

# ***POLICY BRIEF***

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## **Government as Defendant: A Worrisome Trend in Allegheny County**

Beginning in 2005, the government of Allegheny County embarked on a path of enacting ordinances and engaging in other activities that likely has no parallel in the annals of local government in Pennsylvania for displaying a willingness to violate, ignore or circumvent Commonwealth statutes, the state's Constitution and the County Charter. In at least three high profile instances, the courts have overturned ordinances passed by Council and signed by the Chief Executive. One of these ordinances was enacted despite an unambiguous opinion of the County solicitor that passing the legislation would violate state law. It passed 14 to 1 anyway.

Meanwhile, two additional lawsuits against Council await court dates. Rulings in these two cases will have enormous implications for the future of ethical and meaningful home rule government. The lawsuits alluded to are discussed in detail in this *Policy Brief*. Suffice to say here that in a span of just over three years Allegheny County's governing body has shown an arrogant disregard for the rule of law its members swore to uphold.

This is the oath taken by all members of the County Council: ***I, (name), do solemnly swear (or affirm) that I will faithfully execute the office of Member of Council of the County of Allegheny County, and will to the best of my ability, preserve, protect, defend, and obey the Constitution of the United States of America and the Constitution and the laws of the Commonwealth of Pennsylvania. (So help me God).***

It is entirely reasonable to ask, "What part of protect, defend and obey is so hard to grasp?" Moreover, while not directly called for in the oath, presumably clear and direct orders of the courts should also be obeyed if the rule of law is to have any meaning. One can disagree with state laws as written and disagree with court rulings, but until the laws are amended by the General Assembly and court decisions are overturned, Council is duty and honor bound to abide by them. Local governments are not appropriate instruments of civil disobedience.

### ***Courts Strike Down Assessment Plans, Smoking Ban***

Let's begin with the contentious issue of property assessments. In March 2005, Council passed their complicated "4 percent plan" which would have capped assessment increases in the 2006 reassessment to no more than 4 percent. The plan provided for other, smaller steps of increase along with a no change category and no limit to the decreases in assessment values.

That ordinance passed 12 to 3 and was in the courts almost immediately. A quick decision came just a few weeks later in May of that year. The Judge ruled that "without question ... [the cap] violates the Home Rule Charter of Allegheny County, the Second Class County Charter Law, Pennsylvania's governing assessments of real property, and the Uniformity Clause of the Pennsylvania Constitution".

So the cap was tossed and it was back to the drawing board. The Judge ordered as part of his ruling that “the County **may not** (our emphasis), by amending the Administrative Code, reject the 2006 reassessment and take no further action to revise the 2003 reassessment (*2002 reassessment numbers with appeals included*)” and added “it is the responsibility of the County to promptly make available...whatever resources are needed to improve the process”. In short, the County was told by the Court to fix remaining problems with the 2006 assessments. The County’s Chief Assessor had determined the 2006 numbers to be much more accurate than the 2003 numbers being used at the time and met international assessment standards for accuracy. Not perfect but a major improvement.

In keeping with its growing disregard for the law and the courts, Council blatantly ignored Judge Wettick’s order. Instead of making additional refinements and improvements to the 2006 numbers, the County tried a couple of more approaches before settling on the base year system. The vote to adopt the base year was 11 to 4. Citing the fact that many other counties use a base year, the Council President opined that, “I think we’re on solid legal ground”. A court challenge to base year assessments led to a ruling that state laws permitting base year assessments are unconstitutional. The County’s appeal of the ruling has reached the Supreme Court where arguments will be heard beginning September 10<sup>th</sup>.

Now consider the countywide smoking ban enacted in October 2006. The opinion of the Solicitor prepared for the Council and presented months before the final vote warned, “the County is prohibited from entering this field of regulation”. Provisions of Pennsylvania’s Clean Indoor Air Act clearly prohibited Allegheny County from passing a smoking ban. A change in state law would be required to permit such an action. But that did not stop Council from passing the ban by a margin of 14 to 1. Seven months later in May 2007, the Commonwealth Court ruled very succinctly, “the county was without authority to enact the ordinance”.

