

MEMORANDUM

Pennsylvania Commonwealth Court Holds That Developers May Choose Their Own Construction Inspector.

By Marc Kaplin & Ameer Farrell

In a December 6, 2006 decision in *Allegheny Inspection Services v. North Union Township* (“**Allegheny**”), the Pennsylvania Commonwealth Court, in unequivocal terms, held that a municipality must accept the inspection reports of any certified inspector for the purposes of determining whether the construction inspected by the certified inspector complies with the International Building Code (the “**IBC**”), *even if the inspector is selected by the applicant/developer.*

In Allegheny, North Union Township (the “**North Union**”) entered into a contract with K2 Engineering, Inc. (“**K2**”) whereby K2 was to administer and enforce the IBC on behalf of North Union. In addition to the administration and enforcement duties identified in the North Union–K2 contract, North Union agreed that K2 would be the only recognized “inspector” in North Union for inspections necessary to determine compliance with the IBC.

Initially, the Allegheny Court looked to the definitions of “construction code official,” “municipal code official” and “third-party agency” contained in the Pennsylvania Construction Code Act (the “**PCCA**”)¹ and determined that each delineated separate and distinct services that those individuals/entities may provide; namely, (i) plan review of construction documents, (ii) construction inspection or (iii) administration and enforcement of the PCCA and the Regulations. The Court then looked to the specific language of Section 501(d) of the PCCA which provides that nothing in the PCCA “*shall allow a municipality to prohibit a [certified] construction code official from performing inspections in the municipality.*”²

¹ The PCCA is commonly referred to as the “Uniform Construction Code” as the PCCA, and the Regulations adopted pursuant to it, have established the 2003 International Building Code bundle of codes as the construction codes applied uniformly throughout Pennsylvania.

² 35 P.S. §7210.501(d).

In reading the definitions together with the prohibition on exclusion contained in Section 501(d), the Allegheny Court determined that, although K2 could perform inspections in North Union (presuming, of course, that K2 possessed construction code officials who had been qualified by L&I to perform inspections), North Union could not designate K2 as the only inspection company whose results it would accept. Rather, North Union, and indeed *all Pennsylvania municipalities who have opted-in to local enforcement of the PCCA and its associated Regulations must accept the inspection results of any inspector who is a qualified “construction code official” under the PCCA.*

While the Allegheny Court directly addressed only the situation in which municipalities have engaged third-party inspection agencies to inspect on their behalf, the decision should be applicable to municipalities which have retained certified inspectors “in-house.” Any other reading would result in an absurd distortion of the holding whereby a municipality would essentially be permitted an end-run around the PCCA by hiring in-house the same inspector who, when otherwise employed by a third-party agency, would not be permitted a monopoly on inspections within the municipality. Such a conclusion is supported by the Court’s finding that:

“...accepting inspections performed by any certified inspector for purposes of compliance with the UCC fully satisfies the PCCA’s purpose, even if that inspector is a “total stranger.” In fact, where the General Assembly voiced its intent to insure the integrity of building inspections for the purpose of issuing municipal permits, allowing a municipality to establish a single entity to serve both as inspector for purposes of compliance with the UCC and as enforcer of UCC standards would run counter to that intent.”³

Therefore we believe that *a municipality must accept the results of any qualified inspector, whether the municipality has opted to self-enforce the PCCA or it has contracted with a third-party agency to do so on its behalf.*

The Effect of the Allegheny Decision

³ Allegheny, pp. 11. (internal citation omitted).

While significant enough in its unequivocal resolution of the seemingly constant battle between municipalities and developers over inspection related issues, the bigger question becomes the extent to which Allegheny may automatically apply, or otherwise be extrapolated to apply, to not only the inspection process, but also to PCCA provisions regarding fees, plan review, permitting and issuance of certificates of occupancy.

1. Is an applicant required to pay municipal inspection fees?

Although the Allegheny Court did not directly address the issue of fees associated with inspections under the PCCA, the general principles established by Allegheny, coupled with the specific language of the PCCA and the associated Regulations, supports the proposition that an applicant will not be required to pay municipal inspection fees unless the applicant elects to use the municipally designated inspector.

