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Warning: New Case Law Prevents Suppliers from Enforcing Mechanics' Liens

- by **Kirk B. Burkley, Partner**

A recent decision of the Commonwealth Court of Pennsylvania strips critical rights of labor and material suppliers when it comes to the ability to file and enforce a mechanics' lien against non-profit entities under Pennsylvania Law. In *Carter-Jones Lumber Co. v. Northwestern PA Humane Society, 2006 Pa. Commw. Lexis 689 (Pa. Commw. Ct. 2006)*[1], the Court held that the Humane Society falls within the "purely public purpose" exception thereby granting it immunity from the filing of a mechanics' lien. In this vast departure from well-established Pennsylvania law, the Court reasoned that the Humane Society qualified under the public purpose exception, thus giving the public the right to use those services, because it does not have a profit motive (a non-profit organization), it serves the general public at large, and it has cooperated with the local authorities on animal control issues.

Traditionally, labor and material suppliers have relied on the "purely public purpose" exception as only applying to government entities, agencies and/or instrumentalities. This reliance has been founded on almost a century of case law. In *Henry Taylor Lumber Co. v. Carnegie Institute, 225 Pa. 486, 74 A. 357, 358 (Pa. 1909)*, the Pennsylvania Supreme Court held that:

> "It seems to us the legislative intention was to limit the [purely public purpose exception] to buildings erected by public funds for the use of the public. While the [school] is, to some extent, a public institution, in that students are educated upon payment of nominal tuition fee, yet, in our opinion, its purposes cannot be said to be 'purely public.' The funds for its erection and maintenance were contributed by a private citizen, neither the Commonwealth, the city, nor any public agency thereunder furnishing any of the funds necessary therefore, and instead of the school being managed or directed by the public through public officials, it is under the charge of a board of trustees, specially created, with exclusive authority to prescribe the qualification for admission of pupils, the course and terms of study, and make and enforce such rules and regulations for the management of the school as they may deem proper." Id.

[1] The two plaintiffs in this consolidated appeal are Carter-Jones Lumber Company and LGL Animal Care Products, Inc.

> The test whether a use is public or not is whether a public trust is imposed upon the property, whether the public has a legal right, which cannot be gainsaid, or denied, or withdrawn, at the pleasure of the owner. A particular enterprise, palpably for private advantage, will not become a public use because of the theoretical right of the public to use it. The question is whether the public have a right to the use. The general public must have a general and fixed use of the property, a use independent of the will of the private person or corporation in which the title is vested, a public use which cannot be defeated by the private owner, but which is guarded and controlled by the law. Id.
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> The Supreme Court went on to hold that:
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> "Under these circumstances, it seems to us, the public enjoys the benefits of the school, not by right, as it should if the purpose was public, but by permission only. The meaning of the words 'for public use' has frequently been passed upon by our courts, and it has invariably been held that these words do not include every use from which a benefit may incidentally be derived by the public." Id. at 490.

Courts that have analyzed the "purely public purpose" exception since *Henry-Taylor Lumber* have not strayed from the import of that decision. In other words, courts have consistently held that the exception only applies to government owned property and have very narrowly applied the exception. In fact, most of the cases since Henry-Taylor Lumber have focused on whether to take government owned property out of the "purely public purpose" exception because the government used said property for a proprietary purpose. *See American Seating Co. v. City of Philadelphia, 434 Pa. 370, 256 A.2d 599 (1996) and Empire Excavating Co. v. Luzerne County Housing Authority, 303 Pa. Super. 25, 449 A.2d 60 (Pa. Super. 1982)*. In *American Seating,* the Supreme Court held that since the City of Philadelphia engaged in proprietary function by leasing the Spectrum for sporting and entertainment events, it could not take shelter under the "purely public purpose" exception to the mechanics' lien law. In *Empire Excavating*, the Superior Court held that even though a private contractor had erected a housing complex for a public housing authority, the "purely public purpose" exception did not apply because at the time the lien was filed the property was privately owned. *Id. at 61*. In neither case did the Supreme Court or Superior Court hold that privately owned property could fall within the "purely public purpose" exception simply because the owner did not have a profit motive with regard to its use of the property.

Notably, the Court's decision in *Carter-Jones Lumber* expands the "purely public purpose" exception into the realm of privately owned property. The implications of such a broad ruling are alarming. Although the Court's ruling was in respect to a non-profit corporation, these types of corporations are increasingly expanding their presence in all facets of business. If this decision is upheld and applied in other situations, it is feasible to predict that a large corporation, such as UPMC, could be held immune from mechanics' liens simply because it is a nonprofit entity and serves the public at large. Likewise, an organization like Highmark could be protected despite the fact that corporation might own substantial real estate. Similarly, it is unclear whether the Court's decision would apply to for-profit companies that contract with the government to

provide essential public services, including garbage pickup and disposal, e-filing services for the judicial system, etc.

In addition to the loss of significant rights to trade vendors in Pennsylvania, the Commonwealth Court's decision creates a damaging black hole in the law. The Court's decision in Carter-Jones Lumber creates a class of project that does not require a bond, either because it is not a public job and is immune from mechanics' liens or because the owner is a private entity that meets the new definition of "purely public purpose."

Labor and material suppliers have historically relied on their ability to file mechanics' liens on non-government jobs to enforce unpaid obligations (unless a valid no-lien agreement was in place). Generally, government jobs require that a public works bond be posted to protect labor and material suppliers from non-payment. This decision sets very dangerous precedent for both Pennsylvania labor and material suppliers who may not be able to risk selling on credit to jobs involving a non-profit entity as well as the non-profit entities that may struggle to find suppliers willing to work with them. It is not only plausible but also likely that this decision will make it more difficult for those entities to fulfill their respective missions. Although this case is on appeal, we advise credit managers and corporations to consider this risk when making decisions to grant credit to non-profit entities.

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