Instead of being contrite and acknowledging that even a Home Rule County’s governing body must obey state laws, the Council President commented, “the courts are taking away the ability of the citizenry to set policy to move the County forward”. In other words, Council thinks it ought to be able to do as it pleases regardless of the state laws it is sworn to defend and obey. This was a no brainer. The law was clear. Council members should have been working with state legislators to hasten passage of a state smoking ban law.

### ***Waiting in the Wings: Drink Tax and Sunshine Law***

The high profile drink tax controversy has produced additional instances of highhanded Council behavior. After restaurant owners spearheaded a referendum petition drive under the County’s Home Rule Charter to reduce dramatically the rate of the drink tax, Council decided that it too should be able to put a question on the ballot. The problem is that the clear and plain language of Article XII is quite explicit. Council is allowed to pass ordinances calling for referenda *only* for purposes of amending the Charter. At the same time, the Charter explicitly gives the people power to place all other referenda questions on the ballot through the petition process.

Council members are arguing in essence that since the Charter does not specifically prohibit them from placing other referenda questions on the ballot, they can assume an implied power to do so. However, because in the previous section of Article XII the right of referendum is granted solely and specifically to the electorate (except for Charter amendments), it is extremely probable that a judge hearing a case challenging Council will rule that Council has overreached and arrogated power to itself the Charter does not envision or grant.

The importance of the court's ruling on this issue cannot be overstated. If Council is permitted to place any referendum question they wish on the ballot, it will effectively nullify one of the primary prerogatives given to the people of Allegheny County through its Home Rule Charter. If Council does not like a referendum question brought by the people through a petition that collects over 20,000 signatures, then Council can negate the electorate's referendum by placing a competing question on the ballot. Such a question will be worded so as to undermine the intent and force of the people's referendum. Thus, it would require only eight Council votes to cancel out the wishes of tens of thousands of voters supporting a referendum and render meaningless the staggering amount of work done collecting the signatures.

The Council President noted that, "... We already have the power, but we are just going the extra mile in case we get challenged in court at some point." Well, the suit has been filed. And once again the Council's acumen in interpreting law, the Constitution and the Charter will be put to the test. Their batting average so far is perfect—i.e., no wins. They have lost every case challenging their willingness to ignore clearly written statutes.

Finally, the Democrats on Council are being sued on the grounds they have violated provisions of the state's Sunshine Law. The suit claims that the Council's referendum plan for the alternative drink tax question was crafted behind closed doors by the Democratic majority. Assuming the suit's claim is accurate, then Council would be in clear violation of section 704 of the state's Sunshine Act (Act 93 of 1998) which states "official actions and deliberations by a quorum (*majority of members*) of the members of an agency shall take place at a meeting open to the public unless closed [because of] executive session, conference (but no deliberation of agency business can take place) or certain working sessions (examination of accounts and records can be done in private, but official actions cannot)".

The Council members claim they did nothing wrong, but state they will not do it again in the future. "We are changing, but we are not saying we were wrong" were the words of one Councilman. Whether or not the court finds there was a clear violation of the Sunshine Law, the blatant impropriety of meeting behind closed doors reflects poorly on Council.

The three year record of Council being taken to court for disregarding the law should be of great concern to the residents of Allegheny County. A continuation of this behavior would bode ill for the future of county government. It is a terrible example to set.

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**Jake Haulk, Ph.D., President**

**Eric Montarti, Policy Analyst**

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<p>Allegheny Institute for Public Policy 305 Mt. Lebanon Blvd.* Suite 208* Pittsburgh PA 15234 Phone (412) 440-0079 * Fax (412) 440-0085 E-mail: <a href="mailto:aipp@alleghenyinstitute.org">aipp@alleghenyinstitute.org</a></p>
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