the basis of field preemption. The city argued that the court was obliged to apply a conflict preemption analysis, and that the ordinance should survive such analysis because its terms do not directly conflict with the code. The court was unconvinced by the city’s conflict preemption argument, noting that “a winning conflict preemption argument cannot restore

what field preemption already precludes. Upon finding that the legislature intended to occupy the regulatory field, we must reject all local regulation fairly encompassed by that field. Consequently, the city's arguments notwithstanding, we need only determine whether ordinance Sections 263B-3, 263B-4(6), and 263D-1 intrude upon the field that the General Assembly has entrusted to state law and PUC oversight and enforcement. We find that they do." This underlying concern with uniformity of application of laws governing public utilities, specifically the effect of mass local regulation of public utilities and the "patchwork of 'supplementary' regulatory enforcement at whim," is present throughout the opinion.

Next addressing PPL's appeal that the Commonwealth Court erred by upholding the maintenance fee provision of the ordinance, the Pennsylvania Supreme Court held that "like the state-level tariff imposed by the PUC, the city proposes to impose a fee that, at least in part, reflects the regulatory expense of overseeing utilities' conduct ... consequently, the maintenance fee, too, is preempted by the code in favor of the PUC's authority to regulate public utilities."

## **Local Regulation of Public Utilities**

After the court's holding in *City of Lancaster*, the question remains: can local municipalities regulate any public utilities? The answer is yes, but to a very limited degree. For example, Section 619 of the MPC provides that "Article VI of the MPC governing zoning shall not apply to any existing or proposed building, or extension thereof, used or to be used by a public utility corporation, if, upon petition of the corporation, the Pennsylvania Public Utility Commission shall, after a public hearing, decide that the present or proposed situation of the building in question is reasonably necessary for the convenience or welfare of the public," 53 P.S. Section 10619. Consequently, it

would appear that Section 619 authorizes municipalities to regulate public utility buildings via zoning under the limited circumstance where the PUC finds that the building is not reasonably necessary for the convenience or welfare of the public.

Additionally, Section 1511(e) of the BCL addresses a public utility's rights with respect to streets and other places, providing that "before entering upon any street, highway or other public way, the public utility corporation shall obtain such permits as may be required by law and shall comply with the lawful and reasonable regulations of the governmental authority having responsibility for the maintenance thereof." Local governments have attempted to use Section 1511(e) as authority to regulate public utilities. However, in *PECO Energy v. Township of Upper Dublin*, the Commonwealth Court concluded that 1511(e) does not constitute an exception to the PUC's jurisdiction, nor does it grant municipalities additional regulatory powers. Additionally, in the *City of Lancaster*, the Pennsylvania Supreme Court eludes to the application of Section 1511(e) of the BCL to address permitting and related matter associated with entry into rights-of-way, i.e., grading permits and the like.

Section 1991 of the General Municipal Law, 53 P.S. Section 1991, titled, "Use of Streets by Public Utilities," as indicated in its name, governs the use of streets by public utilities. Section 1991 specifically provides: "The proper corporate authorities of such municipality shall have the right to issue permits determining the manner in which public service corporations or individuals shall place, on or under or over such municipal streets or alleys, railway tracks, pipes, conduits, telegraph lines, or other devices used in the furtherance of business; and nothing herein contained should be construed to in any way affect or impair the rights, powers, and privileges of the

municipality in, on, under, over, or through the public streets or alleys of such municipalities, except as herein provided.”

Pennsylvania courts have clarified that Section 1991 only permits regulation of the manner of the initial placement of utility facilities requiring excavation and restoration of public streets. See *Pennsylvania Power v. Township of Pine*, 926 A.2d 1241 (Pa. Commw. Ct. 2007)

Finally, as the Commonwealth Court recently explained in *Township of Pine*, the scope and berth of the permitting authority set forth in Section 1911 of the law has been limited by Section 1511 of the BCL to “matters of local concern,” such as, without limitation, “the manner in which a street or highway is opened, back-filled, repaved, etc., the length of time that the excavation is open, the length of trench open at one time, and the hours of excavation,” 926 A.2d 1241, 1251 (Pa. Commw. Ct. 2007) (concluding that the installation of distribution lines above ground versus underground within a township’s right-of-way was not, by statutory definition, a matter of local concern, and accordingly the township had no authority to require the public utility to proceed in one fashion or the other).

Thus, Pennsylvania municipalities have limited rights to regulate public utilities’ use of their rights-of-way in the context of limited zoning regulation of public utility buildings where the PUC has found that the building is not necessary for the public safety or welfare and pursuant to Section 1991 of the law, 53 P.S. Section 1991, to require that a public utility obtain a permit determining the manner in which it may place on, under, or over municipal streets or alleys, railway tracks, pipes, conduits, telegraph lines or other devices used in the furtherance of business.

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