Specifically, the Regulations enacted pursuant to the PCCA provide that “a municipality or third-party agency that enforces the Uniform Construction Code may establish fees for its ***administration and enforcement*** and time periods for the payment of fees.”⁴ Given that the Court in Allegheny went to such lengths to distinguish between “administration and enforcement” and “inspection” under the PCCA, it is significant that the Regulations provide only that a municipality may establish fees for administration and enforcement, but make no similar provision for fees associated with inspection.

As the Allegheny Court has clearly provided that a municipality is required to accept the inspection results of any qualified construction code official, it follows that it is only the fees of the selected official that an applicant will be required to pay. Indeed, the PCCA itself identifies the elimination of “***unnecessary duplication of effort and fees*** relating to the review of construction plans and the inspection of construction projects” as a primary purpose of the PCCA.⁵

That an applicant is only required to pay the inspection fees of its selected inspector is further supported by the portion of the Allegheny decision where the Court stated that:

⁴ 34 Pa. Code §401.2a, (*emphasis added*).

⁵ 35 P.S. §7210.102(b); *See also* (*Allegheny*, pp. 2 (footnote no. 3)).

“... by accepting inspections from any construction code official who meets the requirements of [the PCCA] a municipality, consistent with the goals of the PCCA, ensures availability of ample qualified inspectors and, by fostering competition, may help reduce the costs of construction.”⁶

It seems clear then that, *an applicant will only be required to pay the inspection fees of the qualified inspector it designates*. Any other result, (i.e. requiring an applicant to pay “double fees” by requiring that it pay both the municipal inspection fees and the fees of a qualified inspector of the applicant's choice), would lead to an absurd result.

2. *May the Allegheny decision relative to inspections be extended to plan review?*

As noted above, the Allegheny Court went to great lengths to distinguish between “administration and enforcement” activities and “inspection” activities under the PCCA. In so doing, the Court specifically found that, under the applicable PCCA definitions, construction code officials, municipal code officials and third party agencies are charged with three separate and distinct tasks – (i) plan review of construction documents, (ii) inspection of construction or (iii) administration and enforcement of the PCCA and the Regulations – and went on to find each task to be “markedly different” from the other and, therefore, subject to separate limits and distinctions under the PCCA.⁷ It is difficult to imagine how plan review, given that it is handled in much the same way as inspections under the applicable PCCA definitions (i.e. as is the case with inspections, it is listed separately from administration and enforcement) could be treated as anything less than “markedly different” from administration and enforcement of the PCCA.

Additional support for this conclusion is found in the PCCA where the elimination of “*unnecessary duplication of effort and fees relating to the review of construction plans* and the inspection of construction projects” is identified as a primary purpose of the PCCA.⁸ As the Allegheny Court correctly notes, the PCCA adequately protects the interests of the municipality, and in turn the general public, by requiring “that those who approve construction plans and

⁶ Allegheny, pp. 11, footnote no. 15, (emphasis added).

⁷ Allegheny, pp. 8 (See also, footnote no. 10 for the applicable definitions).

⁸ *35 P.S. §7210.102(b)* (emphasis added); See also, Allegheny, pp. 2 (footnote no. 3).

inspect various aspects of construction be properly trained and certified with respect to those standards.”⁹

As such, provided that the plan reviewer selected by an applicant is certified by L&I to perform plan review for the purposes of confirming that the proposed construction conforms with IBC requirements and is, therefore, eligible for a construction permit, ***the holding of Allegheny applies to plan review and a municipality should not be permitted to require that a plan reviewer of its choice be utilized to the exclusion of all others.***¹⁰ Following the same logic as was utilized related to inspections and associated inspection fees then, if a municipality is required, pursuant to Allegheny, to accept a certified plan reviewer of the applicant’s choosing, it follows that the applicant would only be required to pay the plan review fees of the selected reviewer.

3. *May the Allegheny decision relative to inspections be extended to issuance of a construction permit?*

The Regulations enacted pursuant to the PCCA require that a party intending to construct or alter a building or structure must first “apply to the building code official and obtain the required permit.”¹¹ Under the Regulations, a “building code official” is defined, in part, as the person designated by the municipality to authorize the ***issuance of certificates of occupancy and of building permits.***¹²

The Regulations thus provide that the municipality’s building code official is the party responsible for the *physical issuance* of building permits. Such a conclusion is supported by the specific provisions of the Regulations that provide that a building code official shall, among

⁹ 35 P.S. §7210.701.

