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HOUSE OF REPRESENTATIVES
COMMONWEALTH OF PENNSYLVANIA
HARRISBURG



November 8, 2021

Matthew W. Kegg, Director
Bureau of Occupational and Industrial Safety
651 Boas Street, Room 1613
Harrisburg, PA 17121

Re: Final-Omitted Rulemaking (DLI 12-115 and IRRC #3321)

Dear Mr. Kegg:

I write to raise a possible constitutional issue related to the adoption of the accessibility provisions of the Uniform Construction Code (UCC) – and to invite the department to work with the General Assembly to avoid any issues that could result from litigation on this topic.

On June 20, 2017, in the case *Protz v. WCAB (Workers' Compensation Appeal Board)*, the PA Supreme Court struck Section 306(a.2) of the Workers' Compensation Act in its entirety, ruling that the use of the "most recent edition" of the American Medical Association impairment guides was an unconstitutional delegation of legislative authority.

The majority opinion in *Protz* clarified that existing third-party standards may be used, but future updates to those standards cannot be adopted automatically:

"At the outset, it is important to clarify that the non-delegation doctrine does not prevent the General Assembly from adopting as its own a particular set of standards which already are in existence at the time of adoption. However, for the reasons we have explained, the non-delegation doctrine prohibits the General Assembly from incorporating, sight unseen, subsequent modifications to such standards without also providing adequate criteria to guide and restrain the exercise of the delegated authority."

The language of Section 304(a)(3) of Act 45 of 1999 (PA Construction Code Act) is uncannily similar to the language that the court found problematic in *Protz* (**emphasis added**):

Section 304. Revised or successor codes.

(a) Duties of department.—

*(3) The department shall promulgate regulations updating accessibility standards under Chapter 3 by adopting by December 31 of the year of issuance of **the accessibility provisions of the most recently published edition of the ICC codes** and any other accessibility requirements which shall be specified in the regulations, or contained in or referenced by the Uniform Construction Code relating to persons with disabilities.*

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To be clear, I believe that the Department of Labor and Industry, in this final-omitted rulemaking, is merely adopting accessibility provisions as they are required to do by statute. Likewise, I believe that Pennsylvania must have some method of adopting these important standards into the UCC. However, I would strongly encourage the department to review the language of Section 304(a)(3) in the context of *Protz* and any other relevant caselaw. If you believe that the statute may contain a constitutional flaw, we should work cooperatively to address any such flaws and provide a constitutional adoption process for the accessibility provisions of our statewide building code and attempt to avoid any negative impacts of potential future litigation.

Thank you for your attention to this matter. I look forward to your response.

Sincerely,



Jim Cox, Chairman

House Labor & Industry Committee

cc: Hon. Jennifer Berrier
Independent Regulatory Review Commission
Hon. Camera Bartolotta
Hon. Gerald Mullery
Hon. Christine Tartaglione