¹⁰ It should be noted that, in finding that any qualified construction code official was eligible to perform inspections required under the PCCA, the Court in Allegheny relied heavily on the language of Section 501(d) of the PCCA which clearly prohibits a municipality from prohibiting qualified construction code officials from performing inspections within the municipality. Although the PCCA does not contain similar language regarding permit review, a general reading of the PCCA and the Regulations supports the argument that the Allegheny rationale should be extended to permit reviews as well; thereby allowing an applicant to select any qualified construction code official to conduct a drawing review in anticipation of the issuance of a construction permit.

¹¹ 34 Pa. Code §403.42(a).

¹² 34 Pa. Code §401.1 (*emphasis added*)

other responsibilities, “grant or deny a permit application.”¹³ *As such, a contention that the Allegheny decision should be extended to provide that the plan reviewer, and not the municipal building code official, be charged with issuance of a building permit is unlikely to succeed – particularly given the clear distinction the Allegheny Court made between “administration and enforcement” and “inspection” under the PCCA.*

That is not to say, however, that a municipality may hold an applicant hostage during the permitting process. Indeed, if Allegheny is extended to provide that an applicant may select any certified plan examiner to perform the construction document review, it follows that the municipality is then bound by the findings of that plan examiner. It is difficult to imagine another outcome given that it was the General Assembly’s intent as expressed in the PCCA – as noted by the Court in Allegheny – “to insure uniform, modern construction standards and regulations throughout the Commonwealth.”¹⁴ It follows then that, *upon confirmation from a certified plan examiner that the construction documents conform to the provisions of the IBC, a municipality is required to issue a construction permit – whether the plan examiner was chosen by the municipality or the applicant.*

4. *May the Allegheny decision relative to inspections be extended to issuance of a certificate of occupancy?*

As noted above, the definition of “building code official,” contained in the Regulations establishes that the municipality’s building code official is the party responsible for the physical issuance of both the building permit and the certificate of occupancy. However, the Regulations dealing with the certificate of occupancy process clearly provide that it is a “construction code official” (i.e. an individual certified by L&I to inspect construction) and not a “building code official” that is to perform inspections to insure compliance with the construction permit and the IBC and, ultimately, to issue a final inspection report indicating that all applicable requirements of the permit and the IBC have been met.¹⁵ The Regulations then go on to provide that a

¹³ §403.43(a)

¹⁴ Allegheny, pp. 2.

¹⁵ §403.45(a), (e).

“building code official” is to issue a certificate of occupancy “within 5 business days after receipt of a final inspection report that indicates compliance” with the IBC.¹⁶

The Regulations thus resolve questions related to the certificate of occupancy process in clear and unambiguous language. Under the certificate of occupancy provisions, and in conformity with the decision in Allegheny, ***any certified “construction code official” may inspect the construction for compliance with the IBC. Upon receipt of a final inspection report confirming compliance with the IBC, a municipal “building code official” must then issue a certificate of occupancy.***

Summary of the Anticipated Ramifications of the Allegheny Decision:

1. Whether a municipality has designated an “in-house” or “third-party agency” construction code official, a municipality must accept any qualified inspector for building inspection purposes.

2. An applicant will only be required to pay inspection fees for the qualified inspector of its choice and will not be required to pay “duplicate” municipal inspection fees.

3. The Allegheny decision is applicable to the permit review process, thereby allowing an applicant to select any certified plan examiner as opposed to only a plan examiner designated by the municipality.

4. The municipal building code official, and not the plan examiner of the applicant’s choice, is charged with issuance of the construction permit. However, upon notice from the plan examiner that the construction documents comply with the IBC, the municipality may not withhold the permit.

5. The municipal building code official, and not the building inspector of the applicant’s choice, is charged with issuance of the certificate of occupancy. However, upon notice from the inspector that the construction complies with the IBC, the municipality may not withhold the certificate of occupancy.

¹⁶ §403.46